

# Competition & Regulatory Newsletter

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On 13 March 2019 the Digital Competition Expert Panel published its report on competition policy in the digital economy. For a detailed analysis, please see our **upcoming briefing on the topic.**

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## European Commission accepts commitments by Disney, NBCUniversal, Sony Pictures, Warner Bros. and Sky UK on cross-border pay TV services

On 7 March 2019 the European Commission **made binding** a set of commitments offered by Disney, NBCUniversal, Sony Pictures, Warner Bros. and Sky UK on cross-border pay TV services, to address the Commission's concerns regarding certain clauses in these studios' film licensing contracts with Sky UK for pay TV. The decision ends the Commission's long-running investigation into cross-border pay TV services involving Sky UK on the basis that - subject to compliance with the commitments - the Commission's concerns have been resolved.

### Background and Commission concerns

The Commission **opened** formal proceedings on 13 January 2014.<sup>1</sup> In July 2015 it **issued** a Statement of Objections (SO) to Sky UK and six US film studios<sup>2</sup> setting out its preliminary view that each of the studios concerned had violated Article 101 of the Treaty on the Functioning of the European Union (TFEU) by agreeing bilaterally with Sky UK to block unsolicited requests (so-called "passive sales") from consumers located in the European Economic Area (EEA) but outside Sky UK's licensed territory (the UK and Ireland) through its online pay TV services (so-called "geo-blocking") or through its satellite pay TV services.<sup>3</sup>

The specific contractual provisions with which the Commission took issue required Sky UK to block access to the studios' audio-visual content through its pay TV services to consumers residing and located outside the UK and Ireland, and required studios to ensure that non-UK broadcasters were prevented from making their pay TV services available in the UK and Ireland.

For further information on any competition related matter, please contact the **Competition Group** or your usual Slaughter and May contact.

<sup>1</sup> The Commission's formal antitrust proceedings were also brought against four other major European pay TV broadcasters (Canal+ of France, Sky Italia, Sky Deutschland and DTS of Spain). On 23 July 2015 the Commission launched a formal investigation into Disney.

<sup>2</sup> The Commission addressed its SO to Sky UK and six major US film studios: Disney, NBCUniversal, Paramount Pictures, Sony, Twentieth Century Fox and Warner Bros.

<sup>3</sup> To some extent, these restrictions emanate from the structure of the broadcasting industry. Audio-visual content, such as films, is generally licensed to pay TV broadcasters by film studios on an exclusive and territorial basis, i.e. a single pay TV broadcaster is licensed in each Member State, or group of Member States with a common language.

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The Commission's concern was that these clauses effectively granted absolute territorial exclusivity to Sky UK, eliminating cross-border competition between pay TV broadcasters and partitioning the internal market along national borders. This follows the principle established in *Premier League v Murphy*,<sup>4</sup> 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.

In July 2016 the Commission accepted commitments offered by Paramount Pictures, which were very similar to those now offered by the remaining parties. For over two years, until [Disney offered commitments](#) in November 2018, followed by [NBCUniversal, Sony Pictures, Warner Bros. and Sky UK](#) in December 2018, all parties except Paramount Pictures had continued to oppose the Commission's SO. We covered the Commission's call for feedback on [Paramount's](#) and [Disney's commitments](#) in previous editions of our Competition Newsletter.

### Legally binding commitments

Parties involved in antitrust proceedings may offer commitments to resolve the Commission's concerns.<sup>5</sup> Disney, NBCUniversal, Sony Pictures and Warner Bros. offered the following commitments, which the Commission accepted following market testing:

- when licensing its film output for pay TV to a broadcaster in the EEA, each committing studio will not (re)introduce contractual obligations preventing the broadcaster from providing passive sales to EEA consumers outside that broadcaster's licensed territory, or obligations requiring the studios to prevent other EEA pay TV broadcaster from providing passive sales to consumers located in the licensed territory; and
- each committing studio will not seek to enforce, act upon or initiate proceedings in relation to the breach of such contractual obligations where they are contained in existing agreements licensing the output to pay TV broadcasters in the EEA.

Similarly, Sky UK offered the following commitments, which the Commission accepted following market testing:

- Sky will not (re)introduce these contractual obligations in agreements licensing the output for pay TV of Disney, NBCUniversal, Paramount Pictures, Sony Pictures, Twentieth Century Fox and Warner Bros.; and
- Sky will not seek to enforce or honour these obligations in such agreements.

The commitments will apply throughout the EEA for a period of five years. They cover both satellite and online broadcast services. These include standard pay TV services and, to the extent relevant under the licence, subscription video-on-demand services. Current and future subsidiaries of the committing parties

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<sup>4</sup> Cases C-429/08 and C-403/08 *FA Premier League v Murphy and others*, judgment of 4 October 2011.

<sup>5</sup> This process is governed by Article 9 of Regulation 1/2003.

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are covered by the commitments, which means that the commitments will also apply to Twentieth Century Fox after it is acquired by Disney.

Non-compliance with the commitments may result in a fine of up to 10 per cent of worldwide turnover. This can be imposed without the Commission having to prove an infringement of EU antitrust rules.

### Impact of the Paramount decision

It is worth noting that the final set of commitments came shortly after the European General Court (GC) rejected a challenge by Canal+, one of Paramount's contracting parties, to the Commission's decision to accept Paramount Pictures' commitments.<sup>6</sup> In this judgment, the GC confirmed that even though a copyright holder may grant to a sole licensee the exclusive right to broadcast from a single Member State, when the agreements concluded by the copyright holder contain clauses under which the holder is thereafter required to prohibit all its contracting partners on the EEA market from making passive sales to geographic markets situated outside the Member State in respect of which it grants them an exclusive licence, those clauses confer a contractually specified absolute territorial exclusivity and thereby infringe Article 101(1) TFEU. The GC also noted that nothing prevents a copyright holder from negotiating a payment that takes account of the potential audience both in the Member State for which the exclusive licence is granted and in any other Member State in which the relevant broadcasts are received.

### The end of geo-blocking?

TV broadcasters should now be able to make passive sales to EEA customers located outside their licensed territory. However, it remains to be seen what the implications will be in practice. As noted by the Commission, the commitments do not affect the rights of the studios or pay TV broadcasters to decide unilaterally to employ geo-filtering technology.

## Other developments

### Merger control

#### CMA imposes first ever unwinding order to reverse pre-emptive integration

The Competition and Markets Authority (CMA) has for the first time imposed an [order](#) to unwind pre-emptive integration between parties to a merger. The order, imposed on 28 February 2019, relates to the CMA's ongoing investigation into Tobii AB's completed acquisition of Smartbox Assistive Technology Limited and Sensory Software International Ltd.

The CMA referred the acquisition to Phase 2 on 8 February 2018, and issued an interim order on 18 February 2019. The unwinding order addresses pre-emptive steps taken by the parties prior to this interim

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<sup>6</sup> Case T-873/16 *Groupe Canal + v Commission*, judgment of 12 December 2018.

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order - namely the conclusion of a reseller agreement and Smartbox's discontinuation of several hardware products and development projects in the run up to the deal.

The CMA found that these pre-emptive actions could prejudice its investigation and may impede the taking of any related action by the CMA. The unwinding order requires the parties to terminate the reseller agreement and compels Smartbox to supply the discontinued products and reinstate its development projects. The deadline for the Phase 2 investigation to complete is 25 July 2019.

### China fines three companies for gun-jumping

China's State Administration for Market Regulation (SAMR) recently published three penalty decisions against companies<sup>7</sup> for failure to seek clearance before completing transactions that were subject to a mandatory notification requirement under the Antimonopoly Law of the People's Republic of China (AML).

The cases involved acquisitions of a majority shareholding and the creation of a 50:50 joint venture involving domestic business within China. SAMR imposed fines on the acquiring entities, including both domestic companies and a Hong Kong incorporated company. In each case, SAMR found that the parties completed the relevant acquisitions without notifying SAMR, despite the fact that the relevant turnover thresholds were met. SAMR imposed penalties ranging from RMB200,000 (approximately £22,565) to RMB300,000 (approximately £33,850). Under the AML, SAMR has powers to impose a fine of up to RMB500,000 (approximately £56,410), cease implementation and, in the extreme case, order the parties to unwind transactions.

It is noteworthy that, in the case of Overseas Hong Kong Investment Limited, SAMR's investigation commenced on 23 March 2018, almost two years after the transaction completed on 23 May 2016. This demonstrates that the risk of SAMR gun-jumping investigation may linger for a significant period of time after completion and that businesses should be alert to the SAMR's willingness to investigate past gun-jumping infringements. In addition, SAMR's investigations may be lengthy; in the above cases the formal investigations reportedly took around 7 to 11 months.

## State aid

### European Court of Justice sets out responsibilities of aid recipients

In [response to a preliminary ruling request](#), the European Court of Justice (CJ) has held that State aid recipients have a responsibility to undertake their own assessment as to whether aid is lawfully granted.

In October 2008 the Estonian Foundation for the Development of Business (EAS) granted aid to an Estonian company, Eesti Pagar, in connection with its purchase of a bread production line. The EAS approved this application on the assumption that, had the aid not been provided, Eesti Pagar would not otherwise have made the investment. As such, the aid had the inducing effect required to grant funds under the then

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<sup>7</sup> Enforcement [decision](#) against Jiangsu Dewei Advanced Materials (No. 1 of 2019); Enforcement [decision](#) against Inly Media (No. 2 of 2019); Enforcement [decision](#) against Overseas Hong Kong Investment Limited (No. 3 of 2019).

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applicable block exemption rules (which exempted the Member State from its obligation to notify the aid to the European Commission).<sup>8</sup> However, EAS later discovered that Eesti Pagar had contracted to purchase the production line prior to its aid application (in August 2008). EAS therefore sought to recover the funds. Eesti Pagar challenged the recovery decision.

The Estonian Court dealing with the challenge referred a number of questions to the CJ, including whether an authority that grants aid unlawfully on the mistaken assumption that the block exemption rules were met creates a legitimate expectation on the part of the aid recipients. Answering in the negative, the Court held that: *“the principle of the protection of legitimate expectations cannot be relied upon against an unambiguous provision of EU law; nor can the conduct of a national authority responsible for applying EU law, which acts in breach of that law, give rise to a legitimate expectation on the part of an economic operator of beneficial treatment contrary to EU law”*.

Furthermore, with regard to the limitation period applicable to the recovery of the unlawful aid, the CJ held that *“it is primarily the duty of the [aid applicant] to ensure that it satisfies the [block exemption] conditions”*. The granting of aid contrary to those conditions could therefore not be considered an error exclusively committed by the national authority and as such a duty arose on the part of recipients themselves to assess the legality of State aid received.<sup>9</sup>

Brussels	London	Hong Kong	Beijing
T +32 (0)2 737 94 00	T +44 (0)20 7600 1200	T +852 2521 0551	T +86 10 5965 0600

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<sup>8</sup> Commission Regulation 800/2008 (General block exemption regulation) required that, to be granted under the exemption, State aid must have an incentive effect.

<sup>9</sup> In this instance, recovery related to aid financed from EU structural funds and was sought by a Member State rather than the Commission. As such a limitation period of four years, rather than the usual 10 years, would apply (provided the other conditions of Regulation 2988/95 on the protection of the European Communities' financial interests were fulfilled).