SLAUGHTER AND MAY

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KPN wins bid to overturn European Commission's Liberty/Ziggo approval decision

On 26 October 2017 the General Court delivered its **judgment** in *KPN BV v European Commission*[1], finding in favour of KPN in its challenge to the European Commission's October 2014 decision to conditionally approve the acquisition of Ziggo NV by Liberty Global plc. The General Court held that the Commission's decision to clear the merger must be annulled on the basis that it is vitiated on procedural grounds. The General Court upheld KPN's second plea, namely that the Commission had breached its duty to state reasons concerning the lack of analysis of possible vertical anti-competitive effects on the market for premium pay TV sports channels. The General Court made no findings in relation to KPN's other two pleas relating to alleged manifest errors of assessment.

Background

On 10 October 2014 the Commission **approved** Liberty Global's acquisition of Ziggo under Article 8(2) of the EU Merger Regulation following the completion of its Phase II investigation. Liberty Global is an international cable operator which owns and operates cable networks offering TV, broadband internet, fixed telephony and mobile telecommunications services. Liberty Global is active in the Netherlands through UPC Nederland BV, which distributes the pay TV channels Sport1 and Film1 in the Netherlands. Similarly, Ziggo owns and operates a broadband cable network that covers more than half of the territory of the Netherlands, offering pay TV channels and other mobile, telecommunications and entertainment services.

Phase II investigation and resulting commitments

For further information on any competition related matter, please contact the **Competition Group** or your usual Slaughter and May contact.

During its original investigation, the Commission reviewed the impact that the merger would have in a number of key markets relating to the pay TV sector, given the nature of the two merging parties' respective businesses. It concluded that the proposed transaction would present a horizontal competition issue in relation to premium pay TV film channels. Absent any remedies to address the issue, Liberty Global would have owned, post-merger, the only two premium pay

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[1] Case T-394/15 KPN BV v European Commission, judgment of 26 October 2017.

TV film channels (Film1 and HBO Nederland) and 75 per cent of premium pay TV channels (Film1, HBO Nederland and Sport1). The Commission further identified that, in relation to vertical competitive effects concerning premium pay TV film channels, Liberty Global would have been able to refuse access to its Film1 channels to its retail competitors. In response to these concerns, the Commission's merger clearance was conditional on a commitment by Liberty Global to divest Film1 in order to remedy the entities' overlap in the premium pay TV film channels market in the Netherlands.

The investigation also focused on the impact of the transaction on the downstream market for the retail supply of pay TV services. The combination of Liberty Global and Ziggo would entail merging the two largest cable operators in the Netherlands which, as such, was expected to represent at least 60 per cent of pay TV subscribers. This posed a competition issue for the Commission as Liberty Global, in its capacity as a purchaser of the TV channels included in these pay TV subscriptions, would have increased buying power which could threaten innovation. The Commission was concerned that Liberty Global would be able to limit the innovative services provided by TV broadcasters, such as "over-the-top" services delivered online. As a result, the Commission accepted commitments requiring Liberty Global to terminate any contracts with TV broadcasters that limited the broadcaster's freedom to deliver its content via "over-the-top" services in the Netherlands and to refrain from contracting on that basis going forward.

KPN's challenge and the General Court's decision

KPN operates in the Netherlands in the TV cable networks sector, the broadband internet market and in fixed telephony and mobile telecommunications services. KPN sought to challenge the Commission's approval of Liberty Global's acquisition of Ziggo on the following grounds:

(i) The Commission made a manifest error in the assessment of the vertical effects of the concentration on the market for premium pay TV sports channels.

(ii) The Commission breached its duty to state its reasons for not assessing the possible vertical anti-competitive effects on the market for premium pay TV sports channels.

(iii) The Commission made a manifest error in its assessment in relation to the role and influence of Liberty Global's largest minority shareholder over other entities active in the same market.

The General Court found that the Commission failed to state its reasons in relation to potential vertical effects in the premium pay TV sports channels market and therefore did not review KPN's two challenges relating to alleged manifest errors of assessment.

In its clearance decision, the Commission had found that there was no horizontal overlap in the premium pay TV sports channels market as Ziggo was not active in this market, Liberty Global already owned Sport1, and Fox Sport – the other premium pay TV sports channel – was not part of the proposed transaction. KPN contended, however, that the Commission did not explain why a mere lack of horizontal overlap implies that the merger would not produce vertical effects. KPN argued that the concentration was likely to give rise to vertical effects given that Liberty Global would cover 90 per cent of the territory of the Netherlands and that Sport1 is an essential input for downstream competitors. According to KPN, the Commission did not state its reasons for not analysing the risk of foreclosure by Liberty Global, as a

wholesale supplier of a premium pay TV sports channel (namely Sport1), of access to that input by downstream competing distributors (for example, KPN).

Conclusions

The General Court upheld KPN's arguments in relation to the second plea, finding that the decision fails to analyse the impact of the deal on the possible market for the wholesale supply and acquisition of premium pay TV sports channels. While the decision did refer to Sport1 and Fox Sports, it did not analyse the vertical effects which would arise out of the proposed concentration if the relevant product market were defined as that of the wholesale supply and acquisition of premium pay TV sports channels. The General Court therefore found that all references to Sport1 and Fox Sports were made within another analytical framework.

Although the Commission had left open the precise market definition, the General Court held that the Commission was nonetheless required to explain, at least briefly, why the proposed deal did not present any issues, including with respect to vertical effects on this narrower market. As a result of this annulment, the transaction needs to be re-assessed in the light of current market conditions.[2] While the General Court's decision is unusual in overturning the clearance decision on the basis of purely procedural grounds, it does not seem that the judgment in this case introduces a more onerous standard by which the Commission must abide. The General Court states that "*[i]t is not necessary for the reasoning to go into all the relevant facts and points of law*" nor must the Commission "*define its position on matters which are plainly of secondary importance*", but it must nonetheless "*set out the facts and the legal considerations having decisive importance in the context of the decision*".[3] Nonetheless it is possible that, going forward, the Commission may take a more cautious approach towards setting out its reasoning.

Other developments

Merger control

MOFCOM grants conditional clearance for Agrium/PotashCorp merger

On 6 November 2017 The Ministry of Commerce of the People's Republic of China (MOFCOM) conditionally **cleared** the proposed merger between Agrium Inc. and Potash Corporation of Saskatchewan Inc. after a review period of nearly 10 months. MOFCOM concluded that the proposed deal may have the impact of eliminating or restricting competition in the global and Chinese potash markets as the combined entity may directly or indirectly control around 50 per cent of global potassium chloride production after the merger. MOFCOM required a number of divestments and commitments to remedy those concerns. These require the combined entity to: (i) divest PotashCorp's share in Israel Chemicals Limited (ICL), Arab

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[2] Art. 10(5) of Council Reg. (EC) 139/2004 (OJ 2004 L24/1, 29.1.2004).
[3] Case T-394/15 *KPN BV v European Commission*, judgment of 26 October 2017, paras. 49 to 51.

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Potash Company (APC) and Sociedad Quimica y Minera de Chile SA (SQM); (ii) not acquire any other competitors in the potash market without the prior approval of MOFCOM; and (iii) convert PotashCorp's interest in a certain unnamed Chinese company into a restricted investment interest.

Similarly, on 18 October 2017 the proposed merger was **approved** by the Competition Commission of India on the condition that the parties commit to divest PotashCorp's interests in ICL, APC and SQM within 18 months of the issuance of the clearance order. The proposed merger remains subject to final approval from the US Federal Trade Commission.

MOFCOM gives Maersk/Hamburg Süd the green light subject to commitments

On 7 November 2017 MOFCOM conditionally **cleared** the proposed acquisition by Maersk Line A/S of Hamburg Süd after a review period of around six months. MOFCOM concluded that the transaction would weaken competition in both general and refrigerated container shipping transportation on the Far East – South America West Coast (SAWC) and Far East – South America East Coast (SAEC) routes. On the Far East – SAWC route, Maersk and the members of the vessel sharing agreements (VSAs) ASPA 1, 2, 3 would have a combined 70-75 per cent volume share of both general and refrigerated container transportation. On the Far East – SAEC route, Maersk and the members of the VSA Asia 2 would have a combined 55-60 per cent and 60-65 per cent volume share of general and refrigerated container transportation respectively.

The clearance is subject to the following commitments to remedy MOFCOM's concerns: (i) Hamburg Süd must withdraw from the VSAs ASPA 1, 2, 3 on the Far East - SAWC route upon the expiration of the relevant VSAs; (ii) Hamburg Süd must withdraw from the VSA Asia 2 on the Far East – SAEC route; (iii) Maersk and Hamburg Süd must not join any VSAs or shipping alliances with other major rivals on routes between the Far East and SAWC or SAEC for five years from closing the deal; and (iv) Maersk must reduce its refrigerated container shipping transportation capacity on the Far East – SAEC route to 34-39 per cent, and maintain that share for three years.

The proposed acquisition was conditionally **cleared** in the EU earlier this year in April, as a result of which Maersk had to give similar commitments in relation to its membership of the VSAs and shipping alliances. The deal remains subject to clearance from the Korean Fair Trade Commission.

Antitrust

CMA to act as single port of call for leniency applications in regulated sectors

Following a **consultation** (which we reported on in our **July edition**), the Competition and Markets Authority (CMA) has **announced** that it will act as the single port of call for initial leniency enquiries and applications in the regulated sectors in the UK. It has also published an **information note** providing guidance on the arrangements for handling these enquiries and applications.[4]

[4] The arrangements described in the information note apply only in respect of leniency applications in the UK. To obtain protection elsewhere, applicants would need to apply to the relevant non-UK authorities, such as the European Commission and other National Competition Authorities, under their applicable leniency regimes.

Certain sectoral regulators[5] have concurrent powers to enforce competition law in their respective markets alongside the CMA, including the power to impose financial penalties for competition law infringements. CMA Guidance provides for immunity from, or a reduction in, penalties for cartel participants that come forward with information on illegal activity and satisfy certain conditions.[6] The informal arrangements that were previously in place gave applicants for such leniency the option of either applying to the CMA or to their sectoral regulator under a 'single queue system'.

Under the new arrangements, "*all businesses should in the first instance approach the CMA by calling the CMA's leniency number in order to secure their place in the leniency queue*". In the event that a leniency enquiry/application is made to a sectoral regulator, the regulator will immediately direct the enquirer/applicant to the CMA. The ultimate decision to grant leniency will be made by the authority to which the case has been allocated (in accordance with the Concurrency Regulations). The new approach is designed to streamline the process and provide certainty and consistency for businesses.

General competition

CMA publishes its response to the UK's national security and infrastructure investment review

On 8 November 2017 the CMA **published** its response to the UK Government's **National Security and Infrastructure Investment Review Green Paper**, which proposed short-term and long-term changes to the Government's powers to review transactions on grounds of national security.[7] The key themes of the CMA's response are:

(i) The UK should maintain a competition-focused merger control regime and only allow intervention on national security (or other) grounds in limited, clearly defined circumstances. The CMA notes that a regime that "*generally assesses mergers only on competition grounds*" would ultimately "*foster inward investment and enable the UK to advocate for similar predictable rules to be applied to UK businesses investing and doing business abroad*".

(ii) The short-term proposals will not materially change the substance and frequency of the CMA's merger reviews. The identified sectors (military, dual use and parts of the advanced technology sectors) should not be treated differently in terms of competitive assessment, so businesses are not required to change their approach when self-assessing whether a notification would be advisable on competition grounds. The CMA considers it "very unlikely" post-reforms that it will call in mergers that are not currently within its jurisdiction.

[5] The Office of Communications (Ofcom), the Gas and Electricity Markets Authority (Ofgem), the Utility Regulator (Northern Ireland), Water Services Regulation Authority (Ofwat), the Office of Rail and Road (ORR), the Civil Aviation Authority (CAA), the Financial Conduct Authority (FCA) and the Payment Systems Regulator (PSR).

[6] Guidance as to the appropriate amount of a penalty (OFT423).

[7] For details of the Green Paper, please refer to our recent **client briefing** on the topic.

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(iii) In order to avoid unnecessarily burdening the CMA with notifications or queries, the Government should clearly delineate the activities that are likely to give rise to national security concerns within the identified sectors and publish guidance to assure businesses that the reforms are not intended to result in competitive scrutiny of mergers that currently fall outside the CMA's jurisdiction. The Government should also provide a clear point of contact to engage directly with investors on questions of national security and jurisdiction.

(iv) The CMA commits to work closely with the Government to ensure that longer-term changes to the national security regulatory regime should result in separate thresholds, processes and substantive assessment rules that are tailored to the national security objective; the existing merger control regime should not be adversely impacted by the reforms.

Brussels
T +32 (0)2 737 94 00

London
T +44 (0)20 7600 1200

Hong Kong
T +852 2521 0551

Beijing
T +86 10 5965 0600

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