Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

11 December 2013 *

(Competition — Concentrations — European markets for internet communications services — Decision declaring the concentration compatible with the internal market — Manifest errors of assessment — Obligation to state reasons)

In Case T-79/12,

Cisco Systems Inc., established in San Jose, California (United States),

and

Messagenet SpA, established in Milan (Italy),

represented by L. Ortiz Blanco, J. Buendía Sierra, A. Lamadrid de Pablo and K. Jörgens, lawyers,

applicants,

v

European Commission, represented by N. Khan, S. Noë and C. Hödlmayr, acting as Agents,

defendant,

supported by

Microsoft Corp., established in Seattle, Washington (United States), represented by G. Berrisch, lawyer,

intervener,

APPLICATION for annulment of Commission Decision C(2011) 7279 of 7 October 2011, declaring the concentration between undertakings involving the acquisition of Skype Global Sàrl by Microsoft Corporation (Case COMP/M.6281 – Microsoft/Skype) to be compatible with the internal market and the Agreement on the European Economic Area (EEA),

THE GENERAL COURT (Fourth Chamber),

composed of S. Papasavvas, acting as President, M. van der Woude (Rapporteur) and C. Wetter, Judges,

Registrar: S. Spyropoulos, Administrator,

* Language of the case: English.

having regard to the written procedure and further to the hearing on 29 May 2013,

gives the following

Judgment

Facts

Parties to the proceedings

1 The applicants, Cisco Systems Inc. ('Cisco') and Messagenet SpA ('the applicants'), are undertakings that provide, inter alia, internet-based communications services and software for, respectively, undertakings and the general public.

2 The intervener, Microsoft Corp., designs, develops and markets a wide variety of software products for different kinds of computing devices. Those products include internet-based communications services and software.

3 Skype Global Sàrl ('Skype') provides internet-based communications services and software. Its products enable instant messaging, voice calls and video communications over the internet.

Administrative procedure

4 On 2 September 2011, Microsoft – acting in accordance with Article 4 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1) – notified a concentration by which it intended to acquire control of Skype.

5 The applicants participated in the investigation conducted by the European Commission. In this respect, Cisco, before Microsoft had even filed its formal notification of the concentration, participated in a meeting with the Commission on 1 August 2011 and replied to the Commission's questions on 12 and 18 August 2011, then provided supplementary replies on 9 September 2011. Cisco also responded to further questions raised by the Commission on 13 September 2011, supplying additional information during a video conference held on 14 September 2011 and written observations on 19 and 26 September 2011. For its part, Messagenet sent written observations to the Commission on 20 September 2011, participated in a telephone conference on 4 October 2011 and supplied additional information on the same day.

6 On 7 October 2011, pursuant to Article 6(1)(b) of Regulation No 139/2004, the Commission adopted Commission Decision C(2011) 7279, in which it found that the concentration by which Microsoft would acquire Skype was compatible with the internal market and the European Economic Area (EEA) Agreement (Case COMP/M.6281– Microsoft/Skype; 'the contested decision').

Content of the contested decision

7 In the contested decision, the Commission held that a distinction should be drawn between internet-based communications services aimed at the general public ('consumer communications') and those aimed at undertakings ('enterprise communications') (recitals 10 to 17 of the contested decision). The Commission did not consider it necessary, for the purposes of its competition analysis, to segment these two broad categories of communications further as it took the view that the notified transaction

did not give rise to any competition concerns, even on the narrowest possible definition of the markets (recitals 18 to 63 of the contested decision). The Commission therefore conducted its analysis by examining the impact of the concentration on each of the two markets that it had identified.

8 As for the geographical dimension of the markets, since the Commission considered that the transaction did not give rise to competition concerns – even with respect to the narrowest possible market, namely that of the European Economic Area (EEA) – it did not take a view on the precise definition of the relevant geographical market (recitals 64 to 68 of the contested decision).

9 As regards the horizontal effects of the concentration on the consumer communications market, after examining the characteristics of the market (recitals 69 to 95 of the contested decision), the Commission examined the narrowest possible segments with the greatest overlap between the services offered by Microsoft and those offered by Skype, namely the segment of instant messaging on personal computers ('PCs') functioning on the Windows operating system ('Windows'), the segment of voice calls on Windows-based PCs and that of video calls on Windows-based PCs. The Commission took the view that the transaction did not give rise to serious doubts as to its compatibility with the internal market, even in those narrow segments (recitals 96 to 132 of the contested decision). In particular, in the segment of video calls on Windows-based PCs ('the narrow market') where the new entity would have a market share of between 80 and 90% with the services of Skype and Microsoft offered under the brand 'Windows Live Messenger' ('WLM'), the Commission considered that Microsoft would face competition.

10 The contested decision also examined whether the concentration would give rise to conglomerate effects on the consumer communications market, having regard to, in particular, the important position held by certain Microsoft products, such as Windows, the Windows Internet Explorer browser and the Microsoft Office software, on other computer software markets. In this respect, the Commission held that the new entity had the ability, but not the incentive, to use that position to distort competition in favour of Skype and Microsoft products by degrading the interoperability of those products with competing products or by resorting to bundling or tying practices. In the Commission's view, even if the new entity attempted to pursue such a foreclosure strategy, the anti-competitive consequences would be limited or even non-existent (recitals 133 to 170 of the contested decision).

11 As to the horizontal effects of the concentration on the enterprise communications market, the Commission concluded that the transaction did not give rise to serious doubts as to its compatibility with the internal market. The presence of Skype on the enterprise communications market is limited and the new entity would not become market leader, even in the narrowest segments of the market where Skype is nevertheless active (recitals 177 to 202 of the contested decision).

12 In its decision, the Commission also addressed certain concerns raised during the investigation by traditional telecom operators and other suppliers of enterprise communications services into possible conglomerate effects on the enterprise communications market, finding that those concerns were unfounded (recitals 203 to 221 of the contested decision). One of the concerns related to the possibility that the new entity might create preferential interoperability between Skype's user base and the user base of Lync, which is a communications software program developed by Microsoft aimed at undertakings, which would give the new entity a significant advantage in the eyes of undertakings using call centres. However, the Commission found that the new entity would have neither the ability nor the incentive to engage in a strategy of exclusion, which would, in any event, be unlikely to produce anti-competitive effects (recitals 213 to 221 of the contested decision).

Procedure and forms of order sought

13 By application lodged at the Registry of the Court on 15 February 2012, the applicants brought the present action.

14 By a separate document lodged on the same day, the applicants also applied to have the case decided under the expedited procedure, pursuant to Article 76a of the Rules of Procedure of the General Court, and, in the alternative, to have the case given priority within the meaning of Article 55(2) of those rules.

15 On 22 March 2012, the Court dismissed the application to have the case decided under the expedited procedure. Moreover, the Court did not grant the application to have the case given priority.

16 By order of 23 May 2012, the President of the Fourth Chamber of the Court granted Microsoft's application to intervene, which had been lodged at the Registry of the Court on 2 March 2012.

17 On 29 May 2012, the parties were notified that a second exchange of pleadings was not necessary, pursuant to Article 47(1) of the Rules of Procedure.

18 On 11 July 2012, Microsoft submitted its statement in intervention. On 24 October 2012, the applicants and the Commission submitted their observations on that statement.

19 On 12 September 2012, the Court submitted written questions to the parties, in the context of measures of organisation of procedure. The parties replied to those questions within the prescribed period.

20 As two members of the Chamber were unable to sit, the President of the Court designated two other Judges to complete the Chamber, pursuant to Article 32(3) of the Rules of Procedure.

21 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure, and, in the context of measures of organisation of procedure, put a question in writing to the intervener, requesting that it reply to that question at the hearing. The intervener complied with that request.

22 At the hearing on 29 May 2013, the parties presented oral arguments and replied to oral questions put to them by the Court.

23 The applicants claim that the Court should:

— order such measures of organisation of procedure as it considers necessary and, in particular, order the Commission to provide the General Court with all documents related to negotiations concerning communications between the Commission and the parties to the transaction on possible interoperability commitments;

— annul the contested decision;

— order the Commission to pay the costs.

24 The Commission contends that the Court should:

— dismiss the application as inadmissible in part and as unfounded with respect to the remainder thereof; and

— order the applicants to pay the costs.

25 The intervener contends that the Court should:

— dismiss the application; and

— order the applicants to pay the costs.

Law

26 In support of the action, the applicants rely on two pleas in law, both alleging manifest errors of assessment by the Commission in implementing Articles 2 and 6 of Regulation No 139/2004 and a breach of the obligation to state reasons, as laid down in Article 296 TFEU. The first plea relates to the assessment of the horizontal effects of the concentration on the consumer communications market. The second plea concerns the errors committed by the Commission in its assessment of the effect on the enterprise communications market of potential interoperability between Skype's user base and Lync's services.

27 By way of introduction to these two pleas, the applicants put forward arguments on the standard of proof incumbent on the Commission when applying Regulation No 139/2004 and the standard of the review of legality carried out by the General Court in this area.

28 Without formally raising a plea of inadmissibility by means of a separate document under Article 114 of the Rules of Procedure, the Commission contends in its defence that Cisco has no legal interest in bringing proceedings in so far as it seeks the annulment of the contested decision under the first plea of the application and that Messagenet does not have *locus standi* as regards the entire application.

Admissibility

29 As regards the admissibility of the application in relation to Cisco, the Commission, supported by the intervener, does not dispute that Cisco is individually and directly concerned by the contested decision and therefore has *locus standi* on that basis to challenge that act, but it submits that Cisco has no legal interest in bringing proceedings against the decision inasmuch as it concerns the consumer communications market. Accordingly, the first plea in law is inadmissible. Since the aim of that plea in law is to secure a finding that the Commission committed a manifest error in assessing the competitive impact of the concentration on a market where Cisco is not present, namely the consumer communications market, upholding that plea cannot procure any advantage upon Cisco. The Commission is of the view that the applicants are not entitled to bring a plea solely in the interest of the law.

30 As for Messagenet, the Commission, supported by the intervener, submits that its marginal involvement in the administrative procedure is not sufficient to confer standing to bring an action against the contested decision. It states furthermore that Messagenet's involvement in that procedure had no effect on the content of the contested decision and that Messagenet was not identified as one of Skype's competitors during the procedure. The Commission specified at the hearing that Messagenet did not even provide software for video calls.

31 The Commission and the intervener conclude that the first plea is inadmissible in so far as it concerns Cisco and that the application is inadmissible in its entirety in so far it concerns Messagenet.

32 The applicants contest the Commission's arguments on the admissibility of the application.

33 As regards the admissibility of Cisco's application, it should be borne in mind that the fourth paragraph of Article 263 TFEU allows a person other than the person to whom the act is addressed to institute proceedings for annulment of that act, if that act is of direct and individual concern to him.

34 According to the case-law, the question of whether an applicant has *locus standi* is to be assessed by reference to the effects that the contested act has on its legal situation inasmuch as that applicant is, first, directly concerned by the contested act (see, to that effect, Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraph 9, and Case T-3/93 *Air France* v *Commission* [1994] ECR II-121, paragraph 80) and, second, individually concerned by that act (see, to that effect, Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 107). However, an applicant's *locus standi* is not determined according to the pleas that it puts forward in support of its application.

35 That also applies to the question of whether an applicant has a legal interest in bringing proceedings. That interest derives from the consequences that annulment of the contested measure might have on an applicant's legal situation (Case 53/85 *AKZO Chemie and AKZO Chemie UK* v *Commission* [1986] ECR 1965, paragraph 21, and Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraph 40). That interest must be vested and present, being evaluated as at the date on which the action is brought and exists only if the action, if successful, is likely to procure an advantage for the party who has brought it (see Case T-177/04 *easyJet* v *Commission* [2006] ECR II-1931, paragraph 40 and the case-law cited).

36 In the present case, on the date at which Cisco brought the action, it had a vested and current interest in having the contested decision annulled, since the decision authorised a concentration involving one of its main competitors which was liable to affect its commercial situation. Consequently, Cisco's interest in bringing proceedings against the operative part of the contested decision cannot be denied (see, to that effect, *easyJet* v *Commission*, paragraph 41).

37 Whilst it is true that the General Court must prevent an applicant from putting forward pleas that he has no legal interest in raising (see, to that effect, Case 85/82 *Schloh* v *Council* [1983] ECR 2105, paragraphs 13 and 14), that is not the case in respect of the first plea put forward by the applicants in the present case. That plea relates directly to the assessment of the horizontal effects of the concentration and, therefore, to one of the foundations of the operative part of the contested decision. Given that Cisco has a legal interest in bringing proceedings against that operative part, it also has an interest in challenging the grounds and aspects of reasoning which led the Commission to adopt that operative part (see, to that effect, *easyJet*, paragraph 41).

38 In addition, it should be borne in mind that the absence of a competitive relationship between an applicant undertaking and the undertakings party to the concentration does not necessarily mean that the action brought by the applicant undertaking is inadmissible, in particular where it operates on a neighbouring market to that on which those undertakings operate (see, to that effect, Case T-158/00 *ARD* v *Commission* [2003] ECR II-3825, paragraphs 78 to 95).

39 The two pleas that the applicants put forward in support of their application are closely linked. The second plea is therefore based on the premiss that the new entity will use its important position on the consumer communications market, in particular for video calls, as leverage to distort the competitive conditions on the enterprise communications market. The applicants, following the same logic, claim that the economic purpose of the concentration on the consumer communications market is partly attributable to the possibility of making a return on the enterprise communications market.

40 Regarding Messagenet's *locus standi*, it should be observed that Cisco and Messagenet submitted one and the same application. According to case-law which is now well established, where one and the same application is involved, as soon as one of the applicants has *locus standi*, there is no need to consider whether or not the other applicants are entitled to bring proceedings except where

considerations of procedural economy exist (see, to that effect, Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 31, and Case T-282/06 *Sun Chemical Group and Others* v *Commission* [2007] ECR II-2149, paragraphs 50 to 52). In the case in point, even if a separate examination of the admissibility of Messagenet's application revealed that Messagenet did not have *locus standi*, the Court would none the less have to examine the application in its entirety. There are therefore no grounds of procedural economy that would justify the Court departing from the case-law in question.

41 It is therefore necessary to reject the Commission's line of argument regarding admissibility and to declare the application admissible.

Substance

The standard of proof on the Commission and the standard of judicial review

42 First of all, the applicants put forward several arguments concerning the standard of proof incumbent on the Commission when reviewing concentrations and the standard of the review of legality carried out by the General Court in that context.

43 The applicants submit that, unlike decisions taken under Article 8 of Regulation No 139/2004, the Commission does not have any discretion when taking decisions pursuant to Article 6(1)(b) of that regulation. The review of legality that the Court is called upon to carry out for decisions taken under Article 6(1)(b) does not involve ascertaining whether or not the concentration in question significantly impedes competition in the internal market, but rather whether the concentration objectively gives rise to serious doubts requiring further investigation. The applicants consider that this kind of review should correspond with that conducted by the Court in State aid cases concerning Commission decisions on whether or not to initiate a procedure under Article 108(2) TFEU. Therefore, the Court cannot confine itself to determining whether or not the Commission committed a manifest error of assessment. Instead, it should examine whether or not the Commission was entitled to conclude, beyond any reasonable doubt, that the concentration at issue did not give rise to competition concerns, even on the narrowest possible market.

44 The Commission, supported by the intervener, disputes those arguments.

45 It should be borne in mind that, when the Commission analyses a concentration within the meaning of Article 2 of Regulation No 139/2004, it carries out a first phase of investigation in order to establish whether or not the concentration raises serious doubts as to its compatibility with the internal market under Article 6(1) of that regulation. If the Commission concludes that the concentration under examination raises such doubts, the Commission opens a second phase of investigation at the end of which it must decide whether or not the concentration significantly impedes competition on the internal market for the purposes of Article 8 of Regulation No 139/2004.

46 Whilst it is true that, unlike Article 8 of Regulation No 139/2004, Article 6 of that regulation refers to the existence or absence of serious doubts as to the compatibility of the notified concentration with the internal market, the fact remains that the Commission must rely in both cases on the same assessment criteria, as laid down in Article 2 of that regulation. Likewise, contrary to the applicants' submission, the standard of proof is no higher for decisions adopted under Article 6 of Regulation No 139/2004 than those adopted under Article 8 of that regulation. Whether the Commission authorises, as in the present case, a concentration at the end of the first stage or after a second stage of examination, the standard of proof is identical. Whether the Commission makes a decision on the basis of Article 6 or pursuant to Article 8 of Regulation No 139/2004 is thus dependent on the period in which the evidence becomes available to it but does not alter the standard of that evidence, as is also indicated by recital 35 of Regulation No 139/2004.

47 As regards the standard of proof, it is apparent from Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraphs 50 to 53, that the Commission is, in principle, required to adopt a position, either in the sense of approving or of prohibiting the concentration notified to it, based on its assessment of the economic outcome attributable to the concentration which is the most likely to ensue. An assessment of probabilities is therefore involved, as the Commission contends, and not, as the applicants submit, an obligation on the Commission to show beyond any reasonable doubt that a concentration does not give rise to any competition concerns.

48 In this respect, the Commission correctly observes that Regulation No 139/2004 is not based on a presumption that concentrations are incompatible with the internal market. The merger control regime cannot therefore be compared with the control system established by Articles 107 and 108 TFEU, which is based on a system of prohibition and derogations.

49 It is true that the applicants observe, also correctly, that Article 6(1)(c) of Regulation No 139/2004 does not confer on the Commission any discretion as regards the initiation of an additional, second phase of investigation where it encounters serious doubts with respect to the compatibility of a concentration with the internal market. Indeed, where the Commission has serious doubts as to the compatibility with the internal market of a concentration, it is obliged to initiate a second phase of investigation. However, even if the notion of 'serious doubts' is an objective one, the Commission correctly observes that the fact remains that, before adopting a decision under Article 6(1)(c) of Regulation No 139/2004, it must carry out complex economic assessments and that it enjoys, for that purpose, a certain margin of discretion of which the Court must take account (Case T-119/02 *Royal Philips Electronics* v *Commission* [2003] ECR II-1433, paragraph 77).

50 Consequently, irrespective of whether decisions are adopted under Article 6 or on the basis of Article 8 of Regulation No 139/2004, the case-law provides for an identical standard of judicial review. In both cases, as the Commission submits, the review by the European Union judicature of complex economic assessments made by the Commission is limited to checking compliance with the rules governing procedure and the statement of reasons, the substantive accuracy of the facts as well as the absence of manifest errors of assessment or misuse of powers. In that respect, it should be borne in mind that the European Union judicature must not only ascertain whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (see, in respect of decisions adopted under Article 8 of Regulation No 139/2004, Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, paragraph 39, and in respect of decisions adopted under Article 6 of that regulation, *Sun Chemical Group and Others* v *Commission*, paragraph 60).

First plea in law, on the horizontal effects of the concentration on the consumer communications market

51 According to the contested decision, Skype's activities in the field of consumer communications overlap with the activities carried out by Microsoft with WLM. That overlap concerns in particular video calls made on Windows-based PCs, which constitute the narrow market. In that narrow market, WLM would have a market share of between 30 and 40% and Skype of between 40 and 50%, so that the concentration would give rise to a combined market share of between 80 and 90% (recitals 97 to 102 and 109 of the contested decision).

52 None the less, the Commission took the view that that combination did not give rise to serious doubts as to the compatibility of the concentration with the internal market. First, in this respect, it took the view that market shares are not particularly indicative of competitive strength in a fast-growing market and that, in so far as video communications services are offered free of charge, any attempt to increase

prices would encourage consumers to switch supplier. The same would be true if the merged entity stopped innovating, since consumers attach great importance to product innovation. Second, the new entity would face competition from both new entrants offering innovative products and from the numerous existing operators, including Google and Facebook. Third, demand for video calls offered by WLM is in marked decline. Moreover, WLM's presence on tablets and smartphones is very limited, whereas these platforms are growing fast. Fourth, the network effects to which the concentration might give rise would be diluted by the fact that users tend to communicate in small restricted circles and use a range of operators. Those factors demonstrate the ease with which user groups switch to other communications services.

53 The applicants submit that if the Commission had correctly applied the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2004 C 31, p. 5; 'the Guidelines on horizontal mergers') and followed its previous decision-making practice, it would have further explored the anti-competitive effects of the concentration. The applicants submit that the Commission should have examined whether those problems could have been overcome by imposing conditions to ensure interoperability between the communications services offered by the new entity and those offered by competing suppliers. By approving the transaction in the first phase of investigation without requiring commitments in this respect, the Commission committed several manifest errors of assessment in its failure to conclude that the transaction in question gave rise to serious doubts.

54 In support of that first plea, the applicants essentially put forward three complaints.

55 First, the applicants claim that the Commission failed to take account of network effects on the consumer communications markets, in particular those which occur on the narrow market. In the applicants' opinion, the Commission's analysis of the network effects is contrary to its practice in previous decisions and the Commission infringed its obligation to state reasons by failing to explain its reasons for departing from that practice.

56 Second, the applicants state that the combination of a very high market share with a concentration degree of 7340 according to the Herfindahl-Hirschman Index ('HHI') provides, at the very least, strong indicia of the existence of competition concerns warranting additional scrutiny and that the arguments put forward in the contested decision do not alter the evidential value of those two factors. Furthermore, the contested decision contains no evidence on the capacity of consumers to switch supplier if the new entity stopped innovating or no longer guaranteed interoperability with competing services.

57 Third, the applicants submit that the Commission did not properly assess the competitive pressure that the new entity would face.

58 The Commission and the intervener submit that the applicants' arguments are unfounded.

59 It is clear from Article 2 of Regulation No 139/2004 that only concentrations which significantly impede effective competition in the internal market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, are to be declared incompatible with the internal market.

60 With respect to horizontal concentrations, the Guidelines on horizontal mergers set out the criteria that the Commission seeks to apply in order to determine whether a concentration fulfils the prohibition conditions laid down in Article 2 of Regulation No 139/2004. It follows from paragraph 22 of those guidelines that those conditions may be fulfilled, inter alia, where a concentration results in the elimination of important competitive constraints on the parties to the concentration, who consequently would have increased market power, without resorting to coordinated behaviour.

61 According to paragraph 8 of the Guidelines on horizontal mergers, the possession by one or more firms of increased market power may result in competitive harm, if that power enables the merged entity to profitably increase prices, decrease output, restrict choice, reduce quality of goods and services offered or diminish innovation, or if that power enables it to influence other parameters of competition.

62 According to the case-law, the burden of proving that a concentration produces such harm lies with the Commission (see, to that effect, Case T-87/05 *EDP* v *Commission* [2005] ECR II-3745, paragraph 61). It should also be borne in mind that, when the Commission relies on a form of future conduct which it contends will be engaged in by a merged entity following a merger, it is required to establish, on the basis of convincing evidence and with a sufficient degree of probability, that the conduct will actually occur (Case T-210/01 *General Electric* v *Commission* [2005] ECR II-5575, paragraph 464).

63 In so far as the Commission is thus required to carry out a prospective analysis requiring numerous economic factors to be taken into account, it enjoys a margin of discretion which the Court must take into account when exercising its power of review. However, that does not mean that the Court must refrain from reviewing the Commission's interpretation of data of an economic nature, as was held in paragraph 50 above.

64 It is in the light of those considerations that the arguments put forward by the applicants in support of the first plea must be examined. However, that examination will be conducted in a different order from that in which the applicants put forward their arguments. It is first appropriate to examine the arguments relating to market share and then assess the arguments based on network effects. Lastly, it is appropriate to analyse the arguments concerning the harm that the contested concentration is liable to cause to competition.

– Market share

65 With respect to the very high market share on the narrow market, it is apparent from paragraph 17 of the Guidelines on horizontal mergers and from the case-law to which that paragraph refers that market shares of 50% or more are liable to constitute serious evidence of the existence of a dominant position. However, it should be made clear that market shares may only be used as indicia of competition concerns to the extent that the market to which those shares relate has been defined beforehand. The same is true of the HHI to which the applicants also refer.

66 In the present case, the Commission confined itself to differentiating consumer communications from enterprise communications (see paragraph 7 above). However, it did not adopt a position on whether it was necessary to identify, within the category of consumer communications, the existence of narrower markets defined according to the functionality, platform or operating system of those communications, since it found that the notified concentration did not give rise to competition concerns even on the narrowest markets. The Commission found, inter alia, that, even on the basis of the narrow market, the new entity would continue to face significant competitive pressure.

67 The applicants therefore base their complaint relating to market power held by the new entity on an incorrect assumption, in so far as the Commission did not define the existence of a specific market for consumer video communications on Windows-based PCs. The Commission did not therefore establish in the contested decision that operators present on the narrow market could act independently of the competitive pressure from other means of consumer communications, such as services offered on other platforms or other operating systems. In addition, the applicants did not themselves submit any evidence or study to support the conclusion of the existence of such a narrow market. By contrast, they merely criticised the factors put forward in the contested decision in order to qualify the significance of market shares (see paragraph 56 above). That criticism is moreover unfounded.

68 First, as regards the figures relating to the use of WLM, it is sufficient to observe that the figures mentioned in the contested decision show a significant fluctuation of WLM's market share over a relatively short period of seven months. Irrespective of whether the market share losses benefited Skype or other providers of video communications services, the fact remains that those figures demonstrate the instability of market shares on the narrow market, on which the Commission relied solely for the purposes of its analysis.

69 Moreover, and above all, as highlighted by the Commission in the contested decision and in the defence as well as by the intervener, the consumer communications sector is a recent and fast-growing sector which is characterised by short innovation cycles in which large market shares may turn out to be ephemeral. In such a dynamic context, high market shares are not necessarily indicative of market power and, therefore, of lasting damage to competition which Regulation No 139/2004 seeks to prevent.

70 Second, although PCs remain the most used platform for consumer video communications, a substantial and growing share of new demand for those services originates from users of tablets and smartphones, sales of those appliances having overtaken those of PCs in Western Europe according to recital 32 of the contested decision. The Commission and the intervener rightly draw attention to the extent of that growth, which the applicants do not contest, because any attempt by the new entity to exert any market power on the narrow market would risk reinforcing that trend to the detriment of the new entity. The new entity is less present on those other platforms and faces strong competition from other operators, in particular Apple and Google.

71 Third, the intervener is also right in observing that the increasing use of tablets and smartphones for video calls means that a growing number of users expect that it should be possible to make those calls from all types of platform. WLM's weak presence on tablets and smartphones does not allow it to respond to that new demand and therefore reduces its commercial attractiveness. The Commission was therefore right to refer to that limited presence in order to qualify the significance of the high market shares observed on the narrow market which it used as a starting point for its competition analysis in the contested decision.

72 Fourth, the applicants' argument that Facebook would not be an effective competitor of the merged entity cannot be accepted. The only factor that they put forward in support of that argument is that Facebook is a licensee and strategic ally of Skype, which cannot use Skype's software to offer services in competition with the paid services of Skype, called SkypeOut, which make it possible to, inter alia, call fixed or mobile telephone numbers and to conduct video calls involving more than two persons. However, they do not submit that that agreement prevents Facebook from offering its video communications services to consumers who might decide to switch away from the new entity if it decided to exert any market power. In this respect, the Commission and the intervener rightly maintain that the use of the same technology by two undertakings does not necessarily affect their competitive relationship.

73 Fifth, contrary to the applicants' submission, the fact that the services are offered free of charge is a relevant factor in assessing the market power of the new entity. In so far as users expect to receive consumer communications services free of charge, the potential for the new entity to set its pricing policy freely is significantly restricted. The Commission rightly observes that any attempt to make users pay would run the risk of reducing the attractiveness of those services and of encouraging users to switch to other providers continuing to offer their services free of charge. Likewise, if the new entity decided to stop innovating in terms of its communications services, it would also run the risk of reducing their attractiveness given the level of innovation on the market in question. It should be borne in mind in this respect that there are no technical or economic constraints which might prevent users from switching providers (see paragraph 79 below).

74 It follows that the very high market shares and very high degree of concentration on the narrow market, to which the Commission referred merely as a basis for its analysis, are not indicative of a degree of market power which would enable the new entity to significantly impede effective competition in the internal market.

– Network effects

75 With respect to the network effects which allegedly result from the concentration in question and which allegedly impede market access, the applicants submit that network effects occur in all the consumer communications markets. They specified however at the hearing that those network effects further strengthen the dominant position of the new entity on the narrow market.

76 It should be observed at the outset that the existence of network effects does not necessarily procure a competitive advantage for the new entity. On the segments of the consumer communications market other than that of video calls on Windows-based PCs, competing operators have sufficiently large market shares to constitute alternative networks. It is thus apparent from recitals 103 to 105 of the contested decision, whose content the applicants do not contest, that the user network of Facebook's instant messaging service is larger than that of the merged entity. Similarly, it is apparent from recitals 106 to 108 of the contested decision, whose content the applicants do not contest either, that, on the segment of voice telephony, the concentration should not change the existing situation, since WLM's market share is very small in that segment.

77 As regards network effects on the narrow market alone, the applicants have not in any way claimed or established that the level of use of video communications services on Windows-based PCs offered by WLM and Skype would increase on account of the concentration. The applicants criticise the Commission's analysis of the network effects, but do not advance any arguments indicating how such effects would have an effect on competition on the narrow market (see paragraph 55 above).

78 In any event, the complaint based on network effects is unfounded.

79 First, contrary to the situations that formed the basis of the Commission's previous decisions which are relied upon by the applicants, and as stated by the intervener, there are no technical or economic constraints which prevent users from downloading several communications applications on their operating device, especially as the software concerned is free, easy to download and takes up little space on their hard drives.

80 Second, the applicants' argument that the consumer switching to alternative providers would be difficult, because consumers belong to several small interconnected groups, is based on the incorrect assumption that switching would have to involve all groups in a single operation. The Commission and the intervener rightly observe that there is no economic or technical obstacle to switching by small group and to users continuing to use several communications programs at the same time.

81 In contrast to the applicant's unsubstantiated assertions, the Commission put forward in the contested decision specific items of information indicating the existence of such a multi-homing phenomenon. The Commission did not only refer to such coexistence between WLM and Skype before the concentration. The report cited in footnote 52 of the contested decision mentions several other examples of multi-homing involving Skype and alternative providers such as Yahoo!, AIM and Gmail. In addition, recital 93 of the contested decision, whose content the applicants do not contest, refers to the recent arrival of competitors such as Facebook, Viber, Fring and Tango, which tends to show that network effects do not, in any event, impede market access.

82 Third, nor do the applicants contest the finding in recitals 73 and 74 of the contested decision that the growth in demand for consumer video communications will to a large extent concern platforms other than PCs, such as tablets and smartphones. If the attractiveness of communications software is supposed to increase according to the number of users, network effects can be significant only if that software makes it possible to also contact consumers who use those other platforms for their video calls. In the present case, the presence of WLM on platforms other than Windows-based PCs is not significant, such that the concentration does not change the competitive landscape.

83 Fourth, with respect to the commercial statements by executives of the parties to the concentration that Skype's value will increase with the number of its users, it should be pointed out that the Commission does not contest the existence of network effects. According to recitals 91 to 94 of the contested decision, the Commission takes the view merely that those network effects do not create barriers to entry. In addition, those statements support rather than weaken the Commission's position. Indeed, those statements could be interpreted as reflecting the intervener's desire to establish itself, through the acquisition of Skype, on platforms on which WLM did not enable it to do so.

84 It follows that the complaint based on network effects and the resulting barriers to entry is unfounded.

– Competitive harm

85 Even if the concentration were to increase the intervener's market power, the applicants provide no relevant information as to how that alleged market power would enable the new entity to cause significant harm to competition.

86 First, as regards prices, the applicants do not contest that video communications services are provided free of charge to users, but assert that there might be increases in the price of using Skype's services with other networks, revenue derived from advertising and revenue from related markets. The applicants also submitted at the hearing that Skype might attempt to charge a fee for certain services which are currently provided for free.

87 Those arguments cannot be accepted.

88 First, Skype's paid services, in particular its SkypeOut services, only concern video calls to a very limited extent. A minimal percentage of SkypeOut's revenue comes from group video communications, which involve more than two users at the same time. Moreover, as was pointed out by the Commission, no operator has thus far been able to charge for its services in respect of video calls between two participants. Consumers expect those services to be provided for free and the applicants have failed to demonstrate how the concentration might enable Skype to change those market conditions without consumers switching operators.

89 The applicants have also failed to explain how market power on the narrow market of video calls on Windows-based PCs might make it possible to increase prices for other communications services. In addition, the applicants completely disregard the competitive constraints exerted by traditional telephone operators and providers of online voice telephony other than Skype, in the event that the new entity sought to increase the prices of SkypeOut voice calls.

90 Furthermore, nor do the applicants explain how the new entity would be capable of imposing a price increase on advertisers. They have not submitted or demonstrated that there is an advertising market aimed specifically at consumer video communications services on Windows-based PCs. In the absence of such a market, advertisers can easily avoid any attempt to increase prices by redirecting their advertising expenditure towards other media, whether on the internet or elsewhere.

91 Lastly, nor do the applicants provide any information on the potential for the new entity to increase prices on related markets, such as communications services for undertakings. They merely refer to their second plea, which will be examined below.

92 Second, the applicants' claims regarding the effect of the concentration on the quality and innovation of video communications services are even more abstract, particularly as they do not call in question the findings made by the Commission in recitals 81 to 84 of the contested decision that consumer communications services depend on innovation. Any attempt by the new entity to degrade the quality of its services on the narrow market will only accelerate the relative loss of importance of video communications services on Windows-based PCs (see paragraph 70 above).

93 Third, the applicants cannot overcome the shortcomings of their arguments relating to the harm to competition caused by the contested concentration by referring to the purchase price of USD 8.5 billion. In this respect, the Commission rightly maintains that, given the high number of potential business models and the lack of reliable market data relating to their potential implementation in these nascent markets, it cannot be the task of merger control to predict the model which will make internet video telephony profitable in the marketplace and thus be viable in the future. Indeed, the powers that Regulation No 139/2004 confers on the Commission are limited to verifying significant impediments to competition which may result from a concentration. Those powers do not enable it, however, to speculate on the price of an acquisition or to substitute its point of view on the value of a transaction for that of the parties concerned, particularly as the reasons underlying that transaction cannot always be explained by purely economic rationale.

94 It follows that the applicants have failed to demonstrate how the concentration might harm competition on the consumer communications market.

95 Consequently, the applicants have failed to demonstrate that the Commission committed a manifest error of assessment in finding that the concentration did not give rise to serious doubts as to its compatibility with the internal market with respect to consumer communications services.

96 In addition, in so far as the applicants complain that the Commission failed to explain the reasons which led it to depart from its practice in previous decisions, it is sufficient to note that, unlike the earlier decisions, the case in point is not characterised by the presence of technical or economic constraints preventing users from downloading several communications software programs at the same time (see paragraph 79 above). There can therefore be no question of any change in policy for which the Commission ought to have stated reasons in the contested decision. The argument relating to the infringement of Article 296 TFEU, which the applicants put forward in support of their first plea, must therefore be rejected.

97 In light of the above, the first plea must be rejected in its entirety.

Second plea in law, on the conglomerate effects of the concentration on the enterprise communications market

98 It is apparent from the contested decision that, during the administrative procedure, third parties expressed the concern that the concentration would produce conglomerate effects on the enterprise communications market. One of the effects complained of concerns the creation by the new entity of preferential ties between Skype's user base and Microsoft's Lync product. It was alleged that that preferential integration would give the new entity a competitive advantage with respect to business users, in particular undertakings using call centres.

99 The Commission took the view in the contested decision that that concern was unjustified. First, the new entity would not have the ability to pursue such a strategy, because Skype is not a product adapted to the needs of undertakings using call centres. Furthermore, the new entity would not have any incentive either to prevent undertakings using other enterprise communications services from contacting users of Skype. Those undertakings would still be able to download the Skype application for free. Moreover, Skype is not a 'must have' product for undertakings using call centres, since numerous other solutions exist for communicating with consumers. Lastly, it is unlikely that anti-competitive effects could occur in the next three years, since Lync faces competition from other large market players, such as Cisco and IBM.

100 The applicants contend that the Commission did not take account of the foreclosure strategy that the new entity could follow on the enterprise communications market by creating exclusive or preferential interoperability between Lync products and Skype's large customer base. That strategy would enable the new entity to position Lync as the only product capable of meeting the growing demand from large business users wishing to interact with their customers and other business contacts. For that purpose, the new entity could, consistent with the past exclusionary practices of Microsoft, enforce its position of strength in markets related to the enterprise communications market and integrate Lync with other Microsoft products. By failing to examine that strategy in more depth and take account of such growing demand, the Commission did not provide proper reasoning for its decision and committed several errors in its assessment of the link between the consumer and enterprise markets, on the latter of which Skype is indeed present.

101 First, the applicants dispute that the new entity does not have the ability to foreclose the market. The relevant question is not whether Skype is a product for call centres, but whether the new entity is able to alter the degree of interoperability to the benefit of its own products and services. This was acknowledged by the Commission in recital 143 of the contested decision.

102 Second, the applicants submit that the Commission's assessment of the new entity's incentives to foreclose the market is flawed. The Commission based its analysis of those incentives on an erroneous premiss. The issue is not whether Skype is a 'must have' product, but whether the integration of Skype with Lync will make Lync a 'must have' product for the purpose of accessing Skype's large user base and, therefore, meeting the expectations of enterprise communications users who may wish to communicate with users of Skype. In the absence of interoperability with Skype, Lync's competitors would have no real alternatives. Thus, the fact that Skype continues to be available for download free of charge does not address the concerns arising from preferential interoperability between Skype and Lync. Furthermore, the Commission itself pointed out that in other cases involving the intervener, users are generally reluctant to download several software applications for one and the same function. Finally, the applicants submit that the Commission failed to examine the reasons why the intervener offered USD 8.5 billion to purchase Skype – reasons which specifically relate to the preferential ties between Skype and Lync – and, notably, overlooked the statements of some of the intervener's representatives. That omission is all the more surprising given the intervener's past conduct. The applicants state that Microsoft has already been sanctioned on several occasions for exclusionary practices and continues to block interoperability between its products and those of its competitors.

103 Third, the applicants claim that the Commission erred in its assessment of the effects of the potential exclusionary strategy. Not only did the Commission underestimate Lync's importance on the enterprise communications market at the time of the administrative procedure, it also overlooked the fact that Lync was offered in conjunction with the Windows Server operating system and other Microsoft products for which the new entity was strongly positioned. Finally, the implementation of preferential or exclusive interoperability between Lync and Skype would be particularly damaging on markets characterised by network effects.

104 The Commission and the intervener submit that the applicants' arguments are unfounded.

105 In support of their second plea, the applicants essentially put forward two complaints.

106 The first complaint alleges breach of the obligation to state reasons as laid down by Article 296 TFEU. In the applicants' submission, the contested decision does not address the arguments that Cisco and other interested parties put forward during the administrative procedure regarding the exclusionary strategy that the new entity would be inclined to pursue.

107 The second complaint relates to the manifest error of assessment that the Commission allegedly committed by disregarding the competition concerns referred to in the previous paragraph. In the applicants' opinion, the Commission failed to take account of the conglomerate effects resulting from the concentration. In particular, the Commission failed to have regard to the ability of and the incentives for the new entity to use its position on the consumer communications market as leverage to distort competition on the enterprise communications market.

– The statement of reasons

108 It is clear from settled case-law that the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent European Union Court to exercise its power of review (*Bertelsmann and Sony Corporation of America* v *Impala*, paragraph 166). In this respect, when stating the reasons for the decision which it is required to take in order to ensure the application of the competition rules, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned in support of their request. It is sufficient if it sets out the facts and legal considerations having decisive importance in the context of the decision (see Case T-114/92 *BEMIM* v *Commission* [1995] ECR II-147, paragraph 41 and the case-law cited). The question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63; Case C-42/01 *Portugal* v *Commission* [2004] ECR I-6079, paragraph 66; and Case C-390/06 *Nuova Agricast* [2008] ECR I-2577, paragraph 79).

109 Similarly, the degree of precision of the statement of the reasons for a decision must be weighed against practical realities and the time and technical facilities available for making the decision (Case 16/65 *Schwarze* [1965] ECR 877, 888; Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 16; and *Bertelsmann and Sony Corporation of America* v *Impala*, paragraph 167). Consequently, the Commission does not infringe its obligation to state reasons if, in its decision, it does not include precise reasoning as to the appraisal of a number of aspects of the concentration which appear to it to be manifestly irrelevant or insignificant or plainly of secondary importance to the assessment of the concentration (*Commission* v *Sytraval and Brink's France*, paragraph 64, and *Bertelsmann and Sony Corporation of America* v *Impala*, paragraph 167). Such a requirement would be difficult to reconcile with the need for speed and the short timescales which the Commission is bound to observe when exercising its power to examine concentrations and which form part of the particular circumstances of proceedings for control of those concentrations (*Bertelsmann and Sony Corporation of America* v *Impala*, paragraph 167).

110 It follows that the Commission is not required to address all the arguments put forward by the parties and third parties during the administrative procedure, or to provide precise reasoning as to the appraisal of those arguments.

111 In the present case, the Commission addressed the arguments presented by Cisco and other interested parties in recitals 213 to 221 of the contested decision. Whilst it is true that that statement of reasons is succinct, it is not however contrary to the requirements of Article 296 TFEU, in the light of the specific context of the case.

112 Indeed, it should be noted that the Commission mentions that it received a relatively large number of observations from third parties which it was required to examine in a relatively short period. Furthermore, the conglomerate effects theory advanced by Cisco during the administrative procedure is complex and abstract (see paragraphs 124 to 127 below), whereas concentrations giving rise to conglomerates do not usually generate competition concerns (see paragraphs 115 and 116 below).

113 In such circumstances, it would be excessive to require a more detailed description of each aspect underpinning the analysis of the theory of conglomerate effects in the contested decision. The Commission was therefore entitled merely to respond in summary fashion to Cisco's arguments, particularly as Cisco was perfectly able to understand the reasoning of that analysis, as is demonstrated by the present application.

114 It follows that the first complaint of the second plea must be rejected as unfounded.

– Whether there was a manifest error of assessment

115 In order to clarify its appraisal criteria as laid down in Article 2 of Regulation No 139/2004 in the area of concentrations generating conglomerate effects, the Commission published Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2008 C 265, p. 6). It is apparent from paragraphs 11 and 92 of those guidelines that this type of concentration does not involve competing undertakings, such that these concentrations are less likely to significantly impede effective competition than horizontal concentrations. Moreover, they may enable the parties involved to achieve efficiencies.

116 However, concentrations generating conglomerate effects may in certain circumstances give rise to competition concerns. That may be the case inter alia where the concentration enables the new entity to pursue a market foreclosure strategy. According to paragraph 93 of the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, market foreclosure may occur if the combination of products in related markets confers on the merged entity the ability and incentive to leverage a strong market position on one market to foreclose competition on another market. According to the case-law, that effect on the other market must be foreseeable in the relatively near future in order for the concentration to give rise to competition concerns under Regulation No 139/2004 (see, to that effect, Case T-5/02 *Tetra Laval* v *Commission* [2002] ECR II-4381, paragraphs 148 to 153).

117 As regards proof of such conglomerate effects, the case-law has established that the quality of the evidence produced by the Commission in order to establish that it is necessary for it to adopt a decision declaring a concentration incompatible with the internal market is particularly important. The assessment of a conglomerate-type concentration is based on a prospective analysis in which, first, the consideration of a lengthy period of time in the future and, second, the leveraging necessary to give rise to a significant impediment to effective competition mean that the chains of cause and effect are dimly discernible, uncertain and difficult to establish (*Bertelsmann and Sony Corporation of America* v *Impala*, paragraph 50; see, to that effect, *Commission* v *Tetra Laval*, paragraph 44).

118 It should be borne in mind that the Commission may declare a concentration incompatible with the internal market only if the significant impediment to competition is the direct and immediate effect of the concentration. Such an impediment, which would stem from future decisions by the merged entity, may be regarded as a direct and immediate effect of the concentration, if that future conduct is made

possible and economically rational by the alteration of the characteristics and the structure of the market caused by the concentration (Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585, paragraph 58; see, to that effect, *Gencor* v *Commission*, paragraph 94).

119 In the present case, the applicants complain in particular about the opportunity that the new entity has to distort the conditions of competition on the enterprise communications market in favour of Lync by guaranteeing preferential interoperability for that product with Skype and thus with the large user base of that communications program.

120 It is common ground that that interoperability was not yet guaranteed at the date of adoption of the contested decision and that it still required relatively lengthy and complex innovative work. According to the information supplied by the intervener which was not called in question by the applicants, the creation of a network bridge between Lync and Skype is only likely to be completed in 2013. In addition, on the assumption that that work is completed on time, the new entity would still have to devote effort to marketing the new product to potentially interested business customers. That marketing campaign would therefore take place during 2014. Lastly, in order that the anti-competitive effects feared by the applicants could occur in 2014, the Commission having referred to a period of three years following the date of adoption of the decision, it would still be necessary for that marketing campaign to be commercially successful to such a large extent that it would tip, almost immediately, the enterprise communications market in favour of Lync and would enable the new entity to foreclose the market. Such commercial success would imply a major change in the position of the operators on the market and would mean in particular that Lync's market share on the enterprise communications market, which was 16% in 2011, would evolve significantly in comparison with Cisco's, which was 32% in 2011.

121 The foreclosure effect feared by the applicants therefore depends on a series of factors in relation to which it is not certain that they might all occur in a sufficiently near future, such as is necessary in order for the prospective analysis of the effects of the concentration not to become purely speculative (see paragraph 116 above). In this respect, as mentioned in the previous paragraph, the Commission referred to a period of three years following the date of adoption of the decision. That period, which the applicants have not moreover disputed, is relatively long where, as in the present case, the sector concerned is a new technology sector which is characterised by relatively short innovation cycles. Lastly, the applicants' reasoning is based not only on future and uncertain events, but also disregards the possibility that competitors of the new entity will adjust their marketing and technological strategies to anticipate and counteract a possible foreclosure strategy.

122 It must therefore be concluded that the market foreclosure effects of which the applicants complain are too uncertain to be considered a direct and immediate effect of the concentration.

123 In addition, even if the negative effects feared by the applicants could be considered as being a consequence of the concentration, it is not possible to conclude, for the reasons set out below, that the Commission committed a manifest error of assessment by deciding that there were no serious doubts as to the compatibility of the concentration with the internal market.

124 With respect, in the first place, to the ability of the new entity to foreclose the market, as an initial remark, it should be observed that the explanations given by the applicants regarding the competitive advantage that the new entity enjoys are vague. It would appear from those explanations that, by the integration of Lync with Skype's user base, the new entity supposedly has a significant business advantage on the enterprise communications market. That integration allegedly enables business users to communicate, including visually, with their customers and other business contacts, such as suppliers and distributors, using the same software as that used for communicating internally within an undertaking.

125 However, the applicants provide no tangible evidence of the existence, scale or development of the demand for such a product. They refer to information that Cisco provided the Commission during the administrative procedure, which merely mentions the names of several large undertakings or sectors which might wish to communicate with users of Skype, without specifying however whether or not those wishes relate to the future product integrating Lync and Skype. By contrast, the intervener produced specific information regarding the lack of interest on the part of Lync customers for an instant messaging communications tool.

126 Second, even if there was real and significant demand for a communications tool such as the one resulting from integrating Lync with Skype, the applicants have failed to explain why business users might wish to specifically communicate with users of Skype. The applicants merely rely on Skype's large user base and the new entity's supposed dominant position on the consumer communications market, in particular for video calls on Windows-based PCs. As the Commission rightly observes, undertakings potentially interested by an integrated communications tool wish primarily to communicate with consumers of their products and services and not with users of Skype. It is not clearly apparent whether these users are also current or potential customers of undertakings that might be interested in purchasing the product resulting from the integration of Lync with Skype and even less that these users wish to communicate visually with those undertakings.

127 In addition, on the assumption that users of Skype constitute a commercially attractive group of consumers, Skype does not allow undertakings to canvass such users actively. As stated by the Commission and the intervener, it is not possible to contact users of Skype, who normally use a pseudonym, without their prior authorisation. Conversely, in the event that the commercial interest of the product resulting from the integration of Lync with Skype relates to the possibility for users of Skype to contact undertakings which sell them goods and services, the applicants provide no information regarding the commercial advantage of that integrated product in comparison with other methods of communications between undertakings and consumers, such as the traditional telephone communication. The Commission and the intervener correctly observe that it is not credible, on account of those other methods of communication, that the product resulting from the integration of Lync with Skype would become a 'must have' product for undertakings wishing to communicate with their consumers. It should also be observed that Skype's application continues to be available and downloadable after the concentration and that it is therefore entirely possible for any undertaking to enable its customers to contact it by Skype by indicating its Skype ID on its goods, in its advertising or on its internet site. In order to communicate with users of Skype, it will not be necessary for an undertaking to have the product formed by the integration of Lync with Skype.

128 Third, in the event that the product resulting from the integration of Lync with Skype gives the new entity a real commercial advantage, that entity would still not have the ability to pursue a strategy of market foreclosure. On the one hand, it follows from the analysis of the first plea that the concentration does not give rise to serious doubts as to its compatibility with the internal market with respect to consumer communications services. On the other hand, as was observed in paragraph 121 above, Lync's competitors, including Cisco, still have sufficient time to develop commercial strategies aimed at counteracting the market foreclosure strategy that the new entity might possibly decide to follow. Those competitors could adjust their prices, the quality or functionality of their products or have recourse to the services of other large providers of consumer communications services, such as Facebook, Twitter and Google. It should be noted, in this respect, that a number of undertakings are already connected to that type of network, as the intervener submits.

129 The applicants cannot dispute the new entity's weak degree of market power by referring to recital 143 of the contested decision, in which the Commission recognised Microsoft's ability to engage in foreclosure strategies on other markets. That recital does not relate to the enterprise communications market, but concerned rather the consumer communications market and in particular the potential for the new entity to combine other products of Microsoft, specifically Windows, Windows Internet Explorer or Microsoft Office, with Skype.

130 Moreover, the applicants have adduced no other evidence demonstrating that the new entity has the ability to engage in the market foreclosure strategy which they allege.

131 With respect, in the second place, to the incentives for the new entity to pursue such a strategy, it should be borne in mind that the applicants did not adduce any specific information regarding the gains that that strategy might secure for the new entity. They merely refer to the large size of Skype's user base, to the value of the transaction which amounts to USD 8.5 billion, to certain statements by Microsoft's Chief Executive Officer and to Microsoft's previous exclusionary practices.

132 In the absence of any information regarding the existence, extent and nature of the demand for a product integrating Skype and Lync, it is difficult, or even impossible, to assess whether an exclusionary strategy may turn out to be profitable for the new entity. In addition, in so far as Skype is still available as downloadable software for all users, including undertakings, it is also difficult to know whether those undertakings will prefer the integrated product over a competing enterprise communications application alongside which they will have downloaded the Skype software. References to earlier commercial practices which concern different markets to the consumer communications market, to the value of the transaction and to general commercial statements by certain representatives of Microsoft cannot compensate for those shortcomings.

133 There are therefore no tangible factors to support the conclusion that the new entity would have the incentive to implement a market foreclosure strategy.

134 With respect, in the third place, to the probable overall effect of such a strategy on prices and choices, the Court notes, as did the Commission and the intervener, that the presence of Lync on the enterprise communications market is certainly significant, but that it is lower than that of its competitors and, in particular that of Cisco. Since implementation of the strategy will last several years (see paragraphs 120 and 121 above), it was not foreseeable at the time of adoption of the contested decision that such a strategy might result in a reversal of the competitive landscape in favour of Lync following the decision.

135 The fact that Lync could be sold in conjunction with other products from the Microsoft range does not alter that finding, since such a sales strategy is not dependent on the concentration concerned by the contested decision.

136 Consequently, the Commission did not commit a manifest error in its assessment of the conglomerate effects on the enterprise communications market.

137 It is therefore necessary to reject the second complaint of the second plea as unfounded and, therefore, the second plea in its entirety.

138 In view of the foregoing, the application for annulment of the contested decision must be dismissed.

139 Lastly, with respect to the first head of claim, the applicants essentially request the Court to adopt a measure of organisation of procedure obliging the Commission to provide the Court with all documents related to negotiations concerning communications between the Commission and the parties to the transaction on possible interoperability commitments. Since it is apparent from the foregoing considerations that the Commission did not commit a manifest error of assessment by approving the concentration on the basis of Article 6 of Regulation No 139/2004, there is no longer any need to consider, in the context of the present application, whether the Commission might have had discussions on interoperability commitments. The Court therefore takes the view that it is not necessary to adopt the measure of organisation of procedure sought in the first head of claim.

Costs

140 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the Commission and the intervener.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. Dismisses the action;

2. Orders Cisco Systems Inc. and Messagenet SpA to bear their own costs and to pay those incurred by the European Commission and Microsoft Corp.

Papasavvas Van der Woude Wetter

Delivered in open Court in Luxembourg on 11 December 2013.

[Signatures]

Table of contents

Facts . . . 2

Parties to the proceedings . . . 2

Administrative procedure . . . 2

Content of the contested decision . . . 2

Procedure and forms of order sought . . . 4

Law . . . 5

Admissibility . . . 5

Substance . . . 7

The standard of proof on the Commission and the standard of judicial review . . . 7

First plea in law, on the horizontal effects of the concentration on the consumer communications market . . . 8

– Market share . . . 10

– Network effects . . . 12

– Competitive harm 13

Second plea in law, on the conglomerate effects of the concentration on the enterprise communications market 14

– The statement of reasons 16

– Whether there was a manifest error of assessment 17

Costs 21