



ОБЩ СЪД НА ЕВРОПЕЙСКИЯ СЪЮЗ
TRIBUNAL GENERAL DE LA UNIÓN EUROPEA
TRIBUNÁL EVROPSKÉ UNIE
DEN EUROPÆISKE UNIONERS RET
GERICHT DER EUROPÄISCHEN UNION
EUROOPA LIIDU ÜLDKOHUS
ΓΕΝΙΚΟ ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ
GENERAL COURT OF THE EUROPEAN UNION
TRIBUNAL DE L'UNION EUROPÉENNE
CÚIRT GHINEARÁLTA AN AONTAIS EORPAIGH
OPĆI SUD EUROPSKE UNIJE
TRIBUNALE DELL'UNIONE EUROPEA

EIROPAS SAVIENĪBAS VISPĀRĒJĀ TIESA
EUROPOS SĄJUNGOS BENDRASIS TEISMAS
AZ EURÓPAI UNIÓ TÖRVÉNYSZÉKE
IL-QORTI ĠENERALI TAL-UNJONI EWROPEA
GERECHT VAN DE EUROPESE UNIE
SĄD UNII EUROPEJSKIEJ
TRIBUNAL GERAL DA UNIÃO EUROPEIA
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VŠEOBECNÝ SÚD EURÓPSKEJ ÚNIE
SPLOŠNO SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN YLEINEN TUOMIOISTUIN
EUROPEISKA UNIONENS TRIBUNAL

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

26 October 2017 *

(Competition — Concentrations — Netherlands market for television services and telecommunications services — Decision declaring the concentration compatible with the internal market and the EEA Agreement — Commitments — Duty to state reasons — Relevant market — Vertical effects — Judicial review)

In Case T-394/15,

KPN BV, established in The Hague (Netherlands), represented by J. de Pree, C. van der Hoeven and G. Hakopian, lawyers,

applicant,

v

European Commission, represented by L. Malferrari, J. Szczodrowski, H. van Vliet and F. van Schaik, acting as Agents,

defendant,

APPLICATION pursuant to Article 263 TFEU for annulment of Commission Decision C(2014) 7241 final of 10 October 2014 declaring the concentration involving the acquisition by Liberty Global plc of sole control over Ziggo NV to be compatible with the internal market and the EEA Agreement (Case COMP/M.7000 — Liberty Global/Ziggo) (OJ 2015, C 145, p. 7),

THE GENERAL COURT (Eighth Chamber),

composed of A.M. Collins (Rapporteur), President, M. Kancheva and R. Barents, Judges,

Registrar: C. Heeren, Administrator,

* Language of the case: English.

having regard to the written part of the procedure and further to the hearing on 16 May 2017,

gives the following

Judgment

Background to the dispute

The entities in question

- 1 The applicant, KPN BV, is active in the sector of cable networks for television, broadband Internet, fixed telephony and mobile telecommunications services, in particular in the Netherlands.
- 2 Liberty Global plc is an international cable operator which owns and operates cable networks offering television, broadband Internet, fixed telephony and mobile telecommunications services in eleven Member States of the European Union and Switzerland. That undertaking is active in the Netherlands primarily through UPC Nederland BV ('UPC'), which owns and operates a cable network in that country, and it distributes the pay TV channels Sport1 and Film1 in the Netherlands. In addition, Liberty Global is expanding its mobile telecommunications business by launching Mobile Virtual Network Operator offers across the European Union, including in the Netherlands.
- 3 Mr John Malone, an American national, holds the largest minority shareholding in Liberty Global. He also holds significant minority shareholdings in Liberty Interactive Corporation, Liberty Media Communications and Discovery Communications, Inc. ('Discovery'). Moreover, he holds the position of Chairman of the respective boards of Liberty Global, Liberty Interactive Corporation and Liberty Media Communications and the position of director of Discovery. Liberty Interactive Corporation, Liberty Media Communications and Discovery are not part of Liberty Global. Furthermore, Discovery is active in the wholesale supply of television channels, including in the Netherlands. It acquired Eurosport SAS in 2014.
- 4 Ziggo NV owns and operates a broadband cable network that covers more than half of the territory of the Netherlands. That undertaking provides digital and analogue cable video, broadband Internet, mobile telecommunications and digital telephony (Voice over Internet Protocol) services. Ziggo owns 50% of HBO Nederland Coöperatief UA ('HBO Nederland'), a full-function joint venture which it controls jointly with a subsidiary of Home Box Office, Inc. ('HBO'). HBO is a subsidiary of Time Warner Inc., a global media company with operations in film, television and magazine publishing. HBO Nederland operates three HBO-branded pay TV channels and related video-on-demand services, offering films, exclusive television shows and other entertainment content. These

channels are distributed on a wholesale basis to retail pay TV suppliers in the Netherlands.

The administrative procedure

- 5 On 14 March 2014, in accordance with Article 4(1) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004, L 24, p. 1), Liberty Global notified to the European Commission a proposed concentration consisting in the acquisition of sole control over Ziggo, of which it already held 28.5% of the capital, by means of the launch of a public bid for the remaining shares in that company.
- 6 The Commission took the view that the proposed transaction raised serious concerns as to its compatibility with the internal market. On 8 May 2014 it decided to initiate detailed investigation proceedings, in accordance with Article 6(1)(c) of Regulation No 139/2004.
- 7 On 10 July 2014, during a state-of-play meeting with Liberty Global, the Commission set out its competition concerns following its in-depth investigation.
- 8 On 14 July 2014, Liberty Global proposed commitments to the Commission, which then sought the views of other operators on those commitments. Having regard to the outcome of that consultation, on 22 August 2014, Liberty Global submitted final commitments so as to render the proposed transaction compatible with the internal market.

The contested decision

- 9 On 10 October 2014, the Commission adopted Decision C(2014) 7241 final declaring the concentration involving the acquisition by Liberty Global of sole control over Ziggo to be compatible with the internal market and the EEA Agreement (Case COMP/M.7000 — Liberty Global/Ziggo) (OJ 2015, C 145, p. 7) ('the contested decision').
- 10 The contested decision states that the Commission considered that the proposed transaction gave rise to certain horizontal overlaps and vertical relationships between the parties' activities in a number of relevant markets along the chain for the distribution of audio-visual television content and the provision of telecommunications services (fixed and mobile telephony and broadband Internet) in the Netherlands.
- 11 According to the contested decision, the proposed transaction would combine the following assets and businesses of the parties:
 - UPC's and Ziggo's cable TV businesses (based respectively on their own cable networks);

- UPC’s and Ziggo’s fixed telephony and fixed broadband businesses (based respectively on their own cable networks);
 - UPC’s and Ziggo’s mobile communications businesses, mainly as mobile virtual network operators (based on another operator’s network).
- 12 In so far as concerns the definition of the relevant markets, the Commission made a distinction between the following markets relating to television services, all of which it regarded as being of national geographic scope:
- the market for the licensing and acquisition of broadcasting rights for television content;
 - the market for the wholesale supply and acquisition of television channels; and
 - the market for the retail supply of television services.
- 13 In so far as concerns the market for the licensing and acquisition of broadcasting rights for television content, the Commission considered that that market could be further segmented into pay TV and free-to-air rights; linear and non-linear broadcasting rights; segmentation by exhibition window; premium and non-premium content; and Dutch-language film and TV series content. However, the Commission left open the question of the precise definition of the relevant product market because the proposed transaction did not raise competition concerns however the market might be segmented.
- 14 Similarly, in so far as concerns the market for the wholesale supply and acquisition of television channels, the Commission considered that that market could be further segmented into free-to-air and pay TV channels, basic pay TV channels and premium pay TV channels, premium pay TV film channels and premium pay TV sports channels, general interest pay TV channels and thematic pay TV channels, and according to distribution infrastructure. In light of the differences in content offering, pricing and size of audience, the Commission concluded that basic pay TV channels and premium pay TV channels belonged to separate product markets. Nevertheless, in so far as concerns the other possible segmentations, and, in particular, segmentation between pay premium TV film channels and premium pay TV sports channels, the Commission considered that the question of whether the market could be further segmented could be left open since its assessment of the proposed transaction would remain the same. Lastly, in so far as concerns possible segmentation according to distribution infrastructure, the Commission concluded that at least cable, Internet Protocol TV over very-high bit-rate Digital Subscriber Line (‘IPTV over DSL’), fibre optic and possibly satellite were interchangeable.
- 15 In so far as concerns the market for the retail supply of television services, the Commission considered that the question of further segmentation into free-to-air television services and pay TV services could be left open since its assessment of

the proposed transaction would remain the same. Similarly, it considered that the question of further segmentation into linear pay TV services and non-linear pay TV services could be left open, since the proposed transaction did not raise competition concerns under any alternative product market definition considered. In addition, it considered that segmentation according to distribution technology was inappropriate because of demand-side substitutability.

- 16 The Commission also set out a series of considerations concerning the markets for fixed telephony and Internet access services, mobile telephony services and ‘multiple play’ services, which are irrelevant to the present dispute.
- 17 In so far as concerns its analysis of the effects of the proposed transaction on competition, the Commission reached the conclusion, after its in-depth investigation, that, in the absence of commitments submitted by the parties to the concentration, that transaction would significantly impede effective competition, on the one hand, on the possible market for the wholesale supply and acquisition of premium pay TV film channels and the wider market for the wholesale supply and acquisition of premium pay TV channels and, on the other hand, on the downstream market for the retail supply of pay TV services.

The effects on the market for the wholesale supply and acquisition of premium pay TV channels (supply side)

- 18 As regards the market for the wholesale supply and acquisition of premium pay TV channels, the Commission noted that there were four premium pay TV channels in the Netherlands, namely Film1, HBO Nederland, Sport1 and Fox Sports. As is clear from recitals 200, 201, 211 and 212 of the contested decision, irrespective of whether the relevant market should be defined as the broader market including all premium pay TV channels or the narrower market comprising only premium pay TV film channels, the notified transaction would be likely to give rise to horizontal competition concerns because Liberty Global would own three of the four premium pay TV channels (Film1, HBO Nederland and Sport1), including the only two premium pay TV film channels (Film1 and HBO Nederland). However, the Commission considered that the proposed transaction would not give rise to any horizontal overlap between the two premium pay TV sports channels since Sport1 already belonged to Liberty Global and Fox Sports was not part of the proposed transaction.
- 19 As regards the vertical effects of the transaction, the Commission examined whether, in light of the position which the merged entity would have on the market for the wholesale supply of premium pay TV film channels, and even on the wider market for the wholesale supply of premium pay TV channels, Liberty Global would have the ability and the incentive to engage in a complete or partial input foreclosure strategy in relation to Film1 and/or HBO Nederland, in particular by refusing to give its retail competitors access to those channels. On completion of its in-depth analysis, the Commission concluded that that would be the case in so far as Film1 was concerned. The Commission went on to state that

such a strategy would have a significant detrimental effect on effective competition downstream on the market for the retail supply of pay TV services, which would also form part of the possible market for the retail supply of multiple play services.

The effects on the market for the wholesale supply and acquisition of basic and premium pay TV channels (demand side)

- 20 As regards the effects of the concentration on the market for the wholesale supply and acquisition of basic and premium pay TV channels, from the demand side, the proposed transaction would combine the businesses and assets of the two largest cable operators in the Netherlands, which would represent at least 60% of pay TV subscribers. That would strengthen the market power of Liberty Global as a purchaser of the basic and premium TV channels included in such pay TV subscriptions. On completion of its in-depth analysis, the Commission concluded, in particular, that the proposed transaction would be likely significantly to impede effective competition on the market for the wholesale acquisition of pay TV channels and on the downstream market for the retail provision of pay TV services, as well as on the possible downstream market for the retail supply of multiple play services. That was namely because Liberty Global would be able, by contractual means resulting from the merged entity's increased buying power and by technical means, to hamper the supply of content offered by television broadcasters by innovative means, such as 'over-the-top' services ('OTT services'). Indeed, according to the contested decision, Liberty Global would have the ability and the incentive to restrict the ability of television broadcasters to offer content in non-linear fashion over the Internet with OTT services.
- 21 Notwithstanding the foregoing, the Commission concluded that the final commitments submitted by the parties to the concentration eliminated the competition concerns identified.
- 22 First of all, Liberty Global therefore gave a commitment to divest itself of Film1, in order to eliminate the horizontal overlap between the parties' activities in relation to premium pay TV film channels in the Netherlands. That commitment would also eliminate the vertical concern arising from the fact that Liberty Global might otherwise be able to prevent its competitors on the market for the retail supply of pay TV services from having access to a premium film channel.
- 23 Secondly, Liberty Global gave a commitment to terminate any agreement between it and television broadcasters that directly or indirectly restricted the latter's ability to offer their channels and content via OTT services in the Netherlands, and not to conclude any such agreements in the future. The Commission considered that commitment would be sufficient to eliminate the competition concerns relating to OTT services.
- 24 In light of the foregoing, the Commission decided, pursuant to Article 8(2) of Regulation No 139/2004, to declare the proposed transaction to be compatible

with the internal market and the Agreement on the European Economic Area (EEA), subject to compliance with the commitments given.

Procedure and forms of order sought

- 25 The applicant brought the present action by application lodged at the Court Registry on 17 July 2015.
- 26 The applicant claims that the Court should:
- annul the contested decision;
 - order the Commission to pay the costs.
- 27 The Commission contends that the Court should:
- dismiss the application;
 - order the applicant to pay the costs.
- 28 Acting on a proposal from the Judge-Rapporteur, the Court (Eighth Chamber) decided to open the oral part of the procedure.
- 29 At the hearing on 16 May 2017, the parties presented oral arguments and replied to oral questions put by the Court.

Law

- 30 In support of its application, the applicant puts forward three pleas in law, alleging, first, a manifest error of assessment regarding the possible vertical effects of the concentration on the market for premium pay TV sports channels, second, a breach of the duty to state reasons concerning the lack of any analysis of the possible vertical anti-competitive effects on the market for premium pay TV sports channels and, third, a manifest error of assessment regarding Mr Malone's exercise of a decisive influence over Liberty Global and Discovery.
- 31 It is appropriate to examine the second plea, relating to an alleged breach of the duty to state reasons, first.

The second plea in law, alleging a breach of the duty to state reasons

Arguments of the parties

- 32 By its second plea in law, the applicant alleges a breach of the duty to state reasons, in that the Commission failed to give its reasons for not analysing the possible vertical anti-competitive effects on the market for premium pay TV sports channels.

- 33 According to the applicant, first, the Commission erroneously concluded that the distinction between premium pay TV sports channels and premium pay TV film channels was not relevant to the assessment of the proposed concentration. Second, the Commission erroneously concluded that the market for premium pay TV sports channels was not a market that was affected by the concentration. Third, it failed to carry out an analysis of the vertical effects of the concentration on that market. The applicant submits that, contrary to the requirements of Article 296 TFEU, the Commission did not, however, provide a statement of reasons for any of those conclusions.
- 34 More specifically, the applicant states that, in recitals 101 and 211 of the contested decision, the Commission found that the segment encompassing the supply of premium pay TV sports channels did not constitute an affected market because the proposed concentration did not create any horizontal overlap, since Ziggo was not active in that market, Sport1 was already owned by Liberty Global and Fox Sport was not part of the concentration. According to the applicant, the Commission failed to explain why the mere lack of horizontal overlap should imply that the concentration would not give rise to vertical effects. In addition, the applicant points out that the concentration enabled Liberty Global to cover 90% of the territory of the Netherlands and that Sport1 is an essential input for downstream competitors, and that that is likely to give rise to vertical effects.
- 35 In the reply, the applicant takes issue with the Commission's argument that it is obvious that the concentration would not lead to vertical competition concerns relating to the market for premium pay TV sports channels and that the reasoning leading to that conclusion is implicit in the contested decision. The applicant maintains that that assertion is quite simply contradicted by the detailed explanations which the Commission gave in its defence, which demonstrate that such a conclusion is not obvious and warranted analysis and a statement of reasons in the contested decision.
- 36 In addition, according to the applicant, the Commission's position with regard to the second plea is to a certain extent contradictory, inasmuch as it argues, on the one hand, that it took Sport1 into account in its analysis and, on the other, that it was so obvious that there were no anti-competitive vertical effects that it was justified in not explicitly stating its reasons for not investigating the market for premium pay TV sports channels.
- 37 The applicant observes that, in its defence, the Commission argues that the statement which it made in the contested decision that the market for premium pay TV sports channels was not an affected market related solely to the absence of horizontal effects. The Commission seems to suggest that the contested decision contains implicit reasoning as to why the proposed concentration would not give rise to vertical effects on that market, other than the lack of horizontal overlap on the upstream market. However, the Commission subsequently states in its defence that it was justified in not investigating any vertical effects on that market, because the merged entity would not have any market power on the upstream

market for premium pay TV sports channels. It therefore follows, according to the applicant, that the Commission did not investigate the possible vertical effects on the market for premium pay TV sports channels because of the absence of horizontal overlap on the upstream market.

- 38 Although the Commission maintains that it explicitly took Sport1 into account in its assessment of vertical effects, the applicant points out that recital 221 of the contested decision concerns the hypothesis of a broader market definition. The Commission's subsequent analysis in the contested decision relating to input foreclosure does not once mention either Sport1 or the expression 'premium pay TV sports channels'. According to the applicant, it is therefore clear that the Commission's analysis was limited to premium pay TV film channels.
- 39 Moreover, the applicant submits that, in its defence, the Commission states that the contested decision mentions all the factual elements which make it evident that there could not be a vertical foreclosure concern in relation to Sport1. However, the applicant takes the view that the factual elements referred to and the arguments put forward by the Commission all relate to Film1 and its analysis of the market for premium pay TV film channels.
- 40 According to the applicant, premium pay TV film channels and premium pay TV sports channels are fundamentally different offerings, which means that conclusions relating to the former are not necessarily valid for the latter. It submits that it was therefore incumbent on the Commission, which admitted that premium pay TV sports channels and premium pay TV film channels may constitute separate product markets, at the very least to explain the reasons why the concentration could not give rise to competition concerns on the market for premium pay TV sports channels. The applicant takes the view that such reasoning, be it well-founded or otherwise, is lacking in the contested decision.
- 41 The Commission disputes the arguments put forward by the applicant. It maintains that, when exercising its power to examine concentrations, it is not required to include in its decision precise reasoning as to the appraisal of a number of aspects of the concentration which appear to it to be manifestly irrelevant or insignificant or plainly of secondary importance to the appraisal of the concentration. The Commission submits that it follows that it is not required to address all the arguments put forward by the parties and third parties during the administrative procedure, or to provide precise reasoning as to its appraisal of those arguments. Furthermore, it maintains that its reasoning can be implicit.
- 42 In the present case, the Commission submits that its statement in the contested decision that the segment encompassing the supply of premium pay TV sports channels did not constitute an affected market applies to horizontal effects only.
- 43 According to the Commission, the contested decision contains sufficient reasoning regarding the likely vertical effects of the proposed merger, including the vertical effects on the possible markets for the wholesale supply and acquisition of

premium pay TV film channels and for the wholesale supply and acquisition of premium pay TV sports channels (and on the possible broader market for premium pay TV channels).

- 44 As regards the competition concerns which it identified in the course of its analysis of the market for premium pay TV film channels, that is to say those arising from the fact that the proposed merger would bring together the only two competing film channels, the Commission states that its finding regarding Liberty Global's ability and incentive to engage in a foreclosure strategy was principally based on a finding of market power in the upstream market. By contrast, it maintains that it expressly stated, in particular in recital 211 of the contested decision, that the situation for premium pay TV sports channels was different.
- 45 The Commission submits that the lack of market power and absence of structural changes on the possible market for premium pay TV sports channels make it unlikely that the proposed merger would lead to vertical anti-competitive effects with regard to such channels. In any event, the Commission takes the view that it explicitly took Sport1 into account in its analysis of vertical effects.
- 46 Moreover, the Commission maintains that the contested decision mentions all the factual elements which show that there could not be a vertical foreclosure concern in relation to Sport1 and that the decision is also clear with regard to the Commission's appraisal of the applicant's arguments. It takes the view that detailed reasoning in that regard was therefore not warranted.
- 47 The Commission states that, contrary to the arguments made by the applicant during the administrative procedure, it did not regard Sport1 as an essential input for Liberty Global's downstream competitors. It maintains that it did not fail to acknowledge in the contested decision that premium pay TV sports channels exert significant competitive pressure on one another, in the same way that premium pay TV film channels do. In its view, it is, however, clear from a combined reading of recitals 205, 211, 218, 231 and 559 of the contested decision that Liberty Global's ownership of 50% of HBO Nederland is the crucial element that would give it the ability and the incentive to engage in input foreclosure. It submits that, in that context, it is clear from the contested decision that there were no competition concerns in relation to the possible market for premium pay TV sports channels because of the continued presence of Fox Sports as a strong and effective competitor owned by a non-vertically integrated third party.
- 48 In its rejoinder, the Commission adds that, given the low probability of vertical anti-competitive effects on the possible market for premium pay TV sports channels, this matter was plainly of secondary importance in the appraisal of the concentration. It submits that, accordingly, to require detailed reasoning in relation to that market would be incompatible with the need for speed and the short timescales which it is bound to observe when exercising its power to examine concentrations.

Findings of the Court

- 49 It is clear from settled case-law that the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent European Union Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America v Impala*, C-413/06 P, EU:C:2008:392, paragraph 166 and the case-law cited).
- 50 The institution which adopted the measure is not required, however, to define its position on matters which are plainly of secondary importance or to anticipate potential objections. Moreover, the degree of precision of the statement of the reasons for a decision must be weighed against practical realities and the time and technical facilities available for making the decision. Thus, the Commission does not infringe its duty to state reasons if, when exercising its power to examine concentrations, it does not include precise reasoning in its decision as to the appraisal of a number of aspects of the concentration which appear to it to be manifestly irrelevant or insignificant or plainly of secondary importance to the appraisal of the concentration. Such a requirement would be difficult to reconcile with the need for speed and the short timescales which the Commission is bound to observe when exercising its power to examine concentrations and which form part of the particular circumstances of proceedings for control of those concentrations (judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America v Impala*, C-413/06 P, EU:C:2008:392, paragraph 167).
- 51 In that regard, while it is true that the Commission is not obliged, in the statement of reasons for decisions adopted under the legislation relating to the control of concentrations, to take a position on all the information and arguments relied on before it, including those which are plainly of secondary importance to the appraisal it is required to undertake, it nonetheless remains the case that it is required to set out the facts and the legal considerations having decisive importance in the context of the decision. The reasoning must in addition be logical and must not disclose any internal contradictions (judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America v Impala*, C-413/06 P, EU:C:2008:392, paragraph 169).

- 52 Furthermore, it is clear from the case-law that a claim that there is no, or only an inadequate, statement of reasons constitutes a plea of infringement of an essential procedural requirement, which, as such, is different from a plea that the grounds of the decision are inaccurate, the latter plea being a matter to be reviewed by the Court when it examines the substance of that decision (see judgment of 19 June 2009, *Qualcomm v Commission*, T-48/04, EU:T:2009:212, paragraph 175 and the case-law cited).
- 53 It is in the light of those considerations that the second plea put forward by the applicant must be examined.
- 54 By that plea, the applicant submits, in essence, that the Commission failed to state its reasons for not analysing the possible vertical anti-competitive effects on the market for premium pay TV sports channels. More specifically, the applicant takes the view that the Commission failed to 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, like itself.
- 55 In that regard, it must be pointed out that, as the Commission stated in its defence, the statement in recital 101 of the contested decision that the segment encompassing the supply of premium pay TV sports channels did not constitute an affected market applied to horizontal effects only.
- 56 Furthermore, it must be stated that the contested decision contains a statement of reasons regarding the vertical effects on the market for the wholesale supply of premium pay TV channels, including the possible narrower market for premium pay TV film channels (recitals 213 to 247 of the contested decision), and the vertical effects on the market for the wholesale acquisition of basic pay and premium pay TV channels (for the purposes of the present action, recitals 258 to 277 and 430 to 439, in particular, of the contested decision).
- 57 However, the fact remains that the contested decision does not analyse the effects of the transaction on the possible market for the wholesale supply and acquisition of premium pay TV sports channels, in which the only two channels present would be Sport1, which is owned by Liberty Global, and Fox Sports, which is owned by a third party. It is true that the contested decision refers to Sport1 and Fox Sports on several occasions. However, it does not contain any analysis regarding 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. Consequently, all the references to Sport1 and Fox Sports in the contested decision are made within another analytical framework.
- 58 In that regard, it must be pointed out that, as is apparent from recitals 84 to 86 of the contested decision and from the answers to the questions put by the Court at the hearing, the Commission acknowledged that the market for the wholesale

supply and acquisition of pay TV channels could be further segmented according to whether they consisted of film or sports channels. The Commission added, in recital 86 of the contested decision, that that question could ‘be left open as the assessment of the proposed transaction would remain the same’. It follows that the Commission left open the precise definition of the relevant product market because, even if there were additional segmentation, the concentration could be declared to be compatible with the internal market because there were no competition concerns.

- 59 That approach of leaving open the precise definition of the relevant market required the Commission to explain, at least briefly, the reasons why the proposed transaction, including the vertical effects on the possible market for the wholesale supply and acquisition of premium pay TV sports channels, did not raise any competition concerns, in such a way as to enable the persons concerned to ascertain the reasons for that view and to enable the EU judicature to exercise its power of review with regard to the Commission’s assessment.
- 60 The importance of a statement of reasons on that point cannot be underestimated. According to settled case-law, a proper definition of the relevant market is a necessary precondition for any assessment of the effect of a concentration on competition (judgments of 31 March 1998, *France and Others v Commission*, C-68/94 and C-30/95, EU:C:1998:148, paragraph 143, and of 7 June 2013, *Spar Österreichische Warenhandels v Commission*, T-405/08, not published, EU:T:2013:306, paragraph 116). The EU judicature has accepted that the Commission could leave open the definition of the relevant product market to the extent that none of the possible market definitions could lead to a finding of a significant impediment to effective competition following the concentration, provided it was clearly and unequivocally demonstrated by the reasons given by the Commission in the decision in question (see, to that effect, judgment of 8 July 2003, *Verband der freien Rohrwerke and Others v Commission*, T-374/00, EU:T:2003:188, paragraphs 107 and 110).
- 61 It must be stated that, when questioned on that point by the Court at the hearing, the Commission admitted that the contested decision did not contain any express reasoning regarding that question, even though it also admitted that a market for the wholesale supply and acquisition of premium pay TV sports channels was conceivable.
- 62 Furthermore, as the Commission admits in its defence and as is apparent from the annexes to the application, the applicant alleged on a number of occasions during the administrative procedure that there were vertical concerns relating specifically to Sport1.
- 63 It follows that, on that point, the contested decision does not satisfy the requirements for the statement of reasons required by Article 296 TFEU. None of the arguments put forward by the Commission can cast doubt on that finding.

- 64 First, in its defence, the Commission submits that the contested decision expressly stated in recital 211 that Liberty Global did not have the ability to foreclose the market because it did not have any upstream market power, since it owned only one of the two premium pay TV sports channels. Apart from the fact that that section of the contested decision relates to the analysis of the horizontal effects, as is, moreover, clear from the wording of that recital, it must be stated that the mere fact that Sport1 has a competitor, namely Fox Sports, does not, in the absence of any analysis of their respective market positions and their competitive relationships, in itself rule out the possibility that Liberty Global may have upstream market power in the segment in question. For example, the fact that an undertaking with a market share of 70% has one competitor does not, without any additional analysis, mean that it has no market power.
- 65 It must be added that, in reply to the questions put by the Court at the hearing, the Commission admitted that the contested decision did not contain any express reasoning as to why Sport1 would not have any upstream market power in the segment in question.
- 66 Second, as regards the argument relating to the absence of structural changes on the possible market for premium pay TV sports channels which, in the Commission's view, makes the issue of vertical effects on that market one of secondary importance, it must be pointed out that the proposed transaction entailed downstream structural changes, in particular with the joining together of Liberty Global's and Ziggo's respective distribution platforms.
- 67 Third, the Commission submits that recital 221 of the contested decision shows that it took Sport1 into account in its analysis of the vertical effects of the concentration. However, it is clear from its wording that that recital relates to a situation in which the product market at issue is defined as encompassing all the premium pay TV channels. Consequently, that recital did not relate to an analysis of the vertical effects on the possible market for the supply of premium pay TV sports channels. Furthermore, in that recital, the Commission confines itself to stating that Liberty Global would have market power in the upstream market for the supply of premium pay TV channels. That finding does not make it possible to draw any conclusions as to Liberty Global's alleged lack of market power as regards the wholesale supply of premium pay TV sports channels.
- 68 Fourth, the Commission submits that detailed reasoning is not necessary, since the contested decision mentions all the factual elements which show that there could not be a vertical foreclosure concern in relation to Sport1. According to the Commission, that is the result, in particular, of the continued presence of Fox Sports as a strong competitor owned by a third party.
- 69 In that regard, it must be pointed out that, as regards the market for the wholesale supply of premium pay TV sports channels, the only finding that emerges clearly from the contested decision is that there is an independent competitor, namely Fox Sports. In particular, the contested decision remains silent regarding the respective

market positions and competitive relationships of Fox Sports and Sport1, with the exception of Liberty Global's claim, set out in recital 191 of the contested decision, that Sport1 was just breaking even.

- 70 However, as has been stated above, the presence of a competitor does not preclude a company from having market power, in particular if the competitor has a weak position on the market. Even though the Commission puts forward numerous arguments in the context of the first plea in the present action in order to show that Liberty Global did not, owing to the presence of Fox Sports, have the ability to engage in a foreclosure strategy and would not have the incentive to do so, the fact remains that those arguments are not set out in the contested decision. What is more, the argument as to the low profitability of Sport1 is set out in the section of the contested decision relating to the notifying party's arguments and not in that relating to the Commission's assessment, which does not make it possible to conclude that that low profitability was regarded as a proven fact in the contested decision and that that decision was based on it.
- 71 Fifth, as regards the argument relating to the need for speed and the short timescales with regard to the examination of concentrations (judgment of 13 May 2015, *Niki Luftfahrt v Commission*, T-162/10, EU:T:2015:283, paragraph 100) in the light of the low probability of vertical anti-competitive effects on the possible market for premium pay TV sports channels, it must be stated that the decisive element in the present case lies in the fact that, initially, the Commission decided to leave open the definition of the relevant product market because, in its view, there would be no competition concerns in any event. Consequently, the Commission could not, subsequently, avoid its obligation to explain, at least briefly, why there would be no vertical competition concerns regarding the possible market for premium pay TV sports channels.
- 72 Lastly, as regards the argument relating to alleged implicit reasoning, which the Commission reiterated at the hearing, the judgment of 7 January 2004, *Aalborg Portland and Others v Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6), states, in paragraph 372, to which the Commission refers in its written pleadings, that the reasoning may be implicit on condition that it enables the persons concerned to know why the measures in question were taken and provides the competent court with sufficient material for it to exercise its power of review. It is sufficient to state that in the present case those conditions are not satisfied because, from a reading of the contested decision, it is impossible for the EU judicature to exercise its power of review with regard to the reasons, apart from the mere presence of an independent competitor, which may have led the Commission to find that there were no vertical competition concerns on the possible market for premium pay TV sports channels.
- 73 Furthermore, the contested decision does not state that the structure and the functioning of the market for premium pay TV sports channels are similar to those on the market for premium pay TV film channels, a point which, moreover, the

applicant disputes. Consequently, it cannot be maintained that the contested decision implicitly contains reasoning relating to the vertical effects on the possible market for premium pay TV sports channels, that is to say, reasoning relating to the vertical effects on the possible market for premium pay TV film channels which is applicable by analogy.

- 74 In view of the foregoing, the second plea in law must be upheld.
- 75 Since the contested decision is vitiated by a failure to state reasons, there is no need to examine the first and third pleas in law, both of which relate to alleged manifest errors of assessment, *inter alia*, as regards the vertical effects of the proposed concentration on the market for premium pay TV sports channels.

Costs

- 76 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the applicant, in accordance with the form of order sought by the applicant.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

- 1. Annuls Commission Decision C(2014) 7241 final declaring the concentration involving the acquisition by Liberty Global plc of sole control over Ziggo NV to be compatible with the internal market and the EEA Agreement (Case COMP/M.7000 — Liberty Global/Ziggo);**

2. Orders the European Commission to pay the costs.

Collins

Kancheva

Barents

Delivered in open court in Luxembourg on 26 October 2017.

E. Coulon

Registrar

President