

ECJ Annuls Paramount Commitments On Cross-Border Pay-TV Restrictions

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On December 9, 2020, the Court of Justice of the European Union granted Canal+’s application to annul the European Commission’s decision under Article 9 of Regulation No. 1/2003 to adopt commitments offered by Paramount (the “Commitments Decision”).¹ The commitments prohibited Paramount from enforcing and complying with contractual clauses that restricted the passive sale of pay-TV subscriptions across borders in the EEA.

The Court of Justice concluded that the Commitments Decision breached the principle of proportionality because, without their agreement, it negated the contractual rights under the passive sales bans of third parties who were not involved in the proceedings (such as Canal+). Prohibiting Paramount from complying with its obligations under the clauses in question undermined those parties’ contractual right to “absolute territorial protection”.²

This is the first time a third party has successfully challenged an Article 9 commitments decision at the EU level, and the judgment marks a departure from the marginal review the Court of Justice adopted in *Alrosa* and *Morningstar*.³ The judgment introduces an important limit on the Commission’s discretion to accept commitments to address potential competition concerns – commitments must not take away the pre-existing contractual rights of third parties who are not part of the proceedings. It also breaks new ground in holding that national courts may not issue judgments finding that behaviour that is the subject of Article 9 commitments is consistent with EU competition law. The overall effect is to render commitments less effective and less attractive where they are intended to regulate provisions in existing contracts with third parties.

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¹ *Groupe Canal+ v Commission* (Case C-132/19 P) EU:C:2020:1007.

² *Ibid.*, para 125.

³ *Commission v Alrosa* (C-441/07) EU:C:2010:377 and *Morningstar v Commission* (Case T-76/14) EU:T:2016:481.



Background

In 2015, the Commission issued a Statement of Objections against six U.S. film studios (NBCUniversal, Paramount, Sony, TWDC, Twentieth Century Fox, and Warner Bros.) and UK broadcaster, Sky. It alleged that certain contractual provisions in the licensing agreements between the studios and Sky restricted cross-border passive sales within the EEA and therefore had, as their object, the restriction of competition within the meaning of Article 101(1) TFEU.

To address the Commission's concerns, Paramount committed:

- not to (re)introduce or enforce any obligation on broadcasters that prevent them from responding to cross-border requests for pay-TV subscriptions ("Broadcaster Obligation"), and
- not to accept or comply with any obligations on itself to impose Broadcaster Obligations in its pay-TV license agreements with other broadcasters ("Studio Obligation").

Canal+ objected to these commitments. It had concluded an exclusive pay-TV licensing agreement for the French market with Paramount in 2014. To protect that exclusivity, its agreement imposed Studio Obligations on Paramount, and Canal+ had in exchange accepted Broadcaster Obligations. Acting on its commitments to the Commission, Paramount notified Canal+ – and its other EEA broadcaster licensees – of its intention to release them from their Broadcaster Obligations and not to honor its Studio Obligations. This affected Canal+'s commercial interests as it was no longer sheltered from cross-border passive sales of pay-TV subscriptions by Sky and other broadcasters into France.

Canal+ brought an action to annul the Commitments Decision before the General Court, which was dismissed on December 12, 2018.⁴ Canal+ appealed the General Court judgment to the Court of Justice. The Court of Justice disagreed with the General Court's finding that there was no disproportionate

interference with third-party rights and annulled the Commitments Decision.

The Court of Justice Judgment

Canal+ invoked four grounds: (i) misuse of the Commission's powers in light of the then-ongoing legislative process relating to the issue of geo-blocking; (ii) breach of the adversarial principle by failing to evaluate Canal+'s argument under Article 101(3) TFEU; (iii) failure properly to examine Canal+'s arguments regarding the appropriate legal and economic context; and (iv) violation of the principle of proportionality by disregarding the implications that the Paramount commitments had for Canal+, which had not been a party to the Commission's investigation.

The Court dismissed the first three grounds of appeal, but agreed with Canal+'s argument that the Commitments Decision violated the principle of proportionality.

The Court referred to the principle established in *Alrosa*: that the principle of proportionality requires the Commission to "*take account of the interests of third parties*" when adopting commitments decisions under Article 9 of Regulation 1/2003.⁵ The Court then continued: "*when the Commission verifies the commitments [...] with regard to their impact on the interests of third parties, the principle of proportionality requires that the rights of which they are holders are not emptied of their substance.*"⁶

Applying these principles, the Court went on to find that the Paramount commitments disproportionately infringed the contractual rights of Canal+ and other third parties. Its decision was based on the following considerations.

- First, Canal+ had not offered the commitments, had not been part of the Commission proceedings, and had not provided any indication that it agreed with the commitments.⁷
- Second, the commitments had the effect of negating Canal+'s existing contractual rights. The commitments obliged Paramount not to

⁴ *Groupe Canal+ v Commission* (Case T-873/16) EU:T:2018:904.

⁵ *Commission v Alrosa* (C-441/07) EU:C:2010:377, para. 41.

⁶ *Groupe Canal+ v Commission* (Case C-132/19 P) EU:C:2020:1007, para. 106.

⁷ *Ibid.*, paras. 107 and 124.

impose and enforce contractual clauses that restricted other broadcasters from selling outside their licensed territory, and into Canal+'s exclusive licensed territory. In doing so, they “automatically entail[ed] that Paramount would not honor certain of its contractual obligations vis-à-vis Canal+”.⁸ The commitments “automatically put into question” Canal+'s contractual right to absolute territorial exclusivity with regard to the licensed content.⁹ Indeed, the Court found that this was the intended effect of the commitments.

- Third, Canal+ was not able to mitigate the impact of the commitments by bringing national proceedings to uphold the validity of the relevant clauses and to obtain damages from Paramount. Although commitments decisions in principle do not have precedential effect, the Court of Justice referred to the duty of national courts to avoid judgments that contradict Commission decisions. This meant that national courts could not oblige Paramount to comply with its contractual obligations or award damages for their breach. More importantly, this meant national courts could not adopt “negative” decisions finding that the relevant conduct by Paramount did not violate Articles 101 and 102 TFEU.¹⁰

In reaching its conclusions, the Court of Justice distinguished the present case from *Alrosa*, where Alrosa had also relied on the principle of proportionality to challenge a commitments

decision.¹¹ In *Alrosa*, De Beers and Alrosa had entered into a purchase agreement that was conditioned on the Commission giving advance negative clearance. The Commission subsequently opened an investigation into the agreement, which De Beers settled by committing to reduce its purchases from Alrosa. The Court explained that the present case involved an interference with pre-existing rights, whereas *Alrosa* concerned future or conditional contractual rights.

Having found that the Commitments Decision breached the principle of proportionality, the Court of Justice exercised its discretion to give a final ruling on the dispute instead of referring the case back to the General Court. The Court of Justice decided that the Commitments Decision should be annulled in its entirety.

Conclusion

The Commission and parties that are seeking to offer commitments will likely need to adapt their approach in future cases. The commitments adopted must not nullify pre-existing contractual rights of third parties who are not part of the proceedings, and the Court of Justice’s reasoning suggests that “rights” should be read broadly, to encompass the essence of the parties’ commercial bargain, and not only explicit contractual provisions. This judgment could mean that commitments will not be available where they implicate existing contractual relations, unless the counterpart(ies) are also party to the Commission

⁸ *Ibid*, para. 107.

⁹ *Ibid*, para. 125.

¹⁰ *Ibid*, paras. 112-113. The national courts’ and competition authorities’ duty not to deviate from a commitments decision arguably only affects the specific conduct subject to the commitments themselves, *i.e.*, that of the parties to the commitments. We do not think that the judgment can be read to mean that the preclusion effect is broader, and that a commitments decision prevents national courts and competition authorities from deviating from the Commission’s theory of harm and upholding similar clauses in agreements between third parties who were *not* part of the Commission’s proceedings. The wording of the Court of Justice’s judgment is ambiguous. The Court reasons that (i) by accepting commitments, the Commission expresses the intention to adopt a decision (while retaining the right to reopen the proceedings), and (ii) under the *Masterfoods* case law and Article 16 of Regulation 1/2003, national

authorities and courts must avoid going against a decision that is “*envisaged*” by the Commission (*Ibid*, para. 112). But this reasoning should not lead to the conclusion that commitments decisions have precedential effect for third party situations. First, recital 13 of Regulation 1/2003 suggests they do not. It provides that commitments decisions are without prejudice to the powers of competition authorities and courts of the Member States to decide upon the case. Second, the *Masterfoods* principle should not apply to deprive national courts and authorities of the right to decide on the agreements and conduct of third parties who have no right to appeal the commitments decision, taking into account that commitments decisions are generally not appealed and not reviewed by the Court of Justice of the European Union (even if the parties who are directly affected can do so in theory), and should not therefore be given the kind of precedential authority accorded to decisions that are subject to judicial scrutiny.
¹¹ *Commission v Alrosa* (C-441/07) EU:C:2010:377.

investigation and sign on to the commitments. Parties may still be able to offer commitments that regulate future relationships and future commercial practices with third parties, even if those third parties are not formally involved in the proceedings.

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