SLAUGHTER AND MAY

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Commission seeks feedback on commitments offered by Disney in pay-TV investigation

On 25 November 2018 Disney offered commitments to address competition concerns raised by the European Commission in its investigation into contractual clauses that prevent or limit cross-border access to retail pay-TV services. Disney's offer follows a Statement of Objections (SO) issued in July 2015 by the Commission to Sky UK, Disney and five other major US film studios (Paramount Pictures, NBC Universal, Sony, Twentieth Century Fox, and Warner Bros). The Commission is now seeking feedback on whether to accept the commitments offered by Disney and therefore to close the investigation on the basis that - subject to compliance with the commitments - the Commission's concerns have been resolved.

Background

Following the Commission's launch of formal antitrust proceedings in January 2014,[1] the July 2015 SO set out the Commission's preliminary view that each of the studios concerned had violated Article 101 of the Treaty on the Functioning of the European Union (TFEU) by bilaterally agreeing to block unsolicited requests from consumers located in the European Economic Area (EEA) but outside Sky UK's licensed territory (the UK and Ireland) from accessing Sky UK's retail pay-TV services.[2]

In Disney's case, the Commission's preliminary view, as expressed in the SO, was that:

- a clause in Disney's agreement with Sky UK prevents or limits Sky UK from responding to unsolicited requests from consumers residing and located in the EEA but outside the UK and Ireland; and

[1] The Commission's formal antitrust proceedings were also brought against the six studios, and four major European pay-TV broadcasters (Canal Plus, Sky Italia, Sky Deutschland, and DTS).

[2] To some extent, these restrictions emanate from the structure of the broadcasting industry. Audio-visual content, such as films, is generally licensed to pay-for-TV broadcasters by film studios on an exclusive and territorial basis, i.e. a single pay-for-TV broadcaster is licensed in each Member State or a group of Member States with a common language.

- that clause has as its object the restriction of competition within the meaning of Article 101(1) TFEU and cannot benefit from an exemption under Article 101(3) TFEU.

The Commission's concern was that these clauses effectively grant absolute territorial exclusivity to Sky UK, eliminating competition between broadcasters and partitioning the market along national borders. This follows the principle established in *Premier League v Murphy*,[3] in which the (European) Court of Justice held that licensing provisions that prevent a satellite broadcaster from allowing access to its live broadcasts (which were not subject to copyright) from outside its licensed area restricted competition contrary to Article 101 TFEU, which extended to online broadcast services.

Proposed commitments

Parties involved in antitrust proceedings may offer commitments to resolve the Commission's concerns.[4] Until Disney's offer, only Paramount Pictures availed itself of this option. Paramount Pictures's commitments were accepted by the Commission and made legally binding in July 2016, bringing proceedings against Paramount Pictures to a close. We covered this development in a **previous edition** of our Competition Newsletter.

Like Paramount Pictures, Disney disagrees with the Commission's concerns but it has nevertheless offered the following commitments:

- when licensing film output for pay-TV to a broadcaster in the EEA, Disney will not (re)introduce contractual obligations which prevent or limit a pay-TV broadcaster from responding to unsolicited requests from EEA consumers outside the licensed territory; and
- Disney will not seek to enforce, act upon or initiate proceedings in relation to the breach of such contractual obligations where they are contained in an existing agreement licensing its film output with pay-TV broadcasters in the EEA.

The commitments offered by Disney cover both satellite and online broadcast services. These include standard pay-TV services and, to the extent they are included in the licence with the broadcaster, subscription video-on-demand services.

Disney's breakaway

Disney has offered commitments that are very similar to those **offered** by Paramount Pictures and **accepted** by the Commission over two years ago. This is a striking breakaway from the united front that the remaining five studios under investigation had maintained ever since Paramount Pictures entered into talks with the Commission about possible commitments.

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[3] Cases C-429/08 and C-403/08 FA *Premier League v Murphy and others*, judgment of 4 October 2011.

[4] This process is governed by Article 9 of Regulation 1/2003.

It will be interesting to see whether the remaining four studios will continue to fight the Commission's case, or look to offer commitments to end this long running investigation.

Next steps

The Commission has given interested third parties to 9 December 2018 to give feedback on the commitments. If the Commission subsequently approves the commitments, they will apply throughout the EEA for a period of five years, during which time Disney has agreed to appoint a monitoring trustee to monitor its compliance.

The Commission's investigation continues into Sky UK and the remaining studios which are still fighting the SO.[5]

Other developments

Merger control

European Commission approves the creation of six joint ventures by Daimler and BMW, subject to conditions

On 7 November 2018 the European Commission announced that it has cleared the creation of six joint ventures (JVs) by Daimler AG (Daimler) and BMW Group (BMW), subject to conditions. The six JVs will combine Daimler and BMW's mobility services in five business fields, namely free-floating car sharing services, via DriveNow (BMW) and car2go (Daimler); ride hailing services; parking services; charging services; other on-demand mobility services; with the sixth JV managing the brands and licences to the other five JVs.

In its investigation, the Commission found that the parties' activities overlap significantly in the market for free floating car services.[6] This overlap raised competition concerns in six European cities, namely in Berlin, Cologne, Düsseldorf, Hamburg, Munich and Vienna, due to a limited number of alternative providers of car-sharing services. The Commission considered the competitive restraints employed by other methods of transportation, such as station-based car sharing (restricting cars to specific drop-off "stations") or public transport. It also considered that free-floating car sharing is a new and growing form of urban mobility, and that many players have plans or intentions to start operations in the cities concerned.

[5] The Commission's investigation also continues into concerns regarding the licensing terms between all six studios and four major European TV broadcasters (Canal Plus, Sky Italia, Sky Deutschland, and DTS).

[6] Free-floating car sharing is a new mobility solution allowing customers to pick up and drop off a car anywhere within a delimited zone, usually in urban areas, using authorised parking spaces such as public parking spots

In addition, the Commission, when looking into the vertical relationships arising from the merging companies' activities, determined that Daimler and BMW would have the ability and incentive to shut out (i) rival car sharing providers; and (ii) rival providers of integrator apps (which aggregate and display multiple transport options, such as free-floating car sharing) to the benefit of Daimler's own app, "moovel".

The parties offered to comply with a two-fold remedies package in the six relevant cities, which fully satisfied the Commission's concerns: (i) to grant application programming interface (API) access to third party aggregator platforms for mobility solutions, so that they can also re-direct users to Daimler and BMW's car sharing services; and (ii) to grant access to Daimler's "moovel" integrator app to interested car sharing providers.

Antitrust

CMA finds comparison site's home insurance contracts could break competition law

Following a market study into digital comparison tools, which concluded in September 2017, the Competition and Markets Authority (CMA) opened an investigation into the use of certain retail "most favoured nation" (MFN) clauses by ComparetheMarket in contracts with home insurance companies. On 2 November 2018 the CMA issued a "statement of objections", setting out its provisional view that the MFN clauses break competition law.

The CMA provisionally found that the clauses stop insurers from quoting lower prices on rival comparison sites and other channels. The clauses therefore prevent these sites and channels from trying to win home insurance customers by offering cheaper prices than ComparetheMarket. As a result, customers could be missing out on better home insurance deals. According to the CMA, home insurance companies are also more likely to pay higher commission rates to comparison sites, with a risk that the extra costs are passed on to customers.

ComparetheMarket now has an opportunity to prepare a response, which the CMA will consider along with any further evidence before reaching its final decision.

European Commission issues roadmap for review of VABER

The European Commission is inviting comments on the functioning of the Vertical Agreements Block Exemption Regulation (VABER). The VABER exempts certain vertical agreements from the application of Article 101(1) TFEU. The Commission is seeking feedback on whether it should allow the VABER to lapse (on expiry in 2022), prolong its duration, or revise it to take proper account of new market developments since its adoption in 2010 (in particular, the increased importance of online sales and the emergence of online platforms).

The review builds on the Commission's Digital Single Market strategy and follows its e-commerce sector inquiry launched in 2015, which concluded that the growth of e-commerce has resulted in the emergence and evolution of certain business practices that raise competition concerns. Our prior briefings on this topic can be found here and here.

The Commission has published a roadmap which sets out the criteria against which the Commission will evaluate the VABER, as well as the key stages in the process. The deadline for feedback is 6 December 2018, with a public consultation period planned for the first quarter of 2019.

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