Canal+ (C-132/19 P): The Court of Justice Annuls Commitment Decision – The Importance of Third Party Contractual Rights

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Today, the Court of Justice annulled the Commission decision that made commitments legally binding for Paramount. This decision is the first annulment of a commitment decision since the adoption of Regulation 1/2003.

The Court held, in particular, that the Commission must assess the proportionality of the commitments with regard to the protection of the contractual rights of third parties when it decides to make commitments binding. The decision will have a significant impact on both the Commission accepting and undertakings proposing commitments. Both will have to take the effect of the commitments on third parties into account, in particular when contracts are involved. However, the rights of third parties should in general 'not be deprived of their substance'.

We will see if this decision will substantially diminish the role of commitment decisions in the future. Some have argued that the Broadcom case and the combined use of interim measures and commitments would even make any new enforcement tools superfluous – looks like we need them after all.

Canal+ also challenged the commitments proposed by NBCUniversal, Sony Pictures, Warner Bros and Sky Hollywood Studios in the same investigation. Canal+ will most likely win that case too. The decision could even affect other existing commitment decisions. Any third parties who would want to appeal Commission commitment decisions would have to respect the time limits of Article 263 (6) TFEU, though.

While the part on third party effects certainly will make this case a landmark ruling, the decision contained another quite surprising statement: an examination of Article 101 (3) TFEU is alien to the very nature of commitment decisions. This indicates that the Commission can entirely disregard Article 101 (3) TFEU in commitment negotiations.

As for the alleged anti-competitive behaviour, the judgment did not present anything new. The license agreements in question restricted the ability of broadcasters to accept passive sales, a restriction of competition by object. True 'European' theories of harm that lead to the partitioning of the EU Internal Market become more and more important though, as we saw with the NBC Universal and Mélia decisions this year.

Background

The investigation

The case relates to the Commission's investigation into the cross-border provision of pay-TV services. In the investigation, the Commission had concerns about certain bilateral clauses in film licensing agreements for pay-TV between six major film studios and Sky UK. Back in 2015, the Commission sent Statement of Objections to Sky UK as well as Disney, NBCUniversal, Paramount Pictures, Sony, Twentieth Century Fox and Warner Bros. The authority criticised that the respective licensing agreements between the studios and Sky UK restricted the ability of broadcasters to accept unsolicited requests (so-called 'passive sales') for their pay-TV services from consumers located outside their licensed territory.

The problematic conduct consisted of two obligations. First, these clauses prevented Sky UK from allowing EEA-consumers outside the UK and Ireland to access films via satellite or online (the 'broadcaster obligation'). Second, the clauses required the film studio to ensure that broadcasters other than Sky UK are prevented from making their pay-TV services available in the UK and Ireland (the 'film studio obligation'). The EU watchdog came to the preliminary conclusion that the clauses restrict cross-border passive sales within the EEA and violate Article 101 (1) TFEU by object.

The commitments

To address those concerns, Paramount offered wide-ranging commitments in April 2016 (in the meantime, the other studios had followed). Those entailed that Paramount will not (re)introduce broadcaster nor film studio obligations, will not seek to bring an action for the violation of a broadcaster obligation in an existing agreement and will not act upon or enforce a film studio obligation in an existing licensing agreement. The Commission made those commitments legally binding in July 2016.

The decision had an effect outside of the investigated companies. Already in 2014, Paramount had concluded a pay-TV licensing agreement with Groupe Canal+ for the French market under the old terms. After the commitment decision, Paramount released Canal+ from the broadcaster obligation and announced that it would not honour the film studio obligation anymore.

The General Court

Canal+ objected and brought an action for annulment of the Paramount commitment decision before the General Court. The broadcaster had lost its exclusive rights for the French market. Canal+ raised essentially a twofold line of argumentation:

- The obligations in the pay-TV license agreements do not restrict competition by object and nevertheless are justified due to general principles of intellectual property law.
- The Commission exceeded the power conferred on it by Article 9 Regulation No 1/200 and breached the principle of proportionality. The authority did not sufficiently take the third-party effects of the commitments into account. The commitments themselves went beyond the investigation, and the decision cannot bind Canal+ since the company was not part of the investigation.

In 2018, the General Court dismissed the action for annulment on both grounds:

- The General Court relied on the Murphy case law. It held that, contrary to active sales, passive sales restrictions are by-object violations because they lead to a contractually specified absolute territorial exclusivity aimed at partitioning national markets according to national borders. The Court further stated that any examination of the conditions of Article 101 (3) TFEU requires the finding of anticompetitive conduct under Article 101 (1) TFEU in the first place. In commitment decisions, the Commission does not find an infringement and, consequently, there should be no examination of the conditions laid down in Article 101 (3) TFEU. In any case, the Court excluded Article 101 (3) TFEU, since the relevant clauses were not indispensable for the production and distribution of audiovisual works that require protection of intellectual property rights.
- Relying on Alrosa, the General Court held that commitments could go beyond what the Commission could itself impose in an infringement decision. While the Commission must take third-party effects into account in its proportionality assessment, in the present case, no commitment would equally address the competition concerns expressed by the Commission. The commitment decision itself is only binding on Paramount, its successors and subsidiaries and not on Paramount's contracting parties. It is not the commitment decision itself that altered the rights of Paramount's contracting partners. Paramount's reaction to the commitments to no longer honour the relevant clauses affects the contracting parties. Paramount made this decision at its own risk. A national judge is available if contracting parties want to enforce the clauses of the licensing agreements or claim damages. That national judge can once again assess Articles 101 (1) and (3) TFEU.

The Advocate General

Canal+ appealed the General Court's judgment in February 2019. In May 2020, Advocate General Pitruzzella gave his opinion.

- Concerning substance, the AG concurred with the preliminary finding of an infringement by object. He criticised the General Court in its apodictic statement that Article 101 (3) TFEU is not applicable in commitment procedures *per se*. In the end, he agreed with the General Court that the justification in Article 101 (3) TFEU does not apply *in the present case*.
- Pitruzzella disagreed with the General Court when it came to the question of proportionality and third-party effect. In essence, the rights of third parties should not be 'deprived of their substance'. The commitments required Paramount to terminate or violate its contractual obligations towards, *inter alia*, Canal+. This violates Canal+ contractual freedom, which is protected under Union law. Third parties are not able to easily enforce clauses that go against commitment decisions in national courts since commitment decisions create a 'presumption of illegality' before a national judge.

The ECJ's Decision

The General Court largely followed AG Pitruzzella today (the judgment is not available in English yet).

The ECJ held that the General Court did not commit an error of law by relying on Murphy. Having regard both to the objectives that the licence agreements seek to achieve and to the economic and legal context in which they are included, they have as their object the restriction of competition within the meaning of Article 101 (1) TFEU (*para 54*).

The Court of Justice disagreed with the Advocate General on justification. The General Court did not err in law in its apodictic statement about Article 101 (3) TFEU and commitment decisions. Article 101 (3) TFEU applies only if an infringement of Article 101 (1) TFEU has been established beforehand (*para 56*). Article 9 decisions are adopted based on a preliminary assessment of the anti-competitive nature of the conduct in question. They do not include a thorough and complete assessment of all the anti-competitive effects of that conduct (*para 59*). Since the Commission is thus unable to compare anti- and pro-competitive effects, an examination of Article 101 (3) TFEU is alien to the very nature of commitment decisions.

The Court then annulled the first instance decision because of a violation of the principle of proportionality and for failing to properly take to account the impact of the commitments on the contractual rights of third parties. The line of argumentation is quite interesting and follows the AG's opinion almost verbatim.

The Court first reiterated its findings in Alrosa, that 'the Commission's proportionality test is limited to verifying that the commitments in question address the concerns the authority expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately. When carrying out that assessment, the Commission must, however, take into consideration the interests of third parties' (*para 105*). In applying Alrosa, the Court distinguished between the two aspects of that proportionality test. In the present case, the Court was not interested in the adequacy of the commitments concerning the competition concerns. The Court is interested in the impact of commitments on the interests of third parties. In that regard, the principle of proportionality requires that the rights of third parties should 'not be deprived of their substance' – a wording taken directly from the AG's opinion (*para 106*).

In the case at hand, the commitments did not directly impose an obligation on Canal+. However, they automatically implied that Paramount would not be able to honour certain contractual obligations with Canal+ (*para 107*). The ECJ dismissed the General Court's arguments that contracting parties could turn to national courts. The Court took recourse to established case law in Gasorba that commitment decisions do not preclude national courts from examining whether those agreements comply with the competition rules. At the same time, due to Article 16 (1) Regulation 1/2003, national courts cannot take decisions that would run counter to the decision adopted by the Commission. National courts would go against the Commission's decision and violate Article 16 (1) Regulation 1/2003 if they would oblige Paramount to contravene the commitments and honour the contractual obligations (*para 111*). Consequently, the Commission must assess the proportionality of the commitments with regard to the protection of the contractual rights of third parties when it takes the decision to make commitments binding (*para 115*).

The Court did not send the case back to the General Court but directly ruled on the merits. The ECJ set aside the General Court's decision and annulled the Commission's decision.