

Memorandum

EU Court Reverses European Commission's Approval of Liberty's Completed Acquisition of Ziggo

October 27, 2017

On October 26, 2017, the lower court of appeals of the European Commission (the Commission), the General Court, reversed the Commission's approval of Liberty Global plc's (Liberty) already-completed acquisition of Ziggo N.V. (Ziggo). The Commission's 2014 clearance decision had been appealed by a rival cable provider which successfully persuaded the General Court to reverse on the grounds that the Commission failed to complete a proper investigation and did not properly analyze whether pay-TV sports channels could constitute a separate market from other pay-TV channels, such as film channels, and raise vertical concerns.

The Commission's merger decisions are typically granted wide deference if challenged, particularly where the challenging party is a market competitor with a direct interest in derailing a transaction, and it is very rare for a challenge to succeed. The last successful appeal of Commission merger clearance occurred in 2006, when the European Court of First Instance (CFI) annulled the creation of a joint venture involving Sony and Bertelsmann, but the CFI's decision was ultimately set aside by the European Court of Justice 18 months later.

At least for the near term, companies should expect the Commission to be particularly cautious and diligent in its investigations, and to be even more deferential to the concerns raised by any third parties during its market testing. As a result, merger reviews in the European Union are likely to take even more time and require more information from notifying parties than they previously have.

Summary of the Original European Commission Investigation

On January 27, 2014, the multinational media company Liberty announced an agreement to acquire Ziggo, the largest provider of cable television in the Netherlands, for EUR 10 billion. The merger would bring together the first and second largest cable TV networks in the Netherlands, and was expected to encounter a difficult antitrust approval process. In the context of increasing consolidation of telecommunications and

cable companies in Europe, including Liberty's acquisition of British cable group Virgin Media in 2013, the parties notified the Commission of the merger on March 14, 2014. During the course of its Phase I investigation, the Commission identified potential competitive concerns that would result from the transaction, and initiated a Phase II investigation on May 8, 2014¹.

In line with Commission precedent in the telecommunication services and TV markets, the Commission identified a number of relevant product markets, including the wholesale market for supply and acquisition of pay-TV channels. TV channel suppliers acquire or produce content and package it into TV channels on either a free-to-air (FTA) basis, or a pay-TV basis. These channels are purchased by providers of retail TV services to consumers. In the Netherlands, Liberty supplied the pay-TV channels Film1 and Sport1, while Ziggo, through its 50% joint venture with HBO Nederland, supplied HBO channels. Thus, the combined entity would supply three of four premium pay-TV channels in the Netherlands, with only Fox Sports remaining outside of Liberty's control.

Citing previous decisions², the Commission defined a wholesale market for the supply and acquisition of TV channels, segmented by (a) FTA channels and (b) pay-TV channels, with pay-TV channels further segmented into basic and premium channels based on the difference in content, pricing, and audience size. The Commission considered an even narrower segmentation of premium channels into, *e.g.*, premium pay-TV film channels and premium pay-TV sports channels. However the Commission left open the question of further segmentation of premium pay-TV channels by content area, as the Commission's assessment that the proposed transaction would raise competitive issues in the wholesale supply of premium pay-TV channels would remain the same. Ultimately, the Commission did identify concerns with respect to the wholesale supply of premium pay-TV channels.

Following a lengthy Phase II investigation and relying extensively on its market testing, the Commission cleared the transaction in a 151-page decision, subject to certain conditions necessary to remedy competitive harms that would result from the merger³. Specifically, the Commission required Liberty to (1) divest its premium Film1 channel and agree to carry Film1 on Liberty's pay-TV network, (2) terminate restrictive over-the-top (OTT) clauses in agreements with TV broadcasters, and (3) commit to maintain an IP network adequate to ensure the effectiveness of its OTT commitment.

The Complainant's Challenge

Unhappy with the Commission's decision to approve the merger subject to the divestiture of Film1, KPN, a

¹ Mergers: Commission opens in-depth investigation into proposed acquisition of Dutch cable operator Ziggo by Liberty Global, http://europa.eu/rapid/press-release_IP-14-540_en.htm.

² *News Corp/BskyB*, Case No. COMP/M.5932 (2010), para. 76-85; *HBO/Ziggo/HBO Nederland*, Case No. COMP/M.6369 (2011), para. 22.

³ *Liberty Global/Ziggo*, Case No. COMP/M.7000 (2014).

rival Dutch cable operator, filed a challenge against the Commission's decision, alleging the Commission failed to carry out an appropriate investigation into the impact of the deal on a putative market for pay-TV sports channels, which KPN contended made up a separate market from pay-TV film channels.⁴ KPN had complained to the Commission on a number of occasions during the original investigation that the Liberty/Ziggo transaction gave rise to vertical concerns relating specifically to Sport1.

It is exceedingly rare that the Commission's merger decisions are successfully challenged in court after their issuance. Although the Commission's statement of reasons for approval or denial of a transaction must enable the persons concerned to understand the reasons for the decision, it is not necessary for the Commission to go into every relevant point of law or fact in its decision, and the Commission's decisions are typically granted wide deference if challenged, particularly where the challenging party is a market competitor with a direct interest in derailing a transaction.

Nonetheless, on October 26, 2017 the General Court overturned the Commission's decision to clear the Liberty/Ziggo transaction.⁵ The General Court found that the Commission failed to adequately consider and explain why the transaction did not give rise to vertical effects with respect to the market for premium pay-TV sports channels. Although the Commission maintains that it did indeed consider the Sport1 channel in analyzing vertical effects, the General Court did not credit the Commission's arguments, noting that its claim was belied by the failure to discuss Sport1 in the vertical foreclosure context in the decision. Ultimately, the General Court found that the Commission failed to sufficiently explain the contested decision, and for that reason annulled the clearance of Liberty's already-completed acquisition of Ziggo.

Implications for Merging Parties Seeking European Commission Clearance

It is very rare for a complainant to successfully persuade a court to annul a completed merger. The ability of aggrieved parties to successfully challenge a clearance decision in court based on perceived holes in the Commission's reasoning or explanation will lead the Commission to be especially cautious and diligent going forward. Further, because KPN complained about the vertical issues during the investigation—which concerns the Commission ultimately did not credit but which eventually led to the annulment of the merger by the General Court—we expect the Commission to be highly deferential to the concerns raised by third parties during its market testing in the future and to request more detailed information from notifying parties so that such issues can be explicitly addressed in the Commission's decision. This will likely lead not only to a greater burden on the merging parties, as the Commission seeks to investigate additional alleged theories of harm, even if remote, but also may lead the Commission to encourage parties to satisfy complainants voluntarily, such as through supply or pricing guarantees.

⁴ Case T-394/15, KPN BV V. European Commission.

⁵ Case T-394/15, KPN BV V. European Commission.

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