SLAUGHTER AND MAY/

NEWSLETTER

9 – 22 DECEMBER 2020

ISSUE 24

COMPETITION AND REGULATORY NEWSLETTER

European Court of Justice annuls Commission's decision to accept commitments from Paramount Pictures

On 9 December 2020 the European Court of Justice (CJ) annulled a European Commission decision accepting commitments from film studio Paramount Pictures to stop geo-blocking clauses, following an appeal filed by French premium TV channel Groupe Canal+.[1]

In its ruling, the CJ quashed the General Court (GC) judgment from December 2018, which confirmed the Commission decision,[2] and held that the Commission did not appropriately take into account the rights of contracting parties of the film studio, such as Canal+.

BACKGROUND

In July 2015 the Commission sent a statement of objections to US film studios Paramount, Disney, NBC Universal, Warner Bros, Sony and Twentieth Century Fox, as well as TV service Sky UK, in relation to potential restrictions of cross-border pay TV services.

Paramount's licensing agreement with Sky restricted Sky's ability to accept unsolicited requests from consumers outside the UK and Ireland; and required Paramount to include reciprocal provisions in its contracts with broadcasters in other Member States. The Commission took the view that this amounted to absolute territorial exclusivity – a 'by object' anti-competitive agreement under Article 101 TFEU.

Subsequently, Paramount proposed a set of commitments to the Commission, offering to stop using and enforcing geo-blocking clauses. In July 2016 the Commission accepted the remedies.

Canal+, a broadcaster with an exclusive licensing agreement for France, challenged the commitment decision in December 2016. This was initially dismissed in 2018 by the GC.

In May of this year the Advocate General Giovanni Pitruzzella advised the CJ to rule that the Commission did not sufficiently consider the interests of third-party broadcasters when accepting the commitments proposed by Paramount.

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[1] Case C-132/19, *Groupe Canal+ v Commission*, judgment of 9 December 2020.

[2] Case T-873/18, *Groupe Canal+ v Commission*, judgment of 12 December 2018.

FINDINGS

The CJ annulled the Commission's commitments decision, agreeing with Canal+ that the Commission erred in its assessment of the effect of the decision on the contractual rights of third parties. The court noted that the Commission is required to assess proposed commitments not only on the basis of whether they address its competition concerns, but also while considering whether the effect on the rights of third parties is proportionate. The CJ found that the Commission's decision to accept commitments not to apply certain contractual clauses, without the consent of other contracting parties such as Canal+, interfered with the contractual freedom of that contracting partner and rendered their contractual rights meaningless.

The GC had held that this issue was resolvable because contracting partners could ask national courts to enforce their contractual rights. However, the CJ ruled that the GC erred in making this finding because, under Article 16 of Regulation 1/2003, national courts cannot adopt decisions contrary to an earlier Commission decision on the matter, and therefore national courts could not declare the relevant clauses to be lawful.

The CJ rejected the other grounds of appeal. Canal+ had argued that the Commission misused its powers in accepting commitments on geo-blocking while at the same time the European Parliament was working on legislation allowing the clauses to be maintained. The CJ agreed with the GC that, provided the legislative process relating to geo-blocking has not led to the adoption of a legislative text, that process does not affect the Commission's powers regarding penalties for anti-competitive conduct.

The court also dismissed a claim by Canal+ that the relevant clauses were lawful and did not breach the prohibition on anti-competitive agreements in Article 101(1) TFEU. The CJ held that the Commission was entitled to find that clauses which conferred, on broadcasters, absolute territorial protection guaranteed by reciprocal obligations gave rise, on a preliminary analysis, to competition concerns.

Moreover, the CJ agreed with the GC that the relevant clauses could validly raise competition concerns for the Commission in relation to the whole of the EEA, without the Commission being obliged to analyse each relevant national market. Since the relevant clauses were intended to partition national markets, the GC correctly observed that such agreements could jeopardise the proper functioning of the single market, regardless of the prevailing situation in the national markets.

CONCLUSION

The Commission must now decide how to proceed with Paramount and the other film studios. There remains the possibility that the Commission will now seek to re-open the proceedings which were abandoned when the commitments were accepted.

More generally, the Commission in future may now look more closely at proposed commitments which affect the contractual rights of third parties, including through more extensive information requests. It remains to be seen whether a potentially more burdensome process for the Commission is likely to have any bearing on the Commission's willingness to pursue commitments in lieu of proceeding with a full investigation and infringement decision.

OTHER DEVELOPMENTS

MERGER CONTROL

SAMR FINES GUN-JUMPING VIE DEALS FOR THE FIRST TIME

The Chinese State Administration of Market Regulation (SAMR) has imposed the maximum fine of CNY 500,000 (c. €63,000) on three large Chinese tech-related companies, namely Alibaba Investment, Tencent-backed China Literature, and SF Express-affiliated Hive Box in three landmark gun-jumping cases involving a variable interest entity (VIE)

structure. The unique structure of VIEs enables Chinese businesses to obtain offshore financing (e.g. through foreign listings) and non-PRC investors to sidestep foreign investment restrictions in China.

There are several important points to note regarding these penalty decisions:

- **VIEs are no longer 'flying under the radar'**. Historically, transactions involving the VIE structure were rarely notified to SAMR because SAMR (and its predecessor MOFCOM) would not review them due to their dubious legal status. It was only recently that SAMR publicly accepted and unconditionally cleared the first case involving a VIE structure, but recent draft Anti-monopoly Guidelines for the Platform Economy, which were published for consultation in November 2020 (for further details, see a previous edition of our newsletter) made it clear that VIE-related transactions are subject to the merger notification obligation. These three penalty decisions are a strong reinforcement of that message.
- **Maximum fine imposed for the first time**. SAMR imposed the maximum fine to reflect the severity of deliberate gun-jumping and its concerns over the companies' significant influence in the market. SAMR also found the companies' access to professional legal teams to be an aggravating factor. However, as SAMR found no anti-competitive effect in all three cases, it did not need to seek to unwind these transactions.
- **In line with the trend of strengthened antitrust enforcement**. SAMR remarked that the Anti-monopoly Law (AML) applies to all sectors regardless of the type of entity or whether the VIE structure is present. Other steps to increase enforcement include the proposed amendment to the AML to raise the maximum gun-jumping penalty to 10 per cent of the undertaking's turnover in the previous fiscal year to deter recalcitrant parties, and consultation on the proposed Anti-monopoly Guidelines for the Platform Economy.

Further details on these cases are available in our recent briefing on these three SAMR penalty decisions.

ANTITRUST

GENERAL COURT RULES THAT INTERNATIONAL SKATING UNION ELIGIBILITY RULES ARE ANTI-COMPETITIVE

The General Court (GC) has made a ruling for the first time on a Commission decision finding that the rules of a sports federation breach EU competition law. It has confirmed that the rules of the International Skating Union (ISU), which provided severe penalties for athletes taking part in speed skating events not recognised by it, are contrary to EU competition law.

The judgment relates to ISU rules which exposed skaters who took part in unauthorised competitions to a lifetime ban from any ISU organised competition. Following a complaint by two Dutch professional speed skaters, the Commission investigated the ISU's rules and found in December 2017 that the eligibility rules were incompatible with Article 101 TFEU. It found that the object of the rules was to restrict the freedom of professional skaters to participate in events organised by other parties, thereby depriving those other parties of the services of the athletes needed for such competitions to take place. The Commission ordered the ISU to end the infringement, but did not impose a fine.

The ISU appeal against this decision has been unsuccessful. The GC acknowledged ISU's regulatory function whereby it can adopt rules for its relevant discipline and authorise competitions. However, the court explained that the ISU must ensure when examining applications for authorisation that third party organisers of competitions are not unduly deprived of access to the relevant market. The GC also noted that the eligibility rules provided ISU broad discretion to authorise competitions by third parties, without clear legitimate objectives for the restrictions. Further, the GC found that the severity of the penalties was disproportionate. Although the protection of the integrity of sport is a legitimate objective recognised in Article 165 TFEU, the GC concluded that the rules went beyond what was necessary to achieve this objective. In the light of all these considerations, the GC concluded that "*the Commission was right to conclude that the eligibility rules have as their object the restriction of competition. In the light of their content and their*

objectives, and of the context of the eligibility rules, those rules reveal a sufficient degree of harm to be regarded as restricting competition by object within the meaning of Article 101 TFEU".[3]

The ISU was however successful in its claims for annulment of some of the corrective measures. The Commission had required a substantial modification to the ISU arbitration rules in the event that the pre-authorisation system was retained. The Commission had considered the ISU arbitration rules to be an aggravating circumstance as they conferred on the Court of Arbitration for Sport in Lausanne exclusive jurisdiction to hear appeals against ineligibility decisions and made such arbitration binding. As a result of these rules, the Commission increased the penalty imposed on the ISU. The GC noted that only unlawful conduct can justify an increase in a penalty and therefore the Commission was not entitled to consider the ISU arbitration rules to be an aggravating circumstance. The GC therefore partially annulled the Commission decision as regards the corrective measures imposed on the ISU. The GC issued a press release in which it summarises its findings.

REGULATORY

EUROPEAN COMMISSION AND CMA STEP UP ON DIGITAL MARKETS

Both the European Commission and the UK Competition and Markets Authority (CMA) have recently published documents indicating significant reform in digital markets regulation.

On 15 December 2020 the Commission announced draft rules relating to digital services - the draft Digital Markets Act (DMA) and the draft Digital Services Act (DSA). The DMA proposes, *inter alia*, that "*digital gatekeeper*" firms should be subject to new *ex ante* regulation, requiring that they comply with new rules of conduct which the Commission states aim to encourage digital innovation. Furthermore, the DMA will impose sanctions for non-compliance, which could include fines of up to 10 per cent of the gatekeeper's worldwide turnover, to ensure the effectiveness of the new rules. The DSA focuses on EU rules that will regulate content on digital platforms such as excluding illegal goods online as well as safeguarding users whose content may be deleted.

The CMA also published the advice of its Digital Markets Taskforce to the UK government on the design and implementation of a pro-competitive regime for digital markets. The report recommends that the government sets up a Digital Markets Unit housed by the CMA from April 2021 to oversee the implementation and enforcement of the newly proposed digital markets regime. The CMA recommends a regulatory framework targeted at the most powerful digital firms, termed as SMS firms, i.e. firms with "*Strategic Market Status*", to which an *ex ante* regime would be applied.

These proposals are discussed in more detail in The Lens, the Slaughter and May blog on Digital Developments: see our Lens blog post on the Commission's new Digital Services Package and our Lens blog post on the CMA's advice.

[3] Case T-93/18, *International Skating Union v European Commission*, judgment of 16 December 2020, para. 120.

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