The appraisal of mergers in high technology markets under the EU merger control Regulation: From *Microsoft/Skype* to *Facebook/WhatsApp*

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1. Introduction

High technology markets are dynamic, fast-growing sectors characterized by a fast-paced innovation. Dominant positions in these markets may be challenged by innovators provided that entry barriers are not high[1]. Competition authorities have to take into account these factors when reviewing the effects of merger operations on the competitive structure of high technology markets. This paper examines the approach taken by the Commission in assessing under the EU Merger Control Regulation (EUMR) the competition impact of mergers in high technology markets in the recent *Microsoft/Skype*[2], and *Facebook/WhatsApp*[3] merger cases.

In the first case the European Commission unconditionally cleared the proposed Microsoft acquisition of Skype in spite of the quasi-monopoly position the merged entity would have in the market for video communication services. The clearance decision was uphold by the General Court of the EU (GC) in the following appeal judgment *Cisco Systems and Messagenet*[4]. In the second case the Commission gave the go-ahead to the proposed acquisition of WhatsApp by Facebook, as the transaction would not threat the competition in the relevant markets for consumer communication, social networks and on-line advertising. The paper focuses, in particular, on the methodology followed by the Commission in these cases for the analysis of the combined market shares of the parties, network effects and degradation of interoperability. In conventional merger control all these are factors may come into relevance as economic evidence of the risk that a proposed transaction may restrain competition. The paper argues that, when reviewing mergers operations affecting high technology markets, due to the specific competition conditions prevailing in such markets, the Commission has assessed with care the parties' market shares, network effects and the interoperability between the products of the merged entity and those of competitors.

The structure of the article is as follows. Section two provides for a definition of high technology markets and outlines how the main characteristics of such markets may influence the competition review of merger operations. Section three examines the relevance of market shares of the merging parties. Section four looks at the role of network effects. Section five is about the approach of the Commission to the issue of interoperability. Section six draws a conclusion.

1 Laurent Godfroid, Stéphane Hautborg,'Telecoms & Media', *The European Antitrust Review* 2014.

2 European Commission, Case M.6281, *Microsoft/Skype.*

3 European Commission, Case COMP/M.7217, *Facebook/Whatsapp*.

4 General Court, case T-79/12, *Cisco Systems and Messagenet v Commission.*

2. Definition of high technology markets

High technology markets are regarded as markets in which there is an intense degree and a fast pace of innovation; products in such markets have a short life cycle[5], market shares are volatile and market power may be transient[6]. Incumbents in high technology markets are often giants with feet of clay[7]. Additional features of high technology markets that can play a role when appraising the effects on competition of mergers are network effects and interoperability[8].

Network effects arise when a given product is more valuable to a user, the more users adopt the same product or compatible ones[9]. In high technology markets network effects may be physical, as the wide membership base of a social network, or virtual, as with complementary products such as between platforms and software. Markets where there are network effects tend to be quite highly concentrated. Network effects constitute a entry barrier and new operator have to make efforts to win away customers from incumbents[10].

In high technology markets it is important that platform and software work together. Interoperability is recognized as a fundamental value in EU competition law[11]. It ensures that the new platform can compete with the incumbent platform, thereby enabling users that opt for the new technologies to communicate with users of existing technologies. In the context of merger control interoperability may come into relevance in two scenarios. First, the merging parties may degrade or even prevents interoperability between their products and those of competitors[12]. Second, the Commission may rely on interoperability remedies to address the competition problems created by a proposed merger whose parties have the control of inputs essential for carrying out economic activities in downstream markets. To avoid the risk of foreclosing competitors, the Commission imposes on the merging parties the obligations to give competitors access to such key inputs[13].

5 Daniel Sokol,'The Broader Implications of Merger Remedies in High Technology Markets', *Competition Policy International Antitrust Chronicle* December 2014 (1); Miguel Rato, Nicolas Petit, 'Abuse of Dominance in Technology-Enabled Markets: Established Standards Reconsidered?' 2013 9 (1) *European Competition Journal*.

6 Sokol, above note n.5.

7 Rato and Petit, above note n. 5.

8 Ibid.

9 Ibid.

10 Ulrich Schwalbe and Daniel Zimmer (2009) Law and Economics in European Merger Control Oxford, p. 146

11 Christopher Thomas, 'Intel and McAfee- Antitrust is “Getting it Right” in High Tech', *Competition Policy International Antitrust Journal January 2011*(2).

12 Case M.5529, *Oracle/Sun Microsystems*; Case M.5984, *Intel/McAfee*; Case M.5669, *Cisco/Tandberg*.

All in all, on the one hand firms compete in high technology markets through innovation rather than through pricing strategies. In other words, firms do not compete in the market but compete for the market. And when a firm markets a product that becomes the standards it may also gain a dominant position. On the other hand, when handling the merger review of transactions affecting high technology markets, competition authorities have to bear in mind that technologies are fast evolving and market shares are volatile. Thereby, competition authorities have to take a cautious approach in the appraisal of this type of merger operations. The risk may be over enforcement of the merger control regime, giving rise to the so-called Type I errors, with the consequence of blocking pro-competitive merger operations and chilling innovation[14].

3. The role of market shares in merger control

a) The Microsoft/Skype *decision of the European Commission and the following judgment of the General Court*

The Commission ruled out that the merger would restrain competition, among other things, in the market for consumer communication services. It based the clearance decision on the fact that the relevant market was fast-growing and the combined market shares of the merging parties, though very high, were not particularly indicative of competitive strength. In the Commission's words '*Market shares only provide a limited indication of competitive strength in the consumer communications services markets...consumer communication services are a nascent and dynamic sector and market shares can change quickly within a short period of time*'[15]. Moreover, the merging parties would face a fierce competition by numerous strong competitors.

Cisco and Messagenet, two competitors of the merging parties in the market for internet-based communication services challenged the Commission decision before the GC. They pleaded that the high shares of Microsoft and Skype in the market for video-calls made on Window-based PC had to be considered by the Commission as indicators of the market power of the merged entity.

The GC, however, rejected this pleading. It noted that the Commission distinguished the market for consumer communication from the market for business communication. Yet, the Commission left open the question as to further segment the wider market for consumer communication into narrower markets according the functionality, platform and operating systems of the communication services. Contrary to what the appellants argued, the Commission did not identify the relevant product market in the narrower market for consumer communication on Windows-based PC, where the merging parties would have a 80-90% combined share. Agreeing with the Commission, the GC held that even if the merging parties had very high market shares, such market shares were unstable

13 Thomas Hoehn and Alex Lewis' Interoperability remedies and innovation: a review of recent case law', www.ssrn.com; Inge Graef', 'How can Software Interoperability be achieved under European Competition Law and Related Regimes?', http://jeclap.oxfordjournals.org/content/early/2013/11/25/jeclap.lpt069.

14 Sokol, above note n. 5; Alison Jones and Brenda Sufrin (2014) EU Competition Law, Oxford, p. 55.

15 Para. 78.

and thus they would not be necessarily indicative of the market power of the merging parties. Crucially, the GC stressed that "*the consumer communication 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 addition, the GC pointed to other relevant factors that contributed to the finding that the high market shares of the parties could not constitute a reliable proxy of market power. First, though PCs were still the most used platform, a growing demand for video communication services was generated from users of new platforms, such as smartphones and tablets. And the merging parties did not have a strong presence on this sector. Second, as the parties offered their services free of charge, had they attempted to charge a price for the services, customers would shift to other players that would not charge them.

b) The assessment of market shares under the previous decisional practice of the Commission

Under the decisional practice of the Commission the market shares of the merging parties are generally viewed a first-sight reliable indicator of the market power of the merged entity and, accordingly, of the possible competition problems of the under scrutiny merger. Nevertheless, in some cases the Commission has not considered market shares as a correct proxy for the market power of the merged entity, clearing the transaction in spite of the high market shares of the parties.

Apparently, in some merger cases the Commission did not attach importance to the market shares as there existed low entry barriers. In *Alcatel/Telettra*[16] the parties were found to have a 83% share and a 81% share in the markets for microwave equipment and for line transmission equipment, respectively. Notwithstanding that, the Commission approved the merger since customers could switch to alternative suppliers which could easily enter the market due to the low entry barriers. Alike, mitigating factors were also found by the Commission in *Mercedes-Benz/Kässbohrer*[17]. The Commission ruled out that the merged entity had a dominant position in the German market for intercity buses, although it enjoyed a 74% share. In that regard, the Commission noted that both actual and potential competitors were capable to exert an effective competition pressure on the merged entity. The buying power of important customers of the parties was also considered a factor limiting the market power of the merged entity. Similarly, the Commission authorized the notified merger in *Canon/Iris*[18], in spite of the very high market shares of the parties, which were close to the 90% threshold in some markets for the office automation equipment and capture software. Indeed, post-merger there were other strong operators capable to effectively compete with the merged entity.

On the contrary, the Commission's cautious approach in considering the relevance of market shares of the parties to mergers in high technology markets seems to be based on competition conditions

16 Case M.42.

17 Case M.477.

18 Case M.6773.

inherent in such markets, such as the changeability and volatility. In *HP/Compaq*[19] the Commission found the parties to have relatively high shares of the relevant product market for the entry-level servers. However, the merger entity was found to be unlikely to enjoy a post-merger dominance. That was due to the dynamic and growing nature of the market with a rapidly evolving technology, combined with the volatility of market shares, absence of entry barriers and the presence of several strong competitors as well a series of fringe suppliers. The Commission followed a similar approach in *Philips/Agilent*[20]. When assessing the effects of the merger on competition on the cardiac ultrasound market, the Commission noted that this was a dynamic, innovation-driven market. Manufacturers' market positions repeatedly changed due to new product developments. And since ongoing technological innovation, particularly new dynamic imaging techniques in the cardiac segment, were expected to continue, no single company would dominate the market.

c) The relevance of the judgment of the General Court and the Commission's decision in Facebook/WhatsApp

The CG judgment in *Cisco Systems and Messagenet* should be taken in great consideration as for the first time a EU court sanctioned the cautious approach of the Commission towards the relevance of market shares in dynamic high technology markets. This appears to be a welcome development for firms having large market shares in such sectors and planning to grow externally through acquisitions of competitors. It can be easily predicted that the precedent in *Cisco Systems and Messagenet* will be cited by the parties to mergers in high technology markets to assuage the Commission's concerns about the economic effects of the proposed transactions.

It is worth noting that such cautious approach was then followed by the Commission in *Facebook/WhatsApp,* when looking at the competition impact of the merger in the market of consumer communication services based on smartphone platforms. On considering whether the methodology proposed by the parties to calculate their market shares was correct or not, the Commission pointed out that '*the consumer communication sector is a recent and fast-growing sector which is characterised by frequent market entry and short innovation cycle in which large market shares may turn out to be ephemeral. In such a dynamic context, the Commission takes the view that in this market high market shares are not necessarily indicative of market power and, therefore, of lasting damage to competition*'[21].

The Commission used a language similar to that of the GC in *Cisco Systems and Messagenet.* Eventually, the Commission reached the conclusion that the proposed Facebook acquisition of WhatsApp was unlikely to have a negative impact on competition in the market of consumer communication services based on smartphone platforms. It must be noted, however, that the collective market shares of the parties in *Facebook/WhatsApp* were estimated in the region of 30-40% and were much lower than those of Microsoft and Skype.

19 Case M.2609.

20 Case M.2256.

21 Para. 99.

4. The assessment of network effects

a) The assessment of network effects in Microsoft/Skype *and* Facebook/Whatsapp

Though in the *Microsoft/Skype* decision the Commission acknowledged the existence of network effects, it then found that the relevance of such effects were mitigated by the fact that consumers mostly used communication services to call a small number of family and friends. It is not difficult for those belonging to such "inner circle" to switch to different providers of communication services. Moreover, consumers tend to use different communication services, thereby opting for multi-homing. As a result, there were low entry barriers as reflected by the fact that new entrants succeeded in rapidly expanding their basis of users[22].

The argument of multi-homing was further articulated by the GC in *Cisco Systems and Messagenet.* The appellants contested the Commission analysis of network effects, arguing that the mergers would give rise to network effects by frustrating the entry of new operators. The GC dismissed as unfounded the appellants' allegations, upholding the Commission's finding. It pointed out that '*the existence of network effects does not necessarily procure a competitive advantage for the new entity*'[23]. Importantly, the GC then ruled that in this case '*there are no technical or economic constraints which prevents users from downloading several communication applications on their operating device, especially as the software concerned is free, easy to download and takes up little space on their hard drives*'[24]. Like the Commission did, also the GC seemed to attach much importance to the phenomenon of multi-homing. It noted that, relying on multi-homing, it was relatively easy for consumers to switch to other communication services by small group and continue using several communication services at the same time. According to the theory of network effects, the more a communication software enables consumers to contact users of other programmes, the more attractive the software is. Yet, considering the weak presence of the Windows communication software, WLM, in the faster growing platforms other than Windows-based PCs, the GC took the view that the merger was unlikely to modify the competition structure of markets.

Similarly, in *Facebook/WhatsApp* the Commission took the view that the existing network effects in the market for consumer communication services could not be taken as evidence that the proposed merger would restrain competition by foreclosing competitors of the merged entity. Indeed, a number of factors mitigated the role of network effects as possible entry barriers. First, regardless of the size of the network effects, consumer communication apps were a fast-moving sector with low switching costs for consumers and low barriers to entry and expansion as reflected by the long track record of successful new entries[25]. Second, multi-homing enabled consumers to use different competing consumer communication apps. Importantly, as the Commission noted, '*multi-homing is*

22 Paras. 91-94.

23 Para. 75.

24 Para. 79.

25 Para. 132.

facilitated by the ease of downloading a consumer communication app, which is generally free, easy to access and does not take much capacity on a smartphone'.[26] Third, as the merging parties did not control any essential parts of the network, users of consumer communication apps were not locked in to a network[27].

b) Behavioural antitrust and EU merger control regime after Cisco Systems and Messagenet *and* Facebook/WhatsApp.

Departing from neoclassical economics, which rests around the fundamental assumption that market subjects rationally act to maximize profit, behavioural economics teaches that in some circumstances market subjects may make irrational decisions. A number of academics and competition enforces have put forward the idea to apply the principles of behavioral economics to competition law enforcement, which is traditionally based on neoclassical economics. In their view, the so-called behavioural antitrust provides for a more accurate understanding of the conducts of economic operators, be they consumers or firms[28].

The Commission's findings in the *Microsoft I*[29] and *Microsoft (Tying)*[30] cases that Microsoft abused its dominant position with a number of tying practices was based, amongst other things, on behavioural antitrust grounds[31]. Microsoft marketed its Windows OS with Windows Media Player (WMP) and the browser Internet Explorer already installed. Consumers could not buy Windows OS without also buying Windows Media Player (*Microsoft I*) and Internet Explorer (*Microsoft (Tying))* and were then coerced into buying the tying product along with the tied product. The Commission pointed out that users did not switch to other software products, though they are easily and freely downloadable because of they are biased by the so-called 'end-users inertia'. Consumers were then unable to make optimal choices due to such biases and their inability was exploited by

26 Para. 133.

27 Para. 134.

28 On the prospects and problems associated with behavioural antitrust, see Amanda Reeves and Maurice Stucke, Behavioral Antitrust, (2011) 68 *Indiana Law Journa*l 1527; Maurice Stucke, 'Money, is That What I Want?: Competition Policy and the Role of behavioral Economics', (50) 2010 *Santa Clara Law Review* 102; Amanda P. Reeves, Behavioral Antitrust: Unanswered Questions on the Horizon, *The Antitrust Source* June 2010; Douglas H. Ginsburg, Derek W. Moore, 'The Future of Behavioral Economics' in *Antitrust Jurisprudence, Competition Policy International,* Spring 2010; Michael Salinger, Behavioral Economics, Consumer Protection and Antitrust, *Competition Policy International*, Spring 2010; Joshua D. Wright and Judd E. Stone II, Misbehavioral Economics: The Case against Behavioral Antitrust, 2012 (33) *Cardozo Law Review*, 1517;

29 Case COMP/C-3/37.792

30 Case COMP/C-3/39.530.

31Nicolas Petit, Norman Neyrinck, 'Behavioural Economics and Abuse of Dominance. A Proposed Alternative Reading of the Article 102 TFEU Case-Law', http://antitrustlair.files.wordpress.com/2010/06/behavioral-economics-and-abuse-of-dominance-petit-and-neyrinck.pdf.

Microsoft to leverage its market power[32]. The Commission's rulings were met with the criticism by some competition scholars that pointed out that Microsoft with the above practices had not undermined the freedom of choice of users. Relying on multi-homing, users could easily install alternative internet browsers and media players on their PCs[33].

Apparently, this argument was embraced by the GC in *Cisco Systems and Messagenet* and by the Commission in *Facebook/WhatsApp.* When excluding the existence of constraints that prevented users from downloading several communication apps, the GC noted that such the software was free, easy to download and took up little space on the user's devices. In *Facebook/WhatsApp,* for the first time in the context of merger control, the Commission expressly took into consideration behavioural antitrust grounds. Incidentally, whether behavioural antitrust can be incorporated in merger control is still an unsettled issue[34]. Having said that, in *Facebook/WhatsApp* the Commission noted that '*neither Facebook Messenger nor WhatsApp are pre-installed on large basis of handsets'.* As it already made it clear in the *Microsoft I* and *Microsoft (Tying)* cases *'software pre-installation can make switching more difficult, in view of users' inertia which leads to the so-called status quo bias'.* Then, contrary to *Microsoft I* and *Microsoft (Tying)* in this case users had to actively download the apps Facebook Messenger and WhatsApp. Users were more likely to download competing consumer communication apps in case of preference for multi-homing or when they were unhappy with the parties' apps[35]. Finally, using a language similar to that of the GC, as said above, the Commission pointed out that the software was free, easy to download and took up little space on the user's smartphones, thereby favouring multi-homing[36].

In sum, *Microsoft I* and *Microsoft (Tying),* on one hand, and *Cisco Systems and Messagenet* and *Facebook/WhatsApp,* on the other hand, seems to rest on a conflicting perception of users of apps. The former, relying on the teaching of behavioural economics, perceive users as being prone to be caught by consumers' biases. Users are then unable to actively download software programmes other than those pre-installed on platforms. The latter, on the contrary, view users as ready to download programmes they like. It should be borne in mind that the facts in *Microsoft I* and *Microsoft (Tying)* differed from those in *Cisco Systems and Messagenet* and *Facebook/WhatsApp* in some relevant aspects. Indeed, in the former the tied software came already pre-installed in the platforms, whereas they were not so in the latter. It is, however, uncertain whether such difference suffice to explain the less strict position of the GC in *Cisco Systems and Messagenet* and of the Commission in *Facebook/WhatsApp.* It is also unclear whether in *Cisco Systems and Messagenet* and *Facebook/WhatsApp* the GC and the Commission reconsidered the relevance of behavioural

32 Petit and Rato, above note n. 5.

33 Jean Tyrole, 'The Analysis of Tying Cases: A Primer' (2005) 1 *Competition Policy International.*

34 Gregory Werden, Luke Froeb and Mikhael Shor "Behavioural Antitrust and Merger Control, www.ssrn.com; Michele Giannino, 'Behavioural Antitrust and the EU Merger Control Regime', www.ssrn.com.

35 Para. 111.

36 Para. 133.

antitrust theories, which the Commission seemed ready to accept in *Microsoft I* and *Microsoft (Tying)*.

5. The issue of interoperability between the products of the merged entity and those of competitors

a) The analysis of the interoperability in the Commission's decision in Microsoft/Skype

In *Microsoft/Skype* the issue of interoperability arose when assessing the possible conglomerate effects of the merger on the market for enterprise communication services. It was feared that the merger might create a preferential link between Microsoft programme for enterprise communication system, Lync, and Skype's user base by degrading the interoperability between Skype and rival OSs of Microsoft Windows or by degrading the interoperability of Windows with competing communication services. It also feared that the merged entity would integrate Skype and Microsoft products[37]. In these ways the merger would give the products of the merged entity a competitive advantage especially with respect to firms using call centers.

The Commission dismissed all the above competition concerns. It ruled out that the merged entity would have the ability to degrade the interoperability of Skype with competing operators, because the Skype services were not suitable for firms using call centres. Nor the merged entity would have the incentive to prevent firms using competing communication services from contacting users of Skype. Indeed, such business users would be able to freely download Skype applications. Moreover, Skype was not a "must have" product for firms using call centres as there existed several alternative communication services.

b) The interoperability issue in the Cisco Systems and Messagenet *judgment.*

The analysis of the Commission was contested by the appellants in *Cisco Systems and Messagenet.* They argued that the Commission understimated the risk that the merger would have foreclosing effects through creating a preferential interoperability between the services of the merging parties, with the ensuing degradation of the interoperability between Skype and the other suppliers of enterprise communication services.

To start with, the GC referred to the EU case law on conglomerate mergers, which, as is known, normally do not give rise to competition concerns[38]. The EU courts set quite a high evidentiary standard to which, under the EUMR, the Commission has to prove that a given conglomerate merger may significantly impede competition. The GC pointed out that the appraisal of a conglomerate merger implies a prospective future-looking analysis, under which the causality links between the merger and the feared anti-competitive effects are dimly discernible and difficult to establish. Then the GC proceeded with establishing whether the anti-competitive effects expected

37 Paras. 133-138.

38 Commission Guidelines on the assessment of non-horizontal mergers, *Official Journal* C 265 of 18.20.2008.

from the integration strategy of the merging parties could be assessed within the framework of conglomerate merger analysis. In that regard, the GC stated that in order for the alleged negative effects on competition to be relevant under the EUMR, they have to materialize in sufficiently near future.

In this case, however, the Commission estimated that at least three year would be necessary to complete the integration of the Lync and Skype services due to the technical and commercial problems that had to be resolved before launching the integrated product. Crucially, the GC found that this period of time was too long, taking into account that the relevant product market "*is a new technology sector which is characterised by relatively short innovation cycles*". Moreover, the likelihood that the strategy integration would lead to foreclosure effects depended on many future factors, the occurrence of which was uncertain. Furthermore, the possibility that competitors might counteract the merging parties's foreclosure strategy by adjusting their policies should be considered as a factor decreasing the likelihood of the occurrence of such anti-competitive effects. In other words, foreclosure of competitors might take place at the end of a period of time too long to be considered as a direct consequence of the merger.

In addition, the appellants failed to indicate which commercial advantages the integration strategy would give to the merged entity. It remains unclear why businesses should opt for the integrated products and might wish to communicate with their clients through Skype. As said above, post-merger the Skype application would be still downloadable for free. Thus, it would be possible for firms to keep communicating with their customers via Skype and no need to use the new product integrating Lync and Skype would be necessary.

All in all, *Cisco Systems and Messagenet* is an important judgment since the GC made it clear that in order to block a conglomerate merger in the high technology market, the Commission have to establish that the merger will have a negative impact on competition by a period of time not longer than three years. It can be argued that in future the judgment may make more difficult for the Commission to block this type of merger operations, due to the difficulties to prove that the feared competition harms have to occur within such a period of time[39].

c) Consistency of Cisco Systems and Messagenet *judgment with previous merger cases*

Arguably, *Cisco Systems and Messagenet* is not consistent with the previous Commission's decisions on the role of interoperability in merger control in *Cisco/Tandberg* and especially in *Intel/McAfee*[40].

Cisco/Tandberg was about a merger between two suppliers of video communication services. The Commission feared that the merger would degrade the horizontal interoprability between the products of the parties and the products of minor competitors[41], since Cisco controlled the essential

39 Kyriakos Fountoukakos, Nick Root, IT and Mergers. An Overview of EU and national case law, e-Competitions, N. 64455, www.concurrences.com

40 Petit and Rato, above note n. 5; Sokol, above note n. 5.

TIP protocol for communication between its screens and those of competitors. To give the go-ahead to the merger, the Commission required Cisco to give a set of behavioural remedies, which included the divestment of its intellectual property rights on the TIP protocol in favour of an independent third party.

In *Intel/McAfee* the merging parties intended to integrate the security products of McAfee into the CPUs manufactured by Intel. This strategy integration would degrade the vertical interoperability between the Intel CPUs and security products of competitors of McAfee as well as the interoperability between the CPUs of competitors of Intel and the security products of McAfee[42]. To put it in other words, the merger would favour a combination between complementary products, such as Intel CPUs and McAfee security products, foreclosing competing producers of CPUs and security products[43]. To address such competition concerns, the Commission authorized the transaction upon the condition of the parties complying with a of set of access remedies. More specifically, Intel entered into the obligation to provide competitors with interoperability information for its current and future products on royalty-free basis.

On the contrary, the integration strategies pursued by the parties in *Microsoft/Skype* may threaten the interoperability between the products of Skype and those of rival operators, leading to risks of anti-conglomerate effects foreclosing competitors similar to those considered by the Commission in *Intel/McAfee.* Notwithstanding that, the Commission took the view, upheld by the GC on appeal in *Cisco Systems and Messagenet,* that the integration strategies in *Microsoft/Skype* would not give rise to relevant competition concerns. It is not easy to reconcile *Microsoft/Skype* and *Cisco Systems and Messagenet* with *Intel/McAfee.* It can be argued that the Commission and GC considered the integration strategies pursued by Microsoft with the purchase of Skype unlikely to negatively affect the competition, since the tied product would be available for free download after the implementation of the merger. However, it must be said that offering products for free is a commercial policy quite common in the Internet economy. And in the longer period this policy may have economic effects detrimental to competition[44].

6. Conclusion

This paper has shown that in some respects the Commission takes a more cautious approach when appraising the competition impact of mergers in high technology markets. As for horizontal mergers, the Commission ruled that the high market shares collectively held by the parties cannot be relied on as indicator of the market power of the parties due to the changeability of markets. Also the relevance of network effects as possible barriers to entry may be mitigated by the possibility of

41 Petit and Rato, above note n. 5.

42 Ibid.

43 Hoehn and Lewis, above n. 13.

44 David Evans, 'The Antitrust Economics of Free', www.ssrn.com.

multi-homing and the availability for free of alternative programmes. Arguably, free downloadability of alternative apps can also assuage the risk of foreclosure due to degradation of interoperability.

Finally, in order to find a conglomerate mergers to significantly impede competition, the causality link between that merger and the restriction of competition must take place within a reasonable period of time. In *Cisco Systems and Messagenet* the GC made it clear that in order for such anti-competitive effects to be relevant under the EUMR, they should occur before three years since the consummation of the merger.