European Commission: 2019 Commitment Decision involving major film studios and Sky UK withdrawn

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On 31 March 2021, the European Commission withdrew an important 2019 Commitment Decision which had made commitments binding a number of well-known film studios and the broadcaster Sky UK to address the Commission's concerns regarding clauses in the studios' licensing contracts for pay-TV with Sky UK (see IRIS 2019-4/6 and IRIS 2015-9/1). The film studios were Disney, NBCUniversal, Sony Pictures, and Warner Bros. According to the Commission, the clauses at issue "prevented Sky UK from allowing EU consumers outside the United Kingdom and Ireland to subscribe to Sky UK's pay-TV services to access films via satellite or online", and also required NBCUniversal, Sony Pictures and Warner Bros. to "ensure that broadcasters other than Sky UK are prevented from making their pay-TV services available in the United Kingdom and Ireland". Crucially, Disney, NBCUniversal, Sony Pictures and Warner Bros. had committed to not applying these clauses in existing film licensing contracts for pay-TV with any broadcaster in the European Economic Area (EEA), and had also committed to refraining from (re)introducing such clauses in film licensing contracts for pay-TV with any broadcaster in the EEA. Sky would also neither apply existing clauses nor (re)introduce new ones in its film licensing contracts for pay-TV with Disney, Fox, NBCUniversal, Sony Pictures and Warner Bros.

However, in December 2020, the Court of Justice of the European Union (CJEU) delivered a judgment in Case C-132/19 P *Groupe Canal + v. Commission*, which annulled a related 2016 Commitment Decision which had made commitments binding on Viacom Inc. and Paramount Pictures International Limited (see IRIS 2015-9/1 and IRIS 2019-4/6). The CJEU held that the Commission's decision to make binding an operator's commitment not to apply certain contractual clauses *vis-à-vis* its contracting partner, such as Groupe Canal +, which had only the status of an interested third party, when that contracting partner did not consent to it, constituted an interference with the contractual freedom of that contracting partner, and went beyond the provisions of Article 9 of Regulation No 1/2003. The CJEU concluded that, by adopting the 2016 Decision, the Commission rendered the contractual rights of third parties meaningless, including the contractual rights of Groupe Canal + *vis-à-vis* Paramount, and thereby infringed the principle of proportionality, with the result that the decision at issue must be annulled.

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Following the CJEU's judgment, the Commission stated in its Decision on 31 March 2021, that "[i]n light of the annulment of the 2016 Decision, it is appropriate to withdraw the 2019 Decision, since the scope of the commitments made binding by that Decision are essentially identical to those of the 2016 Decision."

Finally, this brings to a close the antitrust proceedings that began back in 2014 with the Commission's investigation into restrictions affecting cross border provision of pay TV services. Before the withdrawal of the 2019 Decision and closure of the proceedings, Disney, NBCUniversal, Sony Pictures, Warner Bros. and Sky confirmed to the Commission they had no observations on the proposed withdrawal.

European Commission, Case AT. 40023 - Cross-border access to pay-TV, 31 March 2021

https://ec.europa.eu/competition/antitrust/cases/dec_docs/40023/40023_10990_9.pdf

Judgment of the Court (Second Chamber) of 9 December 2020, Case C-132/19 P, Groupe Canal + v European Commission

https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62019CJ0132

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