The Standard of Proof in Phase I Merger Decisions: The Lesson from the *Microsoft/Skype* Appeal

Andriani Kalintiri, Queen Mary University of London

Introduction

How 'certain' must the Commission be that a notified concentration will or will not impede effective competition on the market, if allowed to proceed, before it lawfully adopts a decision prohibiting or authorising it respectively? This question largely synopsises the heart of the heated discussions that the famous trilogy of merger annulments in *Schneider Electric*, *Airtours* and *Tetra Laval* incited. Amidst a general feeling that the evidence expectations of the European Courts had sharply increased, attempts were made to positively identify the standard of proof governing merger analysis.[1] The issue is not one to take lightly. In view of the prognostic nature of merger control, what standard of proof the Commission has to satisfy determines not only the practical perception of the 'significant impediment to effective competition' test as established in the EU Merger Regulation, but also the legitimacy of its decision-making. In this context, this paper discusses the significance of the latest judicial insight into the problem of the standard of proof governing Phase I merger decisions as provided by the General Court in *Cisco*'s appeal against the Commission's authorisation of the *Microsoft/Skype* concentration.[2]

The Meaning of the 'Serious Doubts' Test

As is well known, article 6(1)(b) of the EU Merger Regulation allows the Commission to authorise a notified concentration, whether subject to conditions or not, where it finds that this 'does not raise serious doubts as to its compatibility with the common market'.[3] Indeed, in acknowledgment of the generally pro-competitive nature of corporate reorganisations, the Commission clears most mergers with a Community dimension. However, the strict time-limits within which a Phase I decision has to be adopted create considerable evidence challenges for the Commission, which only has 25 days at the most (or 35 days where commitments have been offered by the merging entities) to gather evidence, evaluate it and decide on the compatibility of the notified transaction with the common market.[4] The time pressure, combined with the complexity of the assessments that the Commission has to undertake and the information asymmetries which it is confronted with, have reasonably led some commentators to suggest that

[1] See, for instance, Bo Vesterdorf, 'Standard of Proof in Merger Cases: Reflections in the light of the recent case law of the Community Courts' (2005) 1 European Competition Journal 3.
[2] Case T-79/12 *Cisco Systems Inc and Messagenet SpA v Commission* [2013] ECR I-000.
[3] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EUMR) OJ L 24, 29.1.2004, p 1–22.
[4] Article 10(1) of the EUMR.

the standard of proof that the Commission has to satisfy in Phase I proceedings is possibly lower than the level of persuasion expected in Phase II investigations.[5]

Nonetheless, the case-law of the European Courts seems to suggest otherwise. A bit more than a decade ago, in *BaByliss* the General Court (then Court of First Instance) partly annulled the Commission decision declaring the concentration between *SEB/Moulinex* as compatible with the common market subject to Phase I commitments.[6] As the Court noted, there is no difference in the evaluation of commitments depending on the stage of the proceedings. On the contrary, given that 'an in-depth market study is not carried out in Phase I', the Commission had to demonstrate that the commitments were 'sufficient to rule out clearly any serious doubts' as to whether effective competition on the market would be significantly impeded, were the transaction to be authorised.[7] Finding that the Commission failed to satisfy this test with respect to five markets, the Court partly annulled the Commission's decision.[8]

The same test was reiterated a few years later in *easyJet*. This time the Court concluded that the applicant had not sufficiently demonstrated why the Commission's decision to authorise – subject to conditions – the *Air France/KLM* merger was erroneous. However, in so doing, the Court considered whether 'the Commission was entitled, without committing a manifest error of assessment, to take the view that [the proposed] commitments constituted a direct and sufficient response capable of clearly dispelling all serious doubts'.[9]

The arguably strong language of the General Court seems to invalidate the assumption that the standard of proof is lower in Phase I proceedings. In contrast, the fact that the Commission must demonstrate that 'all serious doubts' have been eliminated, either because of the proposed commitments or in light of the available evidence, seems to correspond to a considerably high threshold of persuasion.[10] In this context, the question arises what is the standard of proof to which Phase I merger analysis is subject. Is it lower or higher than the degree of 'certainty' required in Phase II, or is it the same and if so, what is it exactly?

The General Court's Ruling in *Cisco*

Cisco's appeal against the Commission decision clearing the notified *Microsoft/Skype* concentration pursuant to Phase I proceedings provided the General Court with an excellent opportunity to

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[5] See, for instance, Yves Botteman, 'Mergers, Standard of Proof and Expert Economic Evidence' (2006) 2 Journal of Competition Law and Economics 71, 76-77; Ioannis Kokkoris and Ioannis Lianos, *The Reform of EC Competition Law: New Challenges* (Kluwer Law International 2010) 306.

[6] Commission Decision SG (2002) D/228078 of 8 January 2002.

[7] Case T-114/02 *BaByliss SA v Commission* [2003] ECR II-1279, para 169.

[8] The Court found that the Commission failed to 'clearly rule out any serious doubts' as to the possible significant anti-competitive effect that the concentration could have on competition in Italy, Spain, Finland, the UK and Ireland. See also Case T-119/02 *Royal Philips Electronics v Commission* [2003] II-1433, as regards the standard of proof applicable to a referral decision. According to para 343, the Commission 'cannot decide to make such a referral, if (…) it is clear, on the basis of a body of precise and coherent evidence, that such a referral cannot safeguard or restore effective competition on the relevant markets'.

[9] Case T-177/04 *easyJet v Commission* [2006] ECR II-1931, paras 128-129.

[10] See also Laura Parret, 'Sense and Nonsense of Rules on Proof in Cartel Cases' (Workshop on the Law and Economics of Competition Policy, Bonn 2008) 21: 'in the first phase one might consider the standard of reasonable doubt to apply: only serious doubts about the compatibility with the common market can lead to not clearing the merger within the short time limits of the first phase'.

clarify its position on the issue. Besides its two main pleas alleging manifest errors of assessments as regards the evaluation of the horizontal effects of the concentration on the consumer communications market and the effect of potential interoperability between Skype's user base and Lync's services on the enterprise communications market, *Cisco* additionally challenged the standard of proof incumbent on the Commission under the EU Merger Regulation and the standard of review exercised by the General Court.[11]

In particular, *Cisco* argued that the Commission does not enjoy any discretion when adopting a clearance decision under article 6(1)(b) of the EU Merger Regulation. Accordingly, the question that the Court has to consider is not whether the concentration in question significantly impedes effective competition in the common market, but rather 'whether the concentration objectively gives rise to serious doubts requiring further investigation'.[12] Because of this, what the Commission should have demonstrated is that 'beyond any reasonable doubt, the concentration at issue did not give rise to competition concerns, even on the narrowest possible market'.[13] Couched in these terms, *Cisco*'s argument seems to suggest that the standard of proof for Phase I clearance decisions is akin to the criminal standard of persuasion 'beyond any reasonable doubt'. However, the General Court was quick to dismiss this allegation on a number of grounds.

First and most importantly, the General Court acknowledged that the tests in article 6 and article 8 of the EU Merger Regulation are different on their face: article 6 asks for 'serious doubts' as to the compatibility of the concentration with the common market, whilst an article 8 decision requires ascertaining whether the concentration 'would significantly impede effective competition' or not. However, it observed that 'the assessment criteria on which the Commission must rely when taking either an article 6 or an article 8 EUMR decision are the same'. Therefore, 'whether the Commission authorises (…) a concentration at the end of the first stage or after a second stage of examination, the standard of proof is identical'.[14]

Secondly, reiterating the lesson from *Impala II* the General Court confirmed once again that the same standard of proof applies to both clearance and prohibition decisions.[15] Indeed, the Commission is required to decide whether the notified concentration is either compatible or incompatible with the common market on the basis of the economic development 'which is the most likely to ensue'.[16] Because of the prospective nature of the analysis though, the General Court stressed that 'an assessment of probabilities is therefore involved (…) and not (…) an obligation on the Commission to show beyond any reasonable doubt that a concentration does not give rise to any competition concerns'.[17]

Finally, the General Court explained that, even if the concept of 'serious doubts' is objective in the sense that the Commission does not enjoy any discretion as regards the initiation of Phase II proceedings once the existence of serious doubts has been demonstrated, this does not imply

[11] For a brief analysis of the case, see Laurent Godfroid and Jeff Liu, 'Cisco: General Court's ruling dismissing an appeal against Microsoft/Skype merger' (2014) 5 Journal of European Competition Law & Practice 144.
[12] *Cisco v Commission*, para 43.
[13] ibid.
[14] *Cisco v Commission*, para 46.
[15] See Case C-413/06 P *Bertelsmann and Sony Corporation of America v Impala* [2008] ECR I-4951, paras 50-53.
[16] *Cisco v Commission*, para 47.
[17] ibid.

that the Commission does not enjoy any discretion in deciding whether 'serious doubts' exist in the first place. On the contrary, to ascertain whether the notified concentration gives rise to serious doubts as to its compatibility with the common market, the Commission must carry out complex economic assessments, for which it has a certain margin of discretion according to settled case-law.[18] Therefore, the General Court held that 'an identical standard of judicial review' applies too, regardless of whether decisions are adopted under article 6 or article 8 of the EU Merger Regulation.[19]

The Importance of the General Court's Ruling

A number of significant conclusions can be drawn from the General Court's judgment in *Cisco*. First, the Court made it crystal clear that Phase I and Phase II decisions are both subject to the same threshold of evidence sufficiency. In this way, it reinforced the argument that the standard of proof governing merger analysis is uniform and does not vary depending on the progress of the proceedings or the issue to be proved. Moreover, by acknowledging that merger evaluation is in essence 'an assessment of probabilities', the Court dismissed a 'criminalised' understanding of the 'serious doubts' test and allowed some room for justified uncertainty, which is unavoidable given the *ex ante* nature of merger control.

Nonetheless, one is left wondering how far the requirement for elimination of 'all serious doubts' is from persuasion 'beyond any reasonable doubt'. Read in the light of previous case-law, the *Cisco* ruling seems to suggest: not too far. By favouring an identical standard of proof across merger proceedings, the Court extended the scope of *Impala II* to Phase I clearance decisions and confirmed the arguably heavy obligation on the Commission to always take a positive decision to the effect of either prohibiting or authorising the notified concentration.[20] By the same token, when reviewing the Commission's decision, the Court must 'consider whether any possible omissions on the part of the Commission are capable of calling into question its findings that the present concentration does not raise serious doubts as to its compatibility with the common market'.[21] Thus, also in Phase I clearance decisions the Commission must rely on evidence which is 'factually accurate, reliable and consistent', which 'contains all the information which must be taken into account in order to assess a complex situation' and 'is capable of substantiating the conclusions drawn from it'.[22]

As regards the eternal problem of which type of error is preferable in merger analysis, that is, false positives vs false negatives, the *Cisco* ruling exemplifies the Court's dislike of both errors.[23] In line with its review function, the Court's intention is rather to equally eliminate Type

[18] ibid, para 49.
[19] ibid, para 50.
[20] On the merits of having a symmetrical standard of proof see Kathryn Wright, 'Perfect symmetry? Impala v Commission and standard of proof in mergers' (2007) 32 European Law Review 408; also Pal Szilagyi, 'The ECJ has spoken: where do we stand with standard of proof in merger control?' (2008) 29 European Competition Law Review 726.
[21] See *Cisco v Commission*, para 50. Also Case T-282/06 *Sun Chemical Groups and Others v Commission* [2007] ECR II-2149, para 60 and Case C-12/03 P *Commission v Tetra Laval BV* (Tetra Laval II) [2005] ECR I-987, para 39.
[22] ibid.
[23] See also the discussion in David Bailey, 'Standard of Proof in EC Merger Proceedings: A Common Law Perspective' (2003) 40 Common Market Law Review 845, 870-873.

I and Type II errors. By setting the bar as high for Phase I clearance decisions as for Phase II proceedings, the Court proved that it is just as concerned with safeguarding the merging entities' rights as with the protection of consumers and competition.[24] In this regard, the lesson from the *Cisco* ruling is that the Commission must always be on the safe side.[25] This precautionary approach is all the more necessary in Phase I clearance decisions, since the Commission cannot compensate any errors in its evaluation at a later stage, as is the case with an erroneous finding of 'serious doubts'. Admittedly, in *Cisco* the Court upheld the approval of the *Microsoft/Skype* merger. However, the rule remains that if there are any serious doubts about the compatibility of the concentration with the common market, the correct approach is to initiate Phase II proceedings – even if this necessitates spending some more time and resources – in order to ensure that no significant impediment to effective competition will occur as a result of the concentration.

Conclusion

The *Cisco* ruling on the standard of proof governing Phase I clearance decisions falls in line with earlier jurisprudence on the issue. The General Court explicitly stated that the 'serious doubts' test cannot be given a 'criminalised' interpretation in light of the prospective nature of merger analysis. Nonetheless, nor can the Commission simply clear the notified transaction, if it entertains any serious doubts as to its compatibility with the common market. On the contrary, the standard of proof governing Phase I proceedings is identical to the degree of persuasion expected under Phase II investigations. By ruling so, the General Court confirmed once again the absence of any presumption of lawfulness or unlawfulness for concentrations with a Community dimension and verified its intention to subject merger analysis to high procedural standards with a view to safeguarding effective competition in the common market.

[24] See also Case T-87/05 *Energias de Portugal SA v Commission* [2005] ECR II-3745, para 74, where the Court observed that 'the Commission could not conclude that where there is doubt it must prohibit the concentration'. On the contrary, the Commission must 'demonstrate that that concentration (…) must be declared incompatible with the common market because it still leads to the creation or the strengthening of a dominant position that SIEC'.

[25] See also Ben Van Rompuy, 'Implications for the Standard of Proof in EC Merger Proceedings: Bertelsmann and Sony Corporation of America v. Impala (C-413/06 P) ECJ' (2008) 29 European Competition Law Review 608, 610.