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European Court of Justice Annuls Commission Decision Failing to Account for Rights of Third Parties in Anti-Competitive Licensing Obligations

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A recent Judgment of the Court of Justice of the European Union ("***Court of Justice***") in Case *Groupe Canal + v. Commission ("**Judgment**")* provides some clarity about the sorts of commitments that defendants can give to reach a settlement with the European Commission ("***Commission***") in order to avoid it adopting a Decision under Article 101(1) TFEU.[1] In its Judgment of 9 December 2020, the Court of Justice held that the Commission, when accepting commitments from defendants to overcome concerns in competition proceedings under the procedure set forth in Article 9 of Regulation 1/2003,[2] must take due account of the impact of those commitments on the position of third parties where the commitments require the defendant not to respect existing contractual obligations with third parties. This is, essentially, a proportionality test and requires the Commission to accept commitments only if they are necessary to remedy the perceived harm and if they do not have a disproportionately harmful effect on third parties.

I. Background

On 13 January 2014, the Commission opened a formal investigation into licensing agreements for the distribution of content entered into between several major US film studios (including Paramount Pictures International ltd and its parent company, Viacom Inc., together referred to as "***Paramount***") on the one hand, and European pay-TV broadcasters including Sky UK Ltd and Sky plc (together referred to as "***Sky***") and Groupe Canal + SA ("***Canal +***"), on the other.

In July 2015, the Commission adopted a Statement of Objections[3] regarding the enforceability of certain clauses in the licensing agreements concluded between Paramount and Sky and other broadcasters, namely:

1. restrictions on Sky's ability to respond favourably to unsolicited requests from consumers resident in the EEA but outside the United Kingdom and Ireland, to provide access to television distribution services; and
2. the prohibition on broadcasters established in the EEA but outside the UK or Ireland to respond favourably to unsolicited requests from consumers resident in the United Kingdom or in Ireland.

The Commission took the preliminary view that these clauses prevented broadcasters from providing their services across EU Member State borders, and led to a situation of absolute territorial exclusivity. This was capable of constituting a restriction of competition under Article 101(1) TFEU and Article 53 of the EEA Agreement because they partitioned the European Single Market into a series of national markets.

The Commitments

In April 2016, in an attempt to meet the Commission's concerns about the restrictive effects of its arrangements, Paramount offered the following commitments,[4] to apply throughout the territory of the EEA:[5]

1. when licensing its film output for pay-TV to a broadcaster in the EEA, Paramount would not (re-)introduce contractual obligations which prevented or limited a pay-TV broadcaster from responding to unsolicited requests from consumers within the EEA but outside the pay-TV broadcaster's licensed national territory (the "Broadcaster Obligation");
2. when licensing its film output for pay-TV to a broadcaster in the EEA, Paramount would not (re-)introduce contractual

obligations which required Paramount to prohibit or limit pay-TV broadcasters located outside the licensed territory from responding to unsolicited requests from consumers within the licensed territory (the "Paramount Obligation");

3. Paramount would not seek to bring an action before a court or tribunal for the violation of a Broadcaster Obligation in an existing agreement licensing its film output for pay-TV; and
4. Paramount Pictures would not act upon or enforce a Paramount Obligation in an existing agreement licensing its film output for pay-TV.

Consistent with its administrative practice, the Commission sought comments on the proposed commitments from interested third parties, including Canal +. It then adopted a Decision on 26 July 2016 accepting the commitments offered by Paramount (the "***Commitment Decision***").[6]

On appeal at first instance

As an exclusive licensee in France prior to the Commitment Decision being adopted, Canal + brought an action for the annulment of the Commitment Decision before the General Court of the European Union ("***General Court***"). The General Court dismissed Canal +'s action, holding that the commitments offered by Paramount were not binding on Paramount's contracting partners (including Canal +) and that the rights of third parties were not violated because civil proceedings before national courts were still available to them.[7]

Grounds of appeal before the Court of Justice

Canal + appealed to the Court of Justice, arguing that:

1. by adopting the Commitment Decision, the Commission had misused its powers and was trying to circumvent the need for legislation to address the issue of geo-blocking within the EEA;
2. the relevant clauses in the licensing agreements were lawful under Article 101(1) TFEU and there were therefore no grounds for adopting the Commitment Decision;
3. the Commission had wrongly analysed the impact of the contested licensing clauses on the EEA as a whole and, in doing so, had failed to conduct individual assessments of their impact on a country-by-country basis;
4. the General Court erred in law in its assessment of the effects of the Commitment Decision on the contractual rights of third parties by not taking sufficient account of the fundamental legal principle of proportionality.

II. Judgment of the Court of Justice

The Court of Justice upheld the General Court's findings with respect to the first three pleas raised on appeal.[8] However, it found that the General Court had failed to take into account sufficiently the contractual rights of third parties when adopting commitments decisions.

The Court of Justice first recalled that a commitment decision adopted on the basis of Article 9 of Regulation 1/2003 is only binding on the undertakings that have actually offered commitments. As a result, the Commitment Decision could not lead to third parties – in this case, Canal + - being bound by those commitments. Therefore, by making the commitments binding on a contracting party that had not consented to the commitments in question, the Commission was considered to have interfered with Canal +'s contractual freedom. In doing so, the Commission was considered to have exceeded its powers under Article 9 of Regulation 1/2003.

In arriving at this conclusion, the Court of Justice overturned the General Court's finding that the third party could seek redress before a national court to enforce its contractual rights. The Court of Justice referred to the *Masterfoods* Case,[9] which held that the effectiveness of EU law is a fundamental legal principle[10] which must not be undermined by private parties being encouraged to approach national courts to dilute the effectiveness of EU law, as applied by the Commission in the exercise of its competition law powers.[11] The same principle is found in Article 16(2) of Regulation 1/2003, which provides that "[w]*hen competition authorities of the Member States rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty* [now Articles 101 or 102 TFEU] *which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission*".

The Court of Justice declined to refer the case back to the General Court for the error of law to be rectified. Instead, the Court annulled the Commission Decision[12], holding that "*by adopting the decision at issue, the Commission rendered the contractual rights of the third parties meaningless, including the contractual rights of Groupe Canal + vis-à-vis Paramount, and thereby infringed the principle of proportionality*".[13]

III. Implications of the Case

This is the first case in which a commitment decision has been overturned by the European courts. As such, it provides an important clarification as to the scope of commitments that parties under investigation can offer and that the Commission can accept. In practical terms, it limits the scope of commitments that the Commission can extract.

First, the Judgment confirms the principle established in the *Alrosa* Case, in which the Court held that "*the fact that the individual commitments offered by an undertaking have been made binding by the Commission does not mean that other undertakings are deprived of the possibility of protecting the rights they may have in connection with their relations with that undertaking*".[14] However, it should not be forgotten that in *Alrosa*, the Court found that the Commission had not contravened the principle of proportionality – rather, it found that the General Court had been wrong to link the principle of proportionality in the context of commitment decisions adopted under Article 9 of Regulation 1/2003 to the test for proportionality for infringement decisions adopted under Article 7 of Regulation 1/2003.[15] By appearing to take the view that the doctrine of proportionality has a different scope depending on whether the Commission is adopting a commitments decision under Article 9 or an infringement decision under Article 7, the Court seems to have created an elusive shifting standard by which to apply a doctrine usually considered to be universal in its significance.[16]

In this Judgment, the Court has brought some clarity to that problematic distinction. A commitment decision short-circuits the usual procedure for infringement decisions, given that a commitment decision does not reach definitive conclusions about the legality or otherwise of the conduct in question. The procedure for commitment decisions is nevertheless still designed to ensure the effective application of Community law by allowing the Commission to take action in a more expedited manner than would otherwise be the case under the much more cumbersome procedure for infringement decisions. This trade-off means that commitments are limited to unilateral obligations agreed by defendants and there is no full investigation.

Second, it is not the case that the Commission is inexperienced in the handling of multi-party proceedings involving commitments relating to contractual obligations designed to put alleged anti-competitive conduct to an end. The *Cannes Agreement*[17] and *Container Shipping*[18] Cases are two clear examples of the Commission interfering with contractual relations, as are a series of multi-party JVs in the airline sector.[19] The Commission might be justifiably concerned, however, that its decision-making capacity will be impaired if it must in each case take into account third party contractual arrangements before agreeing commitments, especially if it has already consulted with third parties in a stakeholder consultation on the suitability of the commitments.

Third, the Commission and General Court clearly erred in finding that third parties could have recourse to national courts to enforce their contractual rights. The availability of such a remedy would clearly call into question the enforceability of the commitments, and would therefore undermine the principle that EU law must be implemented effectively. Insofar as the Court's Ruling is based on the principle that national courts must refrain from adopting a decision that would contradict a binding Commission Decision, it is difficult to find fault with the Court's logic.

In conclusion, it may be expected that the Commission will respond to the Court's Canal+ Judgment by demanding more information and greater legal certainty in relation to commitments which might interfere with the contractual rights of third parties. In addition, the Commission may take the view that the Court, by asking it to pay greater attention to the rights of third parties in its proportionality analysis, has made commitment decisions too susceptible to legal challenge. If that is the case, the Commission may feel that it has little option other than to pursue infringement decisions more aggressively rather than seeking settlements under Article 9.

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[1] Judgment of 9 December 2020, *Groupe Canal + v. Commission*, Case C-132/19 P, EU:C:2020:1007.

[2] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, pp. 1-25. Regulation 1/2003 sets out the procedural rules which the Commission must respect in pursuing an infringement action under Articles 101-102 TFEU. According to Article 9 of Regulation 1/2003, where the Commission takes the preliminary view that an infringement of the competition rules has taken place, the suspected undertakings can offer commitments to meet the concerns expressed by the Commission. If considered satisfactory, the Commission may by decision render these commitments binding on the undertakings concerned in a Decision.

[3] This is a preliminary assessment setting out the Commission's views that an infringement of EU competition rules has taken place.

[4] Commitments by Paramount in Case AT.40023 – *Cross-border access to pay-TV*, 22.04.2016, available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40023/40023_4638_3.pdf.

[5] At the time, the EU consisted of 28 Member States (including the United Kingdom) and the three additional jurisdictions of Norway, Iceland and Lichtenstein, which collectively constitute the European Economic Area (EEA).

[6] Commission Decision of 26 July 2016 in Case AT.40023 – *Cross-border access to pay-TV* adopted pursuant to Article 9 of Regulation 1/2003.

[7] Judgment of 12 December 2018, *Groupe Canal + v Commission*, T-873/16, EU:T:2018:904, paras. 93-98.

[8] Namely: (i) the Commission had not misused its powers on the issue of geo-blocking given that the legislative process relating to geo-blocking had thus far not resulted in the adoption of a legislative text, and this process was without prejudice to the powers conferred on the Commission under Article 101 TFEU and Regulation 1/2003; (ii) the licensing clauses under Article 101(1) TFEU were unlawful insofar as they eliminated the cross-border provision of broadcasting services and granted broadcasters absolute territorial protection; and (iii) the impact of the licensing clauses over the entire EEA territory was appropriate, without there being a necessity for the Commission to analyse those commitments on an individual basis. One would have thought that the simpler avenue for the Court of Justice would have been to agree with the appellant that the Commission had erred by not assessing each national exclusivity in terms of their competitive impacts, rather than accepting that the Commission was entitled to consider the competitive impacts of the territorial grants of exclusivity in their entirety over the territory of the EEA. By so holding, it would arguably have been more straightforward for the Court to conclude that the interference of the commitments with the appellant's contractual right was "disproportionate" under the fourth plea.

[9] Judgment of 14 December 2000, *Masterfoods and HB,* C-344/98, EU:C:2000:689, para. 51.

[10] The principle of effectiveness is enshrined in Article 19 TEU, in Article 47 of the Charter of Fundamental Rights of the European Union and in numerous cases such as in the Judgment of 13 March 2007, *Unibet,* Case C-432/05, EU:C:2007:163. In the Judgment of 27 March 2014, *Saint-Gobain Glass France SA,* Joined Cases T-56/09 and T-73/06 EU:T:2014:160, paragraph 83, the General Court further emphasised that "*the judicial review of the decisions adopted by the Commission in order to penalise infringements of competition law that is provided for in the Treaties and supplemented by Regulation No 1/2003 is consistent with that principle*".

[11] The doctrine of effective application of EU law is itself based on the doctrine of "sincere cooperation" between EU institutions and the Member States, as found in Article 4(3) TEU, which provides the legal basis for many of the provisions contained in Regulation 1/2003.

[12] In accordance with Article 61(1) of the Statute of the Court of Justice of the European Union.

[13] Judgment of 9 December 2020, *Groupe Canal + v. Commission*, C-132/19 P, EU:C:2020:1007, para. 123.

[14] Judgment of 29 June 2010, *Commission v. Alrosa,* C-441/07 P, EU:C:2010:377, paragraph 49.

[15] *See* Judgment of 29 June 2010, *Commission v. Alrosa,* C-441/07 P, EU:C:2010:377, paragraph 47, where the Court of Justice held that there is no reason that would explain "*why the measure which could possibly be imposed in the context of Article 7 of Regulation No 1/2003 should have to serve as a reference for the purpose of assessing the extent of the commitments accepted under Article 9 of the regulation, or why anything going beyond that measure should automatically be regarded as disproportionate*".

[16] The principle of proportionality is a general principle of EU law provided in Article 5(4) TEU. This principle regulates the exercise of powers by the European Union, by requiring that the actions taken by the EU are limited to what is necessary to achieve the objectives set in the Treaties.

[17] Commission Decision of 04.10.2006 in Case AT.38681 – *Cannes Agreement*. The commitments offered by the Parties consisted of: (i) ensuring that collecting societies could continue to give rebates to record companies; and (ii) the removal of a non-competition clause.

[18] Commission Decision of 07.07.2016 in Case AT.39850 – *Container Shipping.* The commitments offered by 14 container liner shipping companies aimed to increase price transparency for customers and to reduce the likelihood of coordinating prices. *See also* Commission Decision of 16 September 1998 in Case no IV/35.134 – *Trans-Atlantic Conference Agreement,* in which the Commission imposed an obligation on the infringing undertakings to inform the customers with whom they had concluded joint service contracts that those customers were entitled to renegotiate the terms of those contracts or to terminate them forthwith.

[19] Commission Decision of 23.05.2013 in Case AT.39595 – *Continental/United/Lufthansa/Air Canada;* Commission Decision of 14.07.2010 in Case AT.39596 - *American Airlines/British Airways Plc/ Iberia Líneas Aéreas de España*; and Commission Decision of

12.05.2015 in Case AT.39964 – *Air France/KLM/Alitalia/Delta.* In these cases, the affected airlines committed to making slots available in order to facilitate the entry or expansion of competitors, and to enter into agreements in order to allow competitors to offer more attractive services.

Gibson Dunn's lawyers are available to assist with any questions you may have regarding these developments. For additional information, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Antitrust and Competition Practice Group, or the following authors in Brussels:

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