Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

12 December 2018 *

(Competition — Agreements, decisions and concerted practices — Television distribution — Decision making commitments binding — Territorial exclusivity — Preliminary evaluation — Effect on the contractual rights of third parties — Proportionality)

In Case T-873/16,

Groupe Canal + SA, established in Issy-les-Moulineaux (France), represented by P. Wilhelm, P. Gassenbach and O. de Juvigny, lawyers,

applicant,

supported by

French Republic, represented by D. Colas, J. Bousin, E. de Moustier and P. Dodeller, acting as Agents,

by

Union des producteurs de cinéma (UPC), established in Paris (France), represented by É. Lauvaux, lawyer,

by

C More Entertainment AB, established in Stockholm (Sweden), represented by L. Johansson and A. Acevedo, lawyers,

and by

European Film Agency Directors — EFADs, established in Brussels (Belgium), represented by O. Sasserath, lawyer,

interveners,

v

European Commission, represented by A. Dawes, C. Urraca Caviedes and L. Wildpanner, acting as Agents,

defendant,

supported by

* Language of the case: French.

Bureau européen des unions de consommateurs (BEUC), established in Brussels, represented by A. Fratini, lawyer,

intervener,

APPLICATION under Article 263 TFEU for annulment of the Commission Decision of 26 July 2016 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.40023 — Cross-border access to pay-TV), making legally binding the commitments given by Paramount Pictures International Ltd and Viacom Inc., in the context of the licensing agreements on audiovisual content which they concluded with Sky UK Ltd and Sky plc,

THE GENERAL COURT (Fifth Chamber),

composed of D. Gratsias (Rapporteur), President, A. Dittrich and I. Ulloa Rubio, Judges,

Registrar: M. Marescaux, Administrator,

having regard to the written part of the procedure and further to the hearing on 14 September 2018,

gives the following

Judgment

Background to the dispute

1 On 13 January 2014, the European Commission opened an investigation into possible restrictions affecting the provision of pay-TV services in the context of licensing agreements between six United States studios and the main paid-for content broadcasters in the European Union.

2 On 23 July 2015, the Commission sent a statement of objections to Paramount Pictures International Ltd, established in London (United Kingdom), and to Viacom Inc., established in New York (New York, United States), the parent company of the former (together 'Paramount'). In that statement of objections, the Commission set out its preliminary finding concerning the compatibility with Article 101 TFEU and Article 53 of the Agreement on the European Economic Area (EEA) of certain clauses in the licensing agreements which Paramount had concluded with Sky UK Ltd and Sky plc (together 'Sky').

3 In the context of its investigation, the Commission focused on two related clauses in those licensing agreements. The purpose of the first clause was to prohibit Sky from responding favourably to unsolicited requests from consumers residing in the EEA but outside the United Kingdom and Ireland to purchase television distribution services, or to limit the possibility of its responding favourably to such requests. The second clause required Paramount, in the context of the agreements which it concluded with broadcasters established in the EEA but outside the United Kingdom, to prohibit those broadcasters from responding favourably to unsolicited requests from consumers residing in the United Kingdom or Ireland to purchase television distribution services, or to limit the possibility of their responding favourably to such requests.

4 By decision of the hearing officer in certain competition proceedings of 24 November 2015, the applicant, Groupe Canal +, was allowed to participate in the proceedings as an interested other person for the purposes of Article 13(1) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 and 102 TFEU] (OJ 2004 L 123, p. 18).

5 By letter of 4 December 2015, entitled 'Information on the nature and subject matter of the procedure in accordance with Article 13(1) of Regulation (EC) No 773/2004', the Commission communicated to the applicant, in particular, its legal assessment concerning the application of Article 101 TFEU to the facts of the present case, followed by a preliminary conclusion in that respect. According to that preliminary conclusion, the Commission intended to adopt a decision addressed to Sky and to each of the studios covered by its investigation finding that they had infringed Article 101 TFEU and Article 53 of the EEA Agreement, imposing fines on them and ordering them to bring the infringement to an end and to refrain from any measure capable of having a similar object or effect.

6 On 15 April 2016, Paramount proposed commitments in order to address the Commission's competition concerns in accordance with Article 9 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1). After receiving observations from other interested persons, including the applicant, the Commission adopted the Decision of 26 July 2016 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.40023 — Cross-border access to pay-TV) ('the contested decision').

7 It is apparent from Article 1 of the contested decision that the commitments as listed in the annex to that decision are to be binding on Paramount and its successors and subsidiaries for a period of five years from the date of notification of that decision.

8 The ninth paragraph of Clause 1 of the annex to the contested decision sets out various types of clauses forming the subject matter of the procedure ('the relevant clauses'). As regards satellite transmission, the relevant clauses are the first clause, according to which reception in territories other than the licensed territory (overspill) is not to constitute a breach of contract by the broadcaster if the broadcaster has not knowingly authorised that reception, and the second clause, according to which reception in the licensed territory is not to constitute breach of contract by Paramount if Paramount has not authorised the availability of a third party's descrambling devices in that territory. Furthermore, as regards internet transmission, the relevant clauses are, first, the clause requiring broadcasters to prevent the downloading or streaming of audiovisual content outside the licensed territory; second, the clause according to which internet overspill in the licensed territory is not to constitute a breach of contract by Paramount if Paramount has required broadcasters to use technologies to prevent such overspill; and, third, the clause according to which internet overspill outside the licensed territory is not to constitute a breach of contract by the broadcaster if the broadcaster uses technology to prevent such overspill.

9 It is also apparent from the third paragraph of Clause 1 of the annex to the contested decision that 'Broadcaster Obligation' is to mean the relevant clauses or equivalent clauses preventing a broadcaster from responding to unsolicited requests from consumers residing in the EEA but outside the territory for which the broadcaster has a broadcasting right. Similarly, 'Paramount Obligation' is to mean the relevant clauses or equivalent clauses requiring Paramount to prohibit broadcasters located in the EEA but outside the territories for which a broadcaster has exclusive rights from responding to unsolicited requests from consumers residing in those territories.

10 According to Clause 2 of the annex to the contested decision, from the date of notification of the contested decision, Paramount is to be subject to various commitments. First of all, Paramount is not to enter into, renew or extend the application of the relevant clauses in the context of licensing agreements as defined in that annex (point 2.1). Next, as regards existing Pay-TV Output Licence Agreements, Paramount is not to seek to enforce broadcasters' obligations before a court or tribunal (point 2.2(a)). As regards those agreements, it is not directly or indirectly to honour or enforce the 'Paramount Obligation' (point 2.2(b)). Last, it is to notify Sky within 10 days from notification of the contested decision, and any other broadcaster in the EEA within one month of notification of that decision, that it will not seek to enforce the relevant clauses as against broadcasters (point 2.3).

11 The applicant had concluded a Pay Television Agreement with Paramount that entered into force on 1 January 2014 ('the agreement of 1 January 2014'). Article 12 of that agreement provides that the territory covered by the agreement consists of 'exclusive' territories, covering in particular France, and a 'non-exclusive' territory, covering Mauritius. Article 3 of the agreement of 1 January 2014 provides, moreover, that Paramount will not itself exercise or authorise a third party to exercise retransmission rights to the exclusive territories. Annex A.IV to that agreement specifies the obligations borne by the applicant as regards the use of geo-filtering technologies to prevent retransmission outside the licensed territories.

12 By letter of 25 August 2016, Paramount notified the applicant of the commitment in point 2.2(a) of the annex to the contested decision (see paragraph 10 above) and, consequently, stated that it would not bring legal proceedings against the broadcaster to enforce the relevant clauses and that it waived any obligation of the broadcaster under the relevant clauses. Paramount was also careful to stipulate, in that letter, that the expression 'broadcaster obligation' had the same meaning as that set out in the annex to the contested decision. By letter of 14 October 2016, the applicant replied to that notification and emphasised that commitments entered into in a procedure involving only the Commission and Paramount could not be enforced against it.

Procedure and forms of order sought

13 By application lodged at the Court Registry on 8 December 2016, the applicant brought the present action.

14 By order of 13 July 2017, *Groupe Canal* + v *Commission* (T-873/16, not published, EU:T:2017:556), le Bureau européen des unions de consommateurs (BEUC) was granted leave to intervene in support of the Commission. By the same order, the Union des producteurs de cinéma (UPC), the European Film Agency Directors (EFADs) and C More Entertainment AB were granted leave to intervene in support of the form of order sought by the applicant. In addition, by decision of the President of the Fifth Chamber of the General Court of 13 July 2017, the French Republic was granted leave to intervene in support of the form of order sought by the applicant.

15 In the context of the measures of organisation of procedure, the applicant was requested, on 2 May 2018, to answer a written question; it complied with that request on 15 May 2018.

16 The applicant and C More Entertainment claim that the Court should:

– annul the contested decision;

– in the alternative, annul the contested decision in so far as it relates to the French market and the applicant's contracts;

– order the Commission to pay the costs.

17 The French Republic submits that the Court should annul the contested decision.

18 UPC submits that the Court should:

– annul the contested decision;

– in the alternative, annul the contested decision in so far as it relates to the French market;

– order the Commission to pay the costs.

19 EFADs submits that the Court should:

– annul the contested decision;

– in the alternative, annul the contested decision in so far as it relates to the French market and the contracts in force and future contracts concluded with the applicant;

– order the Commission to pay the costs.

20 The Commission contends that the Court should:

– dismiss the action;

– order the applicant, the French Republic, EFADs, UPC and C More Entertainment to pay the costs.

21 BEUC submits that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Law

Preliminary observations

22 In support of its action, the applicant raises four pleas in law, alleging, first, a manifest error of assessment as regards the compatibility of the relevant clauses with Article 101 TFEU and the effects of the commitments imposed; second, infringement of Article 9 of Regulation No 1/2003 as regards the identification of the concerns addressed by the commitments imposed; third, breach of the principle of proportionality; and, fourth, misuse of powers.

23 As explained in paragraph 11 above, the applicant entered into a television distribution agreement with Paramount, namely the agreement of 1 January 2014, which contained clauses equivalent to the relevant clauses. As the applicant made clear in answer to a measure of organisation of procedure, the obligation for Paramount to prohibit broadcasters situated in the EEA, but outside the territories for which the applicant enjoyed exclusive rights, from making passive sales to those territories arises from Articles 2 and 3 of that agreement. It follows, in particular, from those provisions that Paramount granted the applicant a licence over several forms of exclusive television retransmission, that any right not specifically granted would continue to be held by Paramount and that Paramount undertook not to exercise or authorise any third party to exercise those rights towards territories for which the applicant had an exclusive right. It follows that, in so far as any third party needs express authorisation from Paramount in order to exercise the rights in question, the commitment which Paramount made to the applicant not to grant that authorisation is equivalent to the 'Paramount Obligation' as described in paragraph 9 above.

24 In accordance with its obligation arising from the contested decision, Paramount informed the applicant that it had decided that it would no longer take action to ensure that the 'Broadcaster Obligation' was observed vis-à-vis Paramount and to waive that obligation provided that it was covered by the commitments made binding under the contested decision. As will be explained in greater detail in paragraph 95 below, such action on Paramount's part vis-à-vis all its contracting partners in the EEA means that Paramount no longer complies with its obligations towards the

applicant arising under Articles 2 and 3 of the agreement of 1 January 2014 consisting in not authorising its contracting partners to respond to unsolicited requests from consumers residing in territories for which the applicant has an exclusive broadcasting right.

25 Consequently, the applicant's legal position was affected following the implementation of an obligation by Paramount which the Commission imposed on Paramount under the contested decision. Having regard also to the fact that the applicant was allowed to participate in the administrative procedure as an interested third party and, on the basis of a document communicated to it by the Commission, lodged observations in that respect (see paragraphs 4 and 5 above), it must be held that the applicant has *locus standi* to bring an action against the contested decision (see, to that effect, judgments of 29 June 2010, *Commission* v *Alrosa*, C-441/07 P, EU:C:2010:377, paragraph 90, and of 15 September 2016, *Morningstar* v *Commission*, T-76/14, EU:T:2016:481, paragraphs 31 to 34), which, moreover, the Commission does not dispute.

26 While it is the case that the fact that it is affected by the contested decision confers *locus standi* on the applicant to bring an action against that decision, the fact nonetheless remains that the question whether the applicant correctly describes the precise effects which the contested decision has on it belongs to the substance of the case.

27 In that regard, the action raises an essential question relating to the nature and the scope of the effects caused by a decision making binding the commitments offered by an undertaking, within the meaning of Article 9 of Regulation No 1/2003, when the commitments in question consist in a unilateral declaration no longer to honour certain clauses forming part of an agreement between that undertaking and another undertaking which, as it was not concerned by the Commission's investigation, did not receive a statement of objections and did not offer commitments or subscribe to the offer of such commitments.

28 That question is raised in the context of the third plea.

First plea, alleging a manifest error of assessment as regards the compatibility of the relevant clauses with Article 101 TFEU and the effects of the commitments imposed

29 In the applicant's submission, first, the Commission has not identified, with regard to the relevant clauses, concerns relating to an infringement by object within the meaning of Article 101(1) TFEU. In reality, those clauses have the effect of favouring cultural diversity without harming competition, whereas abolishing them would lead to a heavier concentration in the cinematographic production sector.

30 Second, supported by the French Republic, the applicant claims that the protection of intellectual property rights justifies, under the rules of the Treaty, the imposition of geographic limits such as those at issue. In that regard, UPC claims that the distinctions between 'absolute' and 'relative' territorial exclusivity, on the one hand, and 'active' and 'passive' sales, on the other, cannot be applied in a digital context with practically no frontiers. In addition, having regard to the possibilities offered today by the multitude of pay-TV distribution platforms via the internet, on DVD or on video on demand, the relevant clauses do not, according to the applicant and the French Republic, entail genuine exclusivity and therefore do not affect competition. The Commission ought to have carried out a specific analysis of the cinematographic audiovisual sector, failing which the contested decision gives rise to an unlawful reversal of the burden of proof.

31 Third, the applicant submits that the territorial exclusivity pursued by the relevant clauses relates to only a part of the content present on the pay-TV market, and is therefore not capable of eliminating competition on that market. Thus, supported by UPC and the French Republic, the applicant claims that the relevant clauses make it possible to grant appropriate remuneration which is absolutely

necessary for owners of copyright in the context of competition on merit adapted to the characteristics of each national market according to the adapted 'windowing' scheme. They also ensure the survival of the economic model put in place by operators such as the applicant. That model allows an objective allocation of the risk created by the financing of cinematographic production in the European Union, to which the applicant is required to devote a significant part of its total resources. According to UPC, the model in question complies with the legislation in force in certain national legal orders, although the Commission has not undertaken an examination of those legal orders.

32 Thus, fourth, the inapplicability of the relevant clauses indirectly but unquestionably would affect all the contractual relationships in the sector and lead to the emergence of large-scale licences at EU level that would upset the balance of negotiation to the detriment of EU producers. The availability of financing for EU audiovisual production, including through the contributions that broadcasters pay to the national audiovisual bodies, would be radically limited as a result, so that the quality and diversity of the offer to consumers and, ultimately, the cultural diversity protected under Article 3 TEU and Article 167(4) TFEU would be jeopardised. By merely stating that, following the commitments given, Paramount would still be able to grant licences on a territorial basis, the Commission did not state the reasons for its decision to the requisite legal standard as regards the relevance of that fact in the light of the consequences identified by the applicant.

33 The Commission, supported by BEUC, disputes the merits of this plea.

34 It should be borne in mind that Article 9(1) of Regulation No 1/2003 is worded as follows:

'Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.'

35 In addition, recital 13 of Regulation No 1/2003 provides as follows:

'Where, in the course of proceedings which might lead to an agreement or practice being prohibited, undertakings offer the Commission commitments such as to meet its concerns, the Commission should be able to adopt decisions which make those commitments binding on the undertakings concerned. Commitment decisions should find that there are no longer grounds for action by the Commission without concluding whether or not there has been or still is an infringement …'

36 Thus, in the context of the application of Article 9 of Regulation No 1/2003, the Commission's role is limited to verifying that the commitments proposed address the concerns which the Commission expressed to the undertakings concerned and that they have not offered less onerous commitments that address those concerns equally adequately (judgment of 29 June 2010, *Commission* v *Alrosa*, C-441/07 P, EU:C:2010:377, paragraph 41).

37 It should also be observed that, as is apparent from Article 9 of Regulation No 1/2003, the preliminary assessment referred to in that provision (see paragraph 34 above) is made in respect of the undertakings concerned by the Commission's investigation and is intended to allow them to determine whether it is appropriate to propose appropriate commitments to address the competition concerns found by the Commission. In fact, the closure of the infringement proceedings brought against those undertakings allows them to avoid a finding of an infringement of competition law and a possible fine (judgment of 29 June 2010, *Commission* v *Alrosa*, C-441/07 P, EU:C:2010:377, paragraph 48).

38 It follows from those considerations that, although the reasoning in a decision adopted under Article 9 of Regulation No 1/2003 must include the preliminary assessment that gave rise to a successful negotiation in relation to commitments, that reasoning cannot in any event contain all the evidence necessary to establish an infringement of Article 101(1) TFEU or, a fortiori, the evidence that would justify the conclusion that paragraph 3 of that provision cannot be applied in respect of the conduct initially complained of.

39 Consequently, as the Commission claims, review of the lawfulness of the contested decision may relate only to the question whether the circumstances set out in the contested decision establish competition concerns; if so, whether the commitments made binding address those concerns; and, last, whether Paramount did not offer less onerous commitments that addressed those concerns equally adequately.

40 In that regard, the Commission explained, in recitals 37 to 44 of the contested decision, that the agreements leading to absolute territorial exclusivity restored the partitions of national markets and frustrated the Treaty's objective of establishing a single market. Those clauses are therefore deemed to have as their object the restriction of competition, unless other circumstances falling within their economic and legal context justify the finding that they are not liable to have that result. In the latter regard, the purpose of copyright protection is to ensure appropriate remuneration for the right holder and not the highest possible remuneration resulting from arrangements that exclude any cross-border supply of television broadcasting services and thus entail absolute territorial protection.

41 As the Commission explained in recitals 46 to 49 of the contested decision, having regard to their content, their objectives and their economic and legal context, the relevant clauses have as their object the exclusion of all cross-border competition and the grant of absolute territorial protection to broadcasters having contracts with Paramount.

42 It must be held that the grounds summarised in paragraphs 40 and 41 above are well founded and that they are sufficient to justify concerns as to the compatibility of the relevant clauses with Article 101(1) TFEU. Contrary to the assertions of the applicant, the French Republic, EFADs, UPC and C More Entertainment, the contested decision is therefore both reasoned to the requisite legal standard and free of error as to the merits of the grounds on which it is based.

43 In particular, in a factual context characterised by significant barriers that seriously restrict the opportunities for cross-border television broadcasting, the fact that the owner of the copyright grants the exclusive right to broadcast the audiovisual content on the territory of a Member State, and therefore to prohibit, during a specific period, the broadcasting of that content by other operators who have not obtained authorisation from the holders of the rights in question or paid remuneration to them, is indeed not sufficient to justify a finding that such an agreement must be considered to be the object, the means or the result of an arrangement prohibited by the Treaty (see, to that effect, judgments of 6 October 1982, *Coditel and Others*, 262/81, EU:C:1982:334, paragraphs 15 and 16, and of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 137).

44 Consequently, a copyright holder may in principle grant to a sole licensee the exclusive right to broadcast by satellite subject matter protected by such a right, during a specified period, from a single Member State of broadcast or from a number of Member States (judgment of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 138).

45 On the other hand, 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.

46 In fact, an agreement which might tend to restore the partitions between national markets is liable to frustrate the Treaty's objective of achieving the integration of those markets through the establishment of a single market. Thus, agreements which are aimed at partitioning national markets according to national borders or make the interpenetration of national markets more difficult must be regarded, in principle, as agreements whose object is to restrict competition within the meaning of Article 101(1) TFEU (judgment of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 139).

47 In that regard, account should be taken of the development of EU law that has resulted, in particular, from the adoption of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23) and Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15), which are intended to ensure the transition from national markets to a single programme production and distribution market (judgment of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 121).

48 In that context, where a licence agreement is designed to prohibit or limit the cross-border provision of broadcasting services, it is deemed to have as its object the restriction of competition, unless other circumstances falling within its economic and legal context justify the finding that such an agreement is not liable to impair competition (judgment of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 140).

49 It is therefore necessary to examine both the object and the economic and legal context of which the relevant clauses form part.

50 In that regard, as is apparent from paragraphs 3, 8, 9, 11 and 23 above, the mutual obligations set out in the relevant clauses between Paramount and its contracting partners, including the applicant, have the specific object of eliminating the cross-border supply of the services consisting in the broadcast of audiovisual content forming the subject matter of the relevant agreements. Those clauses therefore confer, by agreement, absolute territorial protection and have as their object the elimination of all cross-border competition between broadcasters in the field of the services offered by those broadcasters. Consequently, having regard to the considerations set out in paragraphs 43 to 48 above, those clauses were such as to give rise to concerns on the Commission's part owing to their anticompetitive object, contrary to Article 101(1) TFEU (see, to that effect, judgment of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraphs 142 and 144).

51 Furthermore, as regards the economic and legal context of the relevant clauses, contrary to the assertions of the applicant, the French Republic, EFADs, UPC and C More Entertainment, the fact that the television distribution agreements at issue related to works covered by copyright does not permit the finding that they are not capable of harming competition.

52 First, the commitments made binding under the contested decision do not affect the actual grant of exclusive licences for the broadcast of television content the rights in which are held by Paramount. On the contrary, the commitments in question are intended to put an end to the application of the relevant clauses, which lead to absolute territorial exclusivity and have as their object the elimination of all competition between broadcasters with regard to the works covered by those rights, by virtue of a set of mutual obligations enshrined in the television distribution agreements.

53 Second, while it is true that the specific subject matter of the intellectual property is intended in particular to ensure for the holders of the rights arising therefrom the opportunity to exploit those rights commercially, the fact nonetheless remains that that subject matter does not guarantee them

the opportunity to demand the highest possible remuneration, but only appropriate remuneration. That conclusion is confirmed by recital 10 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10), and by recital 5 of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 2006 L 376, p. 28) (judgment of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraphs 107 and 108).

54 An appropriate remuneration of the holder of that right is remuneration that is reasonable in relation to the actual or potential number of persons who enjoy or wish to enjoy the service provided. Thus, with regard to television broadcasting, such remuneration must in particular be reasonable in relation to the parameters of the broadcasts concerned, such as their actual audience, their potential audience and the language version. That approach is confirmed by recital 17 of Directive 93/83 (judgment of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraphs 109 and 110).

55 In that regard, it must be held that, in the context of a system of licences without clauses intended to partition the markets according to national borders, there is nothing to prevent the holder of the rights from negotiating an amount 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 broadcasts forming the subject matter of the distribution agreement are also received. In fact, the technology necessary to receive the works covered by the rights in question makes it possible to determine the actual and potential audience, by breaking down that audience by country of origin of the purchase request (see, to that effect, judgment of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraphs 112 and 113). The same technology also makes it possible to regulate active promotion activities in order to limit them to the territory for which an exclusive licence is granted.

56 In such a context, there is nothing to preclude the holder of the rights from demanding a premium in return for a licence taking account of the actual and potential audience throughout the EEA. Conversely, the reason for the necessarily higher premium paid for absolute territorial exclusivity is the artificial price differences between the partitioned national markets, which are irreconcilable with the fundamental aim of the Treaty, which is completion of an internal market. To that extent, that premium goes beyond what is necessary in order to ensure appropriate remuneration for those right holders (see, to that effect, judgment of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraphs 114 to 116).

57 Similarly, as regards the activity of an operator such as the applicant, any reduction in subscription prices on French territory, hitherto set at a particular level owing to the absolute territorial protection guaranteed by the application of the relevant clauses, may be offset by the fact that, pursuant to the commitments made binding under the contested decision, Paramount declared its intention no longer to pursue the application of those clauses. That declaration means that the applicant is henceforth free to address a customer base situated throughout the EEA and not only in France. That is in keeping with the fundamental aim pursued by the Treaty when it establishes a market without internal frontiers, within which competition is not distorted by agreements, decisions or concerted practices prohibited by Article 101(1) TFEU. Consequently, even if the applicant devotes part of its revenues to the funding of audiovisual products which require specific support, the normal play of competition, now open on an EEA scale, provides it with opportunities which the relevant clauses denied it as long as Paramount intended to require that they be respected.

58 It follows that the arguments whereby the applicant, the French Republic, EFADs, UPC and C More Entertainment allege that the relevant clauses are lawful by reference to Article 101(1) TFEU (see paragraphs 29 to 32 above) must be rejected. For the reasons set out in paragraph 55 above, the same applies to the alleged impossibility of distinguishing between active and passive sales outside the exclusive territory in a digital context (see paragraph 30 above).

59 In addition, in so far as the arguments alleging that the relevant clauses promote cultural production and diversity and that their abolition will allegedly jeopardise cultural production within the European Union (see paragraphs 30 to 32 above) are to be understood as being based on the applicability of Article 101(3) TFEU with regard to the clauses in question, those arguments cannot succeed.

60 Admittedly, such arguments are designed to claim that the relevant clauses contribute to improving the production or distribution of audiovisual products.

61 However, as is apparent from the grounds set out in paragraphs 34 to 39 above, the procedure giving rise to the acceptance of commitments offered is governed by the principle that the undertakings covered by the investigation are informed of the Commission's concerns and assess whether it is appropriate to propose commitments for the future in return for the Commission's not making a finding of infringement for the past. The Commission, for its part, assesses whether it is appropriate not to make a finding of infringement of Article 101(1) TFEU and thus to save the resources which it would have had to devote to the case in question, in exchange for commitments relating by definition to the future and dispelling all its competition concerns.

62 In that context, the question whether the conduct that gave rise to the concerns in question satisfies the cumulative conditions of the application of Article 101(3) TFEU has no bearing on the actual nature of a decision such as the contested decision. First, the application of that provision assumes a finding of infringement of Article 101(1) TFEU; and, second, the application of Article 101(3) TFEU consists in determining the pro-competitive effects produced by the agreement that infringes Article 101(1) TFEU and in seeing whether those pro-competitive effects outweigh the anticompetitive effects (judgment of 23 October 2003, *Van den Bergh Foods* v *Commission*, T-65/98, EU:T:2003:281, paragraph 107).

63 First, as explained in paragraphs 34 and 35 above, when the Commission considers that the commitment offered is capable of addressing its concerns, it may by decision make that commitment binding for the undertaking that proposed it, without being able to establish, in the decision in question, whether there has been or still is an infringement.

64 Second, the fact of making the commitments offered binding has the specific effect of dispelling the competition concerns expressed by the Commission by precluding any infringement of Article 101(1) TFEU for the future, which would be meaningless in the event of the application of Article 101(3) TFEU. In fact, the purpose of the latter provision is not to compel the undertaking covered by the investigation to alter the conduct in respect of which the Commission formed competition concerns, but specifically to declare that Article 101(1) TFEU is inapplicable, thus allowing that undertaking to continue the behaviour that prompted the opening of the investigation.

65 Thus, while it is true that the Commission may accept and make binding a proposed commitment under which an agreement, decision or concerted practice giving rise to concerns with regard to Article 101(1) TFEU is amended in order henceforth to satisfy the conditions of Article 101(3) TFEU, it is not required to assess whether such an agreement, decision or concerted practice satisfies those conditions when the commitment proposed consists merely, as in the present case, in simply abandoning that conduct.

66 It follows from the foregoing that it is not for the Court, in the context of the review of lawfulness entrusted to it under Article 263 TFEU, to rule on the arguments whereby the applicant alleges that the relevant clauses promote cultural production and diversity and that their abolition will allegedly jeopardise cultural production within the European Union. Those arguments may, on the other hand, be put forward by the applicant before the national court in proceedings brought against Paramount on the basis of the agreement of 1 January 2014, and that court may refer the matter both to the Commission under Article 15 of Regulation No 1/2003 and to the Court of Justice under Article 16 of that regulation and Article 267 TFEU (see paragraph 102 below).

67 In any event, it must be stated that the considerations set out in paragraphs 53 to 57 above preclude the application of Article 101(3) TFEU, since the relevant clauses impose restrictions that go beyond what is necessary for the production and distribution of audiovisual works that require protection of intellectual property rights and thus do not satisfy at least one of the cumulative conditions laid down in Article 101(3) TFEU, namely the condition that the agreement in question does not impose on the undertakings concerned restrictions which are not indispensable for the protection of those rights (see, to that effect, judgment of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 145).

68 In particular, first, absolute territorial protection manifestly goes beyond what is indispensable for the improvement of the production or distribution or the promotion of technical or economic progress required by Article 101(3) TFEU, as shown by the prohibition, intended by the parties to the agreements concerned, of any cross-border supply of television broadcast services, even works for which a licence was granted by Paramount itself and which were broadcast on the territory of a Member State (see, to that effect, judgment of 8 June 1982, *Nungesser and Eisele* v *Commission*, 258/78, EU:C:1982:211, paragraph 77).

69 It follows from the considerations set out in paragraph 57 above that any reduction in the applicant's revenues from customers in France may be offset by the fact that, owing to the implementation of the commitments made binding under the contested decision, the applicant is now free to approach a customer base situated throughout the EEA and not only in France.

70 Second, the argument that the relevant clauses do not eliminate all competition in respect of the works to which they relate, since they are also available on media not covered by the relevant clauses, is aimed at the condition laid down in Article 101(3)(b) TFEU. However, the grounds set out in paragraphs 53 to 56 and 67 to 69 above are sufficient to preclude the application of Article 101(3) TFEU in the present case (judgment of 8 June 1982, *Nungesser and Eisele* v *Commission*, 258/78, EU:C:1982:211, paragraphs 74, 75 and 78).

71 The Commission set out, in essence, those assessments in recitals 40 to 44 of the contested decision in the context of its preliminary analysis relating to the application of Article 101(1) TFEU.

72 It follows that, even if the Commission must be considered to have been required to examine the applicability of Article 101(3) TFEU in the procedure at issue, the conclusion set out in recital 52 of the contested decision, that its preliminary examination led to the conclusion that the cumulative conditions for the application of Article 101(3) TFEU were not satisfied, must be read in the light of the grounds set out in recitals 40 to 44 of the contested decision. The Commission's assessment must therefore be considered not to contain any error.

73 Consequently, first, the contested decision is reasoned to the requisite legal standard as regards the question whether the commitments offered by Paramount in the present case, consisting in no longer honouring the relevant clauses, were appropriate for dispelling the competition concerns which the Commission had expressed and, second, the Commission did not err in answering that question in the affirmative.

74 The first plea must therefore be rejected.

75 It is now appropriate to examine the third plea.

Third plea, alleging breach of the principle of proportionality

76 The third plea consists of two parts, the first alleging breach of the principle of proportionality owing to the manifestly disproportionate nature of the commitments that were made binding (see paragraphs 77 and 78 below) and the second alleging improper effect on the contractual rights of third parties, such as the applicant (see paragraph 79 below).

77 Supported by the French Republic, the applicant claims that the principle of proportionality is applicable in relation to commitments even if those commitments are based on an offer made by the party under investigation. In that context, the Commission should have ascertained that the commitments addressed the concerns which it had identified and that the undertaking concerned had not proposed less onerous commitments that addressed those concerns equally adequately.

78 First, the Commission made commitments binding that did not address concerns formulated in its preliminary assessment, so that they are manifestly more onerous than would have been necessary in order to allay the concerns actually identified. That assessment was all the more justified because the commitments at issue had a harmful effect on cultural diversity within the EEA as a whole owing to the loss of revenues that broadcasters might allocate to the making of European films.

79 Second, the applicant, supported by the French Republic, claims that the commitments made binding under the contested decision affect the interests of third parties in so far as they constitute a unilateral amendment of the agreement of 1 January 2014 as concerns clauses from which it derives rights, when the administrative procedure did not relate to the agreement in question, which negatively affected its procedural rights. It is clear from the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (OJ 2011 C 308, p. 6) that in order to be accepted a commitment must, in particular, be executed directly, in that it must not depend on the willingness of a third party not bound by the commitment. Consequently, when the commitment consists in the amendment of a contractual relationship requiring the consent of the parties to the contract, as in this instance, the offer of a commitment must be rejected by the Commission. As the Commission departed from its own notice without offering any justification whatsoever in the contested decision, that decision should be annulled.

80 First, the Commission again contends that the proposed commitments adequately addressed the competition concerns which it had identified and that it was therefore not required itself to seek less onerous or less restrictive solutions.

81 Second, the Commission claims that it duly took account of the interests of third parties by inviting them to submit observations and examining those observations.

82 Third, supported by BEUC, the Commission maintains that the contested decision did not deprive the applicant of its contractual rights or affect the value of the relevant clauses. On the contrary, it was only Paramount's intention that had the effect that Paramount would no longer adhere to or no longer be bound by the clauses in question. In that regard, fourth, the Commission emphasises that the contested decision does not have *erga omnes* effect and that it does not in any way prejudge any action that the applicant might bring against Paramount for breach of its contractual obligations. When examined from that aspect, the commitments offered by Paramount did not depend on the willingness of a third party within the meaning of point 128 of its notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU. Nor does the agreement of 1 January 2014 contain any clause equivalent to that described in recital 2(b) of the contested decision.

83 It is appropriate to examine first of all the second part of the third plea, alleging that, in breach of the principle of proportionality, the contractual rights of third parties, such as the applicant, were affected.

84 On the other hand, the arguments put forward in the context of the first part of the present plea and alleging breach of the principle of proportionality in that the commitments made binding are not based on a proper description of concerns and that they go beyond what is necessary to allay the concerns actually described (see paragraphs 77 and 78 above) are in reality confused with the arguments put forward in support of the second plea. They will therefore be examined in the context of that plea.

85 It is apparent from the parties' arguments that they are agreed on the premiss that a measure such as the contested decision cannot lawfully have the effect, vis-à-vis the applicant, of removing the relevant clauses from the agreement of 1 January 2014. In fact, in answer to the argument which the applicant has raised to that effect (see paragraph 79 above), the Commission contends that the contested decision does not have such an effect, but merely requires Paramount to declare to its contracting partners its intention no longer to honour the relevant clauses. In the Commission's contention, that obligation does not in any way prejudge the assessment that a national court might make of the validity of the clauses in question following an action that the applicant decided to bring against Paramount before a national court.

86 In fact, the right of economic operators to configure their relationships according to their intention as expressed in the agreements which they enter into forms part of freedom of contract. That freedom, which includes the ability to choose with whom to do business and to determine the terms of an agreement, is guaranteed by Article 16 of the Charter of Fundamental Rights of the European Union, which enshrines the freedom to conduct a business (judgment of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28, paragraphs 42 and 43).

87 While it is true that the freedom to conduct a business is not absolute, but must be viewed in relation to its social function, the fact nonetheless remains that any limitation of that right must, in accordance with Article 52(1) of the Charter of Fundamental Rights, be provided for by law and respect the essence of that right (see, to that effect, judgment of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28, paragraphs 45 to 48).

88 It follows in that regard from Article 9 of Regulation No 1/2003 (see paragraph 34 above) that the offer made by an undertaking under that provision must constitute a 'commitment'. It must consist in a concession, namely a limitation of the range of behaviours that that undertaking would be inclined to adopt. That commitment may consist either in an obligation to act in a specific manner or an obligation to refrain from acting.

89 In addition, when the Commission considers that the commitment offered is capable of addressing its concerns, it may by decision make it binding on the undertaking that offered it, without the Commission being able to establish, in the decision in question, whether there has been or still is an infringement. That decision is addressed, as in the present case, only to the undertakings that offered the commitment and is binding only on them, in accordance with the fourth paragraph of Article 288 TFEU.

90 It must therefore be stated that, as the applicant and the Commission claim, a decision adopted on the basis of Article 9 of Regulation No 1/2003 cannot have the object or the effect of making a commitment, within the meaning set out in paragraph 88 above, binding on operators who did not offer it and who have not subscribed to it.

91 In fact, such a possibility would run counter to the letter of Article 9 and recital 13 of Regulation No 1/2003 (see paragraph 35 above), from which it is clear that the commitments accepted by the Commission are to be made binding for the undertakings that proposed them. That approach is also reflected in paragraph 115 of the Commission notice on best practices for the conduct of proceedings

concerning Articles 101 and 102 TFEU. According to that paragraph, 'if the Commission accepts [the] commitments, it may adopt a decision which makes them binding on the parties subject to the proceedings'. It is common ground that, as a third party which did not receive a statement of objections, the applicant is not 'subject to the proceedings' which the Commission opened solely against Paramount and Sky. Consequently, when the commitment consists in not executing a contractual clause that confers rights on a third party, recognising that the Commission had the power to make it binding on that third party when that third party has not offered it and when the Commission's proceedings have not been brought against it would constitute an interference in the contractual freedom of the operator in question that went beyond the provisions of Article 9 of Regulation No 1/2003.

92 That conclusion is also confirmed by paragraph 128 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, which provides as follows:

'Commitments must be unambiguous and self-executing [that is, their implementation must not be dependent on the will of a third party which is not bound by the commitments]. Furthermore, when commitments cannot be implemented without the agreement of third parties (e.g. where a third party that would not be a suitable buyer under the commitments holds a pre-emption right), the undertaking should submit evidence of the third party's agreement.'

93 In that context, the question arises whether, having regard to its wording and also to the legal context in which it was adopted, the contested decision has the object or the effect that the commitment offered by Paramount amounts, contrary to Article 9 of Regulation No 1/2003, to a commitment offered by the applicant.

94 In that regard, it should be observed that, first, according to Article 1 of the contested decision, the commitments listed in the annex to that decision are to be binding on Paramount and also on its successors and subsidiaries. It therefore does not follow from the contested decision that that decision imposes any obligation on Paramount's contracting partners such as the applicant.

95 Second, the fact that Paramount gives a general commitment not to enforce or initiate proceedings before a court to ensure compliance with the broadcasters' obligation not to make passive sales outside their exclusive territories, as provided for in paragraph 2.2(a) of the annex to the contested decision, automatically means that Paramount will not honour its obligation to prohibit such sales, as provided for in paragraph 2.2(b) of that annex. That commitment automatically entails, in turn, an interference with the contractual right enjoyed vis-à-vis Paramount by the broadcasters who have contracted with Paramount, consisting in the guarantee by Paramount to each of them of absolute territorial exclusivity as regards the subject matter of each pay-TV output licence agreement.

96 The question that arises in such a context is whether that result is brought about by the contested decision itself, in which case it would amount to an irremediable effect as against a third party that neither offered nor subscribed to the commitment made binding, or whether, as the Commission claims, Paramount's statement that it will no longer honour the relevant clauses is essentially an act that Paramount undertakes at its own risk and does not affect the possibility that its contracting partners will bring proceedings before the national courts in order to enforce those clauses or indeed to claim damages.

97 It should be borne in mind, in that regard, that, according to Article 16(1) of Regulation No 1/2003, 'when national courts rule on agreements, decisions or practices under Article [101] or [102 TFEU] which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission'.

98 However, Regulation No 1/2003 explains, in recital 13, that commitment decisions 'are without prejudice to the powers of competition authorities and courts of the Member States to make [findings as to whether there has been or still is an infringement] and decide upon the case'. Likewise, recital 22 of Regulation No 1/2003 states that 'commitment decisions adopted by the Commission do not affect the power of the courts and the competition authorities of the Member States to apply Articles [101] and [102 TFEU]'.

99 In fact, unlike decisions adopted under Article 7 of Regulation No 1/2003, a decision making commitments binding in accordance with Article 9 of that regulation does not contain grounds classifying the conduct examined as an infringement of Article 101 TFEU and does not mean that that conduct is covered by that provision. Article 9 of Regulation No 1/2003 is based on considerations of procedural economy and is designed to ensure the effective application of the rules on competition laid down in the FEU Treaty through the adoption of decisions that make binding commitments proposed by the parties and deemed appropriate by the Commission in order to provide a more rapid solution to the competition problems which it has identified. In that context, the Commission's role is confined to examining, and possibly accepting, the commitments offered by the undertakings concerned in the light of the problems identified by it in its preliminary assessment and having regard to the aims pursued (judgment of 29 June 2010, *Commission* v *Alrosa*, C-441/07 P, EU:C:2010:377, paragraphs 38 and 40; see also, to that effect, judgment of 23 November 2017, *Gasorba and Others*, C-547/16, EU:C:2017:891, paragraph 25).

100 It follows that, as the Commission submits, when the contested decision requires that Paramount no longer honour the relevant clauses in its relationships with its contracting partners, that obligation does not in any way prejudge the powers of the national courts, in an action brought by the applicant, to assess whether those clauses are in fact contrary to Article 101(1) TFEU and, if appropriate, to draw the necessary conclusions under paragraph 2 of that article and under national law. In that context, the contested decision can, at most, influence the findings of the national court only in so far as it contains a preliminary assessment which the national court must take into account solely as an indication of the anticompetitive nature of the agreement examined in the light of Article 101(1) TFEU (judgment of 23 November 2017, *Gasorba and Others*, C-547/16, EU:C:2017:891, paragraphs 27 and 29). Thus, having regard to its summary and provisional nature, the Commission's assessment of conformity with competition law set out in a decision under Article 9(1) of Regulation No 1/2003 must not ultimately prevent the national court from reaching a conclusion which deviates in whole or in part in the same case following further investigations and a more thorough examination (Opinion of Advocate General Kokott in *Gasorba and Others*, C-547/16, EU:C:2017:692, points 33 and 35).

101 Consequently, the fact that the individual commitments offered by an undertaking have been made binding by the Commission does not mean that other undertakings are deprived of the possibility of protecting the rights they may have in connection with their relations with that undertaking (judgment of 29 June 2010, *Commission* v *Alrosa*, C-441/07 P, EU:C:2010:377, paragraph 49).

102 In that context, if the national court considers, following its analysis and after examining the possibility of pursuing the routes provided for in Articles 15 and 16 of Regulation No 1/2003, that the relevant clauses infringe Article 101(1) TFEU without satisfying the conditions in paragraph 3 of that article, it will be required to declare that they are void pursuant to Article 101(2) TFEU. On the other hand, if it considers that the relevant clauses do not infringe Article 101(1) TFEU or that they satisfy the conditions of paragraph 3 of that article, it will have to assess, where necessary, the merits of the claim before it, as Article 101 TFEU does not preclude the application of the relevant clauses.

103 In the latter situation, if the outcome of the proceedings before the national court leads Paramount to breach the commitment made binding under the contested decision, it will be for the Commission, where appropriate, to reopen its investigation in accordance with Article 9(2)(b) of Regulation

No 1/2003, in which case it will not be bound by the decision of the national court (see, to that effect, judgments of 14 December 2000, *Masterfoods and HB*, C-344/98, EU:C:2000:689, paragraph 48, and of 25 November 2014, *Orange* v *Commission*, T-402/13, EU:T:2014:991, paragraph 27).

104 Having regard to the foregoing, it must be concluded that the contested decision does not affect the possibility for the applicant to bring an action before the national court in order to establish the compatibility of the relevant clauses with Article 101(1) TFEU and to draw, vis-à-vis Paramount, the inferences prescribed by national law, and does not preclude the possibility of interim measures being ordered to safeguard the interests of the parties pending final judgment (see, to that effect, judgment of 14 December 2000, *Masterfoods and HB*, C-344/98, EU:C:2000:689, paragraph 58).

105 It should be added that the applicant would have been in an essentially similar situation if Paramount, by carrying out an autonomous analysis and before any intervention by the Commission, had concluded that the relevant clauses might appear to be problematic in the light of Article 101(1) TFEU and had declared that it intended no longer to honour them, relying to that effect on Article 101(2) TFEU.

106 Consequently, in adopting the contested decision, the Commission acted within the limits of the powers conferred on it by Article 9 of Regulation No 1/2003 and safeguarded the objective of that provision, which is based on considerations of procedural economy and efficiency (see paragraph 99 above), without affecting the applicant's contractual or procedural rights in a manner that went beyond what is necessary in order to achieve those objectives.

107 In that context, paragraph 128 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (see paragraph 92 above) must be understood not as meaning that a decision adopted under Article 9 of Regulation No 1/2003 which concerns the contractual relationship between the undertaking that offered a commitment and third parties has in itself effects on those third parties' contractual rights, but as a condition intended to guarantee the effectiveness of the commitment in order for the Commission to accept it. Thus, the inclusion of paragraph 128 in the Commission notice in question had neither the object nor the effect of precluding that, in a case such as this, the Commission, exercising the power of assessment which it enjoys in such matters, will accept a commitment by Paramount to declare to its contracting partners that it intends to make the relevant clauses inapplicable, although it remains possible for a national court, in an action brought by the applicant, to conclude that the clauses in question do not infringe Article 101(1) TFEU.

108 It follows that, in making binding for Paramount the commitments set out in paragraphs 2.2 and 2.3 of the annex to the contested decision, the Commission did not exceed the power conferred on it by Article 9 of Regulation No 1/2003 and did not breach the principle of proportionality in that respect, and the second part of the first plea must therefore be rejected.

Second plea, alleging infringement of Article 9 of Regulation No 1/2003 as regards the identification of the concerns addressed by the commitments imposed

109 Supported by the French Republic, the applicant claims that the commitments accepted by the Commission do not address the competition concerns expressed in its preliminary assessment. In particular, the object of the contested decision was to examine the agreements between Paramount and Sky on the distribution of audiovisual works in the United Kingdom and in Ireland. However, the Commission made commitments binding that related to the whole of the EEA and did so without examining the legal and economic context of the agreements entered into by Paramount, for the one part, and broadcasters other than Sky active in the EEA, for the other part. In proceeding from the premiss that any preliminary analysis relating to the market in the United Kingdom and in Ireland could be implicitly extrapolated to the French market, which was not the subject of an analysis the

Commission made a manifest error of assessment entailing an error of law. What is more, the Commission imposed the same consequences on Sky and on the applicant, although those two broadcasters did not enjoy the same procedural rights, which entailed a breach of the applicant's rights of defence. The Commission's approach would become even more paradoxical after the departure of the United Kingdom from the EEA, since the commitments made binding would apply solely in markets which have not been the subject of any preliminary analysis by the Commission.

110 The applicant and the French Republic add that, in that context, the Commission ought to have opened a procedure covering all the distribution agreements concluded by Paramount and thus have given all the contracting parties the opportunity to reply to a statement of objections. In addition, in the same vein, the Commission ought to have declared a part of Paramount's commitments binding and left it to Paramount to escape its obligations to third parties. It follows that, in making the proposed commitments binding for all of Paramount's contractual relationships in the EEA, the Commission exceeded its powers and thus infringed Article 9 of Regulation No 1/2003.

111 The Commission disputes the merits of this plea.

112 As explained in paragraph 84 above, the arguments presented in the context of the first part of the third plea, alleging breach of the principle of proportionality, and those put forward in support of the second plea should be examined together. In fact, all of those arguments relate to the question whether, in adopting the contested decision, the Commission affected the applicant's position in a disproportionate or unjustifiable manner having regard to the nature and the geographic scope of the competition concerns which it expressed.

113 It should be borne in mind that the specific characteristics of the mechanisms provided for in Articles 7 and 9 of Regulation No 1/2003 and the means of action available under each of those provisions are different, which means that the obligation on the Commission to ensure that the principle of proportionality is observed has a different extent and content, depending on whether it is considered in relation to the former or the latter article (judgment of 29 June 2010, *Commission* v *Alrosa*, C-441/07 P, EU:C:2010:377, paragraph 38).

114 In particular, the application of the principle of proportionality in the context of Article 9 of Regulation No 1/2003 is confined to verifying that the commitments offered address the concerns which the Commission expressed to the undertakings concerned and that the latter undertakings have not offered less onerous commitments that address those concerns equally adequately. It is in that context that the Commission must take account of the interest of third parties, but it is not required itself to seek out less onerous or more moderate solutions than the commitments offered to it (judgment of 29 June 2010, *Commission* v *Alrosa*, C-441/07 P, EU:C:2010:377, paragraphs 41 and 61).

115 Undertakings which offer commitments on the basis of Article 9 of Regulation No 1/2003 consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the regulation after a thorough examination. However, the closure of the infringement proceedings brought against those undertakings allows them to avoid a finding of an infringement of competition law and a possible fine (judgment of 29 June 2010, *Commission* v *Alrosa*, C-441/07 P, EU:C:2010:377, paragraph 48).

116 Moreover, as explained in paragraph 101 above, the fact that the individual commitments offered by an undertaking have been made binding by the Commission does not mean that other undertakings are deprived of the possibility of protecting the rights they may have in connection with their relations with that undertaking (judgment of 29 June 2010, *Commission* v *Alrosa*, C-441/07 P, EU:C:2010:377, paragraph 49). In that regard, it follows from the assessments of the effects that the contested decision has for the applicant (see paragraphs 85 to 104 above) that the applicant may bring an action before the national court in order to establish the compatibility of the relevant clauses with Article 101(1) TFEU and to request that court to draw, with regard to Paramount, the conclusions

provided for in national law, and does not exclude the possibility of interim measures being ordered that are necessary to safeguard the interests of the parties pending final judgment (see, to that effect, judgment of 14 December 2000, *Masterfoods and HB*, C-344/98, EU:C:2000:689, paragraph 58).

117 It follows that taking the interests of third parties into account in the context of a commitments procedure means that, among several types of commitments proposed that address equally adequately the competition concerns expressed by the Commission, the Commission must make binding the commitment which, when it is implemented by the addressee of the decision, will have a less pronounced effect in regard to those third parties.

118 First, it follows from the reasoning set out in paragraphs 43 to 58 above that, by their nature, the relevant clauses have as their object the partitioning of the national markets of the whole of the EEA, and their economic and legal context does not permit a finding that they are not capable of harming competition. Consequently, the concerns expressed by the Commission validly relate to the whole of that geographic area, so that the commitments offered and made binding are adequate to address those concerns, without the Commission being required to analyse one by one the national markets concerned. The arguments which the applicant has put forward in that regard both in the context of the second plea (see paragraph 109 above) and in the context of the third plea (see paragraphs 77 and 78 above) are therefore irrelevant.

119 Second, in the present case no commitment addressing equally adequately the competition concerns expressed by the Commission and the execution of which by Paramount would have had less pronounced effects vis-à-vis the applicant was proposed to the Commission. In any event, no such commitment seems to be manifestly adequate in order to address the Commission's concerns as effectively without requiring Paramount to no longer honour the relevant clauses.

120 Third, the argument that the commitments have a harmful effect on cultural diversity within the whole of the EEA owing to the loss of revenues that broadcasters could devote to the making of European films must be rejected for the reasons set out in paragraphs 57 and 69 above.

121 Fourth, in so far as, by their arguments, the French Republic, EFADs, UPC and C More Entertainment implicitly claim that there are insurmountable barriers of a practical nature preventing the supply of cross-border broadcasting services to the French market, it must be held that they adduce no evidence capable of showing that that is so. In addition, the inclusion of Article 3 in the agreement of 1 January 2014 constitutes a particularly conclusive indication to the contrary (see, to that effect, judgment of 20 January 2016, *Toshiba Corporation* v *Commission*, C-373/14 P, EU:C:2016:26, paragraphs 33 and 47).

122 In those circumstances, fifth, the arguments alleging in particular that the applicant did not enjoy the same procedural rights as Sky and those based on the imminent departure of the United Kingdom from the European Union are also irrelevant. What is meant by the taking into account of the interest of third parties in the context of a commitment procedure is explained in paragraphs 115 to 117 above, and the argument based on the limited procedural rights enjoyed by the applicant as an interested third party must therefore be rejected for the reasons set out in paragraph 119 above. As for the complaint based on the imminent departure of the United Kingdom from the European Union, it is sufficient to point out that the relevant clauses have as their object the partitioning of the national markets of the whole of the EEA, and the departure of the United Kingdom therefore does not in any event affect the validity of the concerns expressed by the Commission (see paragraph 118 above).

123 It follows from the foregoing considerations that, in adopting the contested decision, the Commission did not exceed the powers conferred on it under Article 9 of Regulation No 1/2003 and did not breach the principle of proportionality, as the applicant claims in the context of the first part of the third plea.

124 The second plea and the first part of the third plea must therefore be rejected.

Fourth plea, alleging misuse of powers

125 In the applicant's submission, the fact of having accepted commitments covering the whole of the EEA and not addressing competition concerns, as explained in the context of the second plea, means that the contested decision was adopted for an unlawful reason, which also constitutes a misuse of powers. In addition, it maintains that the Commission substituted itself for the EU legislature, which is dealing with the issue of geo-filtering in the broadcasting of audiovisual works, and thus encroached on the legislature's powers by pre-empting those choices. The conduct of the legislative process, and also the implications of the contested decision, which are much wider than the object of that decision, bear witness to the Commission's intention to impose de facto legislation by also prejudging the outcome of other pending investigations. The applicant also requests the Court to ask the Commission to communicate the preparatory acts relating to the contested decision and to the legislative process in question, so that serious indicia of a misuse of powers may be further corroborated.

126 EFADs claims that the Commission has not published a full version of the commitments offered or given interested third parties access to the statement of objections.

127 The Commission disputes the merits of the fourth plea.

128 It should be borne in mind that a misuse of powers exists when an institution exercises its powers with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (judgment of 25 January 2007, *Dalmine* v *Commission*, C-407/04 P, EU:C:2007:53, paragraph 99).

129 As is clear from paragraph 118 above, the commitments offered and made binding are adequate for addressing the competition concerns expressed by the Commission, and for the whole of the EEA. Consequently, the applicant's argument that the Commission misused its powers in that the commitments in question did not address the concerns expressed is based on a false premiss.

130 As for the applicant's remaining arguments alleging encroachment on the legislative process, it must be held that such a process, as long as it has not resulted in the adoption of a legislative measure, is without prejudice to the powers conferred on the Commission by Article 101 TFEU and Regulation No 1/2003. Consequently, the fact that the Commission exercised those powers by making binding for Paramount the commitments which Paramount offered, although a legislative procedure was in course concerning rights such as those concerned by the present case, is not capable of demonstrating a misuse of powers.

131 Last, it must be stated that the objections raised by EFADs concerning the publication of the commitments offered and access to the statement of objections constitute in reality pleas which were not raised by the applicant and must therefore be rejected as inadmissible. In any event, the undertakings and other bodies not having the status of party concerned within the meaning of Article 27(2) of Regulation No 1/2003 have the rights provided for in Article 27(4) of Regulation No 1/2003 and Article 13 of Regulation No 773/2004, which the Commission observed in the present case (see paragraphs 4 and 5 above).

132 The fourth plea must therefore be rejected and the action dismissed in its entirety.

Costs

133 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

134 Under Article 138(1) of the Rules of Procedure, moreover, the Member States which have intervened in the proceedings are to bear their own costs and, under Article 138(3) of the Rules of Procedure, the Court may order an intervener other than those referred to in paragraphs 1 and 2 to bear his own costs.

135 As the applicant has been unsuccessful, it must be ordered to pay the Commission's costs, with the exception of those relating to the intervention of the French Republic, EFADS, UPC and C More Entertainment, and to pay BEUC's costs, in accordance with the forms of order sought by them.

136 Furthermore, the French Republic, EFADS, UPC and C More Entertainment must, in addition to bearing their own costs, pay the costs incurred by the Commission in relation to their intervention.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Groupe Canal + SA, in addition to bearing its own costs, to pay the costs incurred by the European Commission, with the exception of those relating to the intervention of the French Republic, the European Film Agency Directors — EFADs, the Union des producteurs de cinéma (UPC) and C More Entertainment AB, and by the Bureau européen des unions de consommateurs (BEUC);**

3. **Orders the French Republic, EFADs, UPC and C More Entertainment, in addition to bearing their own costs, to pay the costs incurred by the Commission in relation to their intervention.**

Gratsias Dittrich Ulloa Rubio

Delivered in open court in Luxembourg on 12 December 2018.

[Signatures]