

Client Alert

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ICC Tribunal Decides Claim on Commitments Attached to European Commission's Merger Approval

On February 20, 2012, an ICC tribunal decided a claim in relation to commitments attached to a European Commission ("Commission") merger decision clearing News Corporation's acquisition of two satellite broadcasters.¹

While the raising of competition claims in arbitration is not a new development, this case appears to be the first time that an ICC tribunal has decided on issues of Commission-approved merger commitments. The case exemplifies the evolving nature of private enforcement, be that through litigation or arbitration, of competition law claims in the EU.

Background

Reti Televisive Italiane (RTI) is a subsidiary of Italy's largest commercial broadcaster, Mediaset Group, which was founded in the 1970s by Silvio Berlusconi. Mediaset's main competitor is a pay-TV channel, Sky Italia, which is owned by News Corporation, the U.S. company founded by Rupert Murdoch.

On April 2, 2003, the Commission authorised, subject to conditions ("commitments"), a merger by News Corporation (which was, at the time, The News Corporation Limited, Australia) of two Italian pay-TV companies to create Sky Italia (see **Commission's decision: Case No COMP/M. 2876, Newscorp/ Telepiù**). The merger resulted in a near-monopoly in the Italian pay-TV market (as opposed to free-to-air TV that was not found to be affected by the operation). However, the Commission took the view that authorising the merger, with commitments, would be more beneficial to consumers than the disruption that would have been caused by the likely closure of one of the two existing operators.

To ensure the market remained open, the Commission accepted structural and behavioural undertakings from News Corporation and an arbitration procedure to ensure the effective implementation of those commitments. The Commission's conditions included preventing Sky Italia from offering pay-TV other than on satellite and preventing it from keeping or acquiring digital terrestrial television (DTT) frequencies for broadcast of land-based signals. The Commission also facilitated entry in the market for newer entrants by requiring News Corporation's undertaking to grant satellite competitors access

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to its own platform and offering related services under fair and reasonable conditions. This enabled competitors to have the possibility to broadcast by satellite without having to set up their own platform, which otherwise could have represented a high barrier to entry.

On July 20, 2010, the Commission announced that on the basis of market change it released Sky Italia from its commitment arising from the 2003 merger which prevented it from acquiring DTT frequencies. This variation of News Corporation's commitments allowed it to bid in the tender for the allocation of DTT frequencies that arose as a result of the impending switch in Italy from analogue to digital broadcasting.

Arbitration Proceedings

In 2010, ahead of the FIFA World Cup, RTI initiated arbitration proceedings, contending that Sky Italia's acquisition of exclusive rights to broadcast the 2010 World Cup on pay-TV and refusal to resell the digital terrestrial rights was a breach of the commitments it undertook to the Commission in 2003.

RTI initially sought an urgent order that such rights be made available to other television operators prior to the start of the World Cup. Later, after the tournament, it amended its pleadings and sought damages derived from loss of revenue from its own inability to broadcast the World Cup.

In an award dated 20 February, 2012, the ICC tribunal completely rejected RTI's claims and confirmed the legitimacy of Sky Italia's behaviour. The tribunal held that the broadcasting rights of the World Cup did not fall within the commitments since the World Cup was beyond the remit of "world-wide sports rights". The tribunal found that the tournament was not essential for the competitiveness of a competing pay-TV television operator since it occurred only once every four years.

Arbitrating Competition Claims: Concluding Thoughts

Until recently the main method of enforcing competition law in Europe was investigation before a relevant national competition authority (such as the Office of Fair Trading in the UK or the Autorité de la concurrence in France) or the Commission. Private enforcement of competition law claims in the EU, whether through litigation or arbitration, is still an evolving area but is gaining momentum. While the question of arbitrating competition law claims is not being disputed, important questions remain to be decided.

The *Sky Italia* case illustrates the increasing scope to raise competition law questions in arbitration; in this instance in the area of merger control, which up to now has not been a traditional context for arbitrating matters of competition law. In a parallel development in relation to mergers, the Commission is increasingly using arbitration commitments as part of its merger control role. When clearing a merger with commitments, it often provides in its merger clearance decision (or the commitments appended to it) that the merged entity must submit to arbitration with third party beneficiaries of rights flowing from a behavioural remedy under the merger clearance decision. There is typically a corresponding right on the part of a third party to trigger the arbitration commitment to enforce rights arising from the behavioural remedy and to obtain damages and/or specific performance. The arbitration provisions in this case support the Commission's public law powers such as its ability to impose fines or other sanctions. This use of arbitration as part of a bundle of commitments is a recognition by the Commission of the expertise and speed of arbitral tribunals, the ability to recover

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private law damages and the ease of enforceability of an award. The cost of the arbitral proceedings is also typically borne by the relevant third parties, thus saving Commission costs and resources.

It remains to be seen how the future landscape will develop regarding the arbitration of competition law claims and the extent to which competition law authorities themselves will support arbitral procedures. Against this background, the following appear to be some significant practice points:

- Be prepared to raise or defend competition law claims in an arbitration even when not specifically provided by the parties. Such issues may be raised by the other party or the tribunal.
- Do not assume that the opportunity for a "second look" at competition law issues in an arbitration will necessarily be successful without a close examination of the competition law claims at issue and the extent to which they have already been decided by a relevant competition authority. Similarly, do not assume that providing for arbitration will necessarily oust an inquiry by a competition authority.
- Consider the role of arbitration in relation to merger control and the enforcement of commitments entered into by merging parties.
- While the power of arbitrators to consider competition law claims is accepted, there remain some areas of uncertainty such as the extent to which arbitrators may consult with the competition authorities and courts on such matters and the quality of their decisions to the extent that they do, or do not do so.

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This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice.

¹ The decision is not publicly available at the time of writing.