

CLIENT ALERT

The General Court of the European Union Annuls the European Commission's 2014 Conditional Clearance of the *Liberty Global / Ziggo* Transaction

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By a judgment handed down on October 26, 2017, the General Court (GC) annulled at the request of a third party, KPN, the conditional clearance decision the European Commission (EC) had adopted in 2014 regarding the *Liberty Global / Ziggo* deal.

The GC held that the EC should have stated and failed to state why the transaction did not entail any problematic vertical effects on the market for premium pay TV sports channels. The EC will now have to reassess the transaction in light of the GC's ruling (unless the EC decides to appeal the GC's ruling to the Court of Justice of the European Union).

In March 2014, Liberty Global notified the EC of its contemplated acquisition of control of Ziggo. Both companies operate cable networks in the Netherlands and offer cable TV, fixed telephony and broadband as well as mobile communications services. Opening an in-depth investigation in May 2014, the EC identified, *inter alia*, the following possible issues. On the market for whole supply of premium TV channels, the EC noted that the transaction could give rise to horizontal concerns (the resulting entity would own three out of the four premium pay TV channels), as well as vertical concerns (the resulting entity could refuse to offer its premium pay TV channels to its competitors on the market for the retail supply of television services). Liberty Global offered to divest Film1, thereby removing the horizontal overlap while also addressing the identified vertical concern. On that basis, the EC cleared the transaction in October 2014.

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In July 2015, KPN challenged the decision, alleging a breach of the duty to state reasons, in that the EC failed to give reasons for not analyzing the possible vertical anticompetitive effects on the market for premium pay TV sports channels. KPN emphasized that the EC considered the segment of premium pay TV sports channels as unproblematic (“unaffected”) because of the lack of any horizontal overlap between the parties (since Ziggo was not active in this area) but failed to address potential vertical issues (since the transaction reinforced the parties’ position in the downstream market of retail supply of television services).

The EC argued it had analyzed, both explicitly and implicitly, these possible vertical anticompetitive effects in its decision. It added that, in any event, given the low probability of vertical anticompetitive effects on the possible market for premium pay TV sports channels, this matter was of secondary importance, so that requiring it to provide detailed reasoning would be incompatible with the need for speed and the short timescales which it is bound to observe in merger cases.

The GC agreed with the applicant, KPN, and held that the EC’s decision did not contain, either implicitly or explicitly, sufficient reasoning as to the absence of vertical effects regarding premium pay TV sports channels. It emphasized that the only element included in the decision in this respect was that one competing sports channel would remain on the market post-transaction and that was in and of itself insufficient to rule out vertical issues. The GC also added that since the EC had left open the existence of a market for premium pay TV sports channels, it could not avoid its obligation to explain, at least briefly, why there would be no vertical competition concerns.

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It is uncertain whether the ruling will have any practical impact on the specific transaction in this case. The EC will now review the merger again and may simply decide to readopt a decision similar to its original October 2014 decision but containing a more detailed assessment regarding the lack of anticompetitive vertical effects.

It is however rare for the GC to annul a merger control decision, even more so a clearance decision. That said, the decision follows the GC’s decision earlier this year to annul the EC’s 2013 prohibition of the *UPS/TNT Express* merger. This renewed increased level of scrutiny of EC merger decisions from the European Union courts serves as a timely reminder to the EC (i) to assess all aspects of a merger thoroughly, (ii) to allow the parties to comment on each aspect of its analysis, and (iii) to provide clear reasons for its conclusions, also in relation to issues which the EC itself may consider not to be particularly problematic.

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