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EU Court annuls a 2014 European Commission merger clearance for insufficient reasoning

October 2017

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The EU General Court ("GC" or "Court") annulled a 2014 decision of the European Commission ("Commission") clearing the Liberty Global/Ziggo transaction for lack of appropriate reasoning. The GC found that the Commission decision failed to deal with one of the concerns raised by a third party during the administrative procedure.

The judgment is noteworthy because:

- It is a rare example of an annulment of a clearance decision.
- It creates a situation of uncertainty, because it forces the parties to re-notify, and the Commission to re-examine, a transaction that was consummated 3 years ago.
- It emphasises the need for procedural safeguards for third parties; in this case, that the Commission decision be well-reasoned.
- It may raise the bar for the Commission when drafting its decision, which ultimately could increase the burden on notifying parties.

The judgment

On 26 October 2017, the GC handed down a judgment annulling the Commission's decision of 10 October 2014 clearing Liberty Global's acquisition of Ziggo (*Case T-394/15, KPN BV / European Commission*).

During the Commission's review of the transaction, a major competitor, KPN, raised concerns about possible negative vertical effects, namely that the transaction could allow Liberty, as a wholesale supplier of one of the two pay-TV sports channels, to foreclose access to that input for downstream competing distributors, such as KPN (§54).

In line with established practice, the Commission had analysed the effects of the transaction on the market for the wholesale supply of premium pay-TV channels, and raised the possibility that such market could be further divided in two narrower markets, namely the wholesale supply of premium pay-TV film and sports channels, respectively.

In the decision, the Commission explained why the transaction would not lead to negative vertical effects on the market for the wholesale supply of *premium pay-TV* channels, and on the possible narrower market for premium pay-TV *film* channels.

However, the Commission decision did not explain why such negative effects could be excluded on the possible narrower market for premium pay-TV *sports* channels.

The Court recalls that the Commission is allowed to leave a market definition open, provided it *"clearly and unequivocally"* demonstrates in its decision that the transaction would not generate anticompetitive effects on any of the possible market definitions (§60).

In its defence, the Commission submitted that the decision acknowledges that Liberty did not have upstream market power since it only owned one of the two premium pay-TV sports channels. But the Court excludes this justification, considering that the mere existence of a competitor, in the absence of a more detailed analysis, could not in itself rule out the possibility of market power and negative effects (§64).

The Court also rejected the Commission's claims that the need for speed, coupled with the low likelihood of negative effects, justified the lack of explanation: having left the market definition open, the Commission could not escape its obligation to explain, "*at least briefly*", why there could be no vertical concerns on the possible market for premium pay-TV sports channels (§71).

Finally, the Court also rejected (i) the Commission's *ex post* explanations (i.e. during the Court proceedings), since the reasoning must be set out in the decision itself, and (ii) the Commission's argument that the decision implicitly addressed KPN's concerns (§72).

Take-aways

First, it is rare that Commission decisions approving a merger are challenged successfully. It has happened only four times in the history of the Merger Regulation,[1] while seven Commission decisions prohibiting mergers have been annulled.

Second, unlike in the *UPS/TNT* case, in which a prohibition decision was annulled, this time the Court has annulled a *clearance* decision, following which the parties had consummated the transaction. While the Merger Regulation does not require the merger being undone, the parties will have to submit a new notification to remedy this situation, and the Commission will have to re-adopt a decision dealing with the issue of possible vertical foreclosure effects, in light of *current* market conditions. This means the Commission may have to take new measures of inquiries and that the re-adoption process could be lengthy[2] or, in the worst case scenario, lead to adverse findings for the parties (although nothing in the Commission decision renders this prospect likely in the present case).

Third, the judgment confirms the importance of procedural safeguards in the context of merger control. In the recent *UPS/TNT* case, the Court had annulled the Commission decision because the parties had not been in a position to challenge the economic evidence on which the Commission relied to prohibit their attempted merger (see here).

In the present case, the Commission failed to lay out a complete and coherent reasoning justifying its clearance of the transaction: the Court found that without a clear reasoning, the rights of third parties challenging the merger clearance may not be safeguarded, as it is impossible for them to understand the reasons underlying the clearance, and for the Court to exercise its judicial review.

Annulments for lack of reasoning are rare in the context of merger control, another rare example being the annulment of the Sony/BMG clearance decision.[3] By contrast, the EU Courts have regularly reminded the

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1 Cases C-68/94 [1998], *France and Société commerciale des potasses and de l'azote and Entreprise minière and chimique v Commission* ; T-156/98 [2001], *RJB Mining v Commission*; T-119/02 [2003], *Royal Philips Electronics v Commission ;* T-464/04 [2006], *Impala v Commission* (the General Court's judgment was however annulled by the Court of Justice on appeal).

2 In *Kali & Salz*, the Court annulled the decision on 31 March 1998, the parties re-notified on 8 June 1998 and the Commission authorised again the transaction on 9 July 1998. In *RJB Mining*, the Court annulled the decision on 31 January 2001, the parties re-notified on 8 November 2001, and the Commission authorised again the transaction on 7 May 2002. In *Royal Philips*, the Court annulled the decision on 3 April 2003, the parties re-notified on 14 April 2003, and the Commission authorised again the transaction on 11 November 2003. Finally, in *Impala,* the Court annulled the Commission decision on 13 July 2006, the parties re-notified on 31 January 2007, and the Commission authorised again the transaction on 3 October 2007.

3 Case T-464/04, *Impala v Commission* (annulled by the Court of Justice on appeal).

Commission of the necessity to provide ample reasoning for its decisions in the context of antitrust enforcement, for example in the recent *Air Cargo*, *Printeos*, and *Cement* cases.[4]

Fourth, by raising the bar for the Commission when drafting the decision, the judgment may have the unwelcome rippling effect of further burdening – and thus slowing down – the administrative procedure, e.g. by leading to additional information requests to notifying parties. However, that risk should perhaps not be overstated, as it is clear from the Court's reasoning that it was the *complete* lack of explanation in this case which was problematic, and that the Commission could have discharged its obligation by offering even a *"brief"* explanation (§71).

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[4] Respectively Cases T-56/11 [2015], *SAS Cargo Group and Others v Commission*; T-95/15 [2016], *Printeos and Others v Commission*; C-247/14 P [2016], *HeidelbergCement v Commission*,