Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 7 May 2020 [1]

Case C-132/19 P

Groupe Canal +
v

European Commission

(Appeals – Competition – Agreements, decisions and concerted practices – Television distribution – Territorial exclusivity – Regulation No 1/2003 – Article 9 – Decision rendering commitments binding – Misuse of powers – Preliminary assessment – Legal and economic context – Proportionality – Obligation for the Commission to take account of considerations relating to the application of Article 101(3) TFEU – Third-party contractual rights – Protection)

I. Introduction

1. The present case arose from an action brought against a decision of the European Commission by which certain commitments assumed by a multinational producer of audiovisual content in response to the competition concerns expressed by the Commission on opening an investigation procedure were rendered binding.

2. The concerns related to an alleged vertical agreement the aim of which was to partition the internal market on a national basis by means of contractual clauses which guaranteed the multinational and a broadcaster in the United Kingdom and Irish market a licence providing absolute territorial exclusivity.

3. The Commission's decision to accept the commitments offered and to make them binding was challenged by a French broadcaster, a third party to the proceedings that intervened at a later stage, to which the multinational had given notice of the commitments in order to inform it that it no longer intended to require compliance with contractual clauses which assured the broadcaster of absolute territorial exclusivity in the French market.

4. The present appeal is brought on various grounds. The essential legal issues on which I shall focus, at the Court's request, arise from the third and fourth grounds of appeal and are as follows: (i) the need to place the conduct which gave rise to the competition concerns in its legal and economic context; (ii) the question of whether, when adopting a decision under Article 9 of Regulation No 1/2003, the Commission must take account of considerations relating to the

[1] Original language: Italian.

application of Article 101(3) TFEU; (iii) the question of the Commission's observance of the principle of proportionality on making commitments offered by an undertaking binding, with particular reference to the effects upon third parties of a decision adopted pursuant to Article 9 of Regulation No 1/2003, in particular when the commitments given by the undertaking to which the decision is addressed, and which are subsequently made binding by the Commission, consist in a unilateral declaration no longer to comply with certain clauses of an agreement between that company and another company which, not being concerned by the investigation, has neither proposed nor endorsed the offer of such commitments.

II. Legal framework

5. Recital 13 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now Articles 101 and 102 TFEU] [2] reads 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. Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case. …'

6. Recital 22 of Regulation No 1/2003 of 16 December 2002 reads as follows:

'In order to ensure compliance with the principles of legal certainty and the uniform application of the Community competition rules in a system of parallel powers, conflicting decisions must be avoided. It is therefore necessary to clarify, in accordance with the case-law of the Court of Justice, the effects of Commission decisions and proceedings on courts and competition authorities of the Member States. 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 81 and 82 of the Treaty.'

7. Moreover, Article 9 of Regulation No 1/2003 provides:

'1. 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.

…'

[2] OJ 2003 L 1, p. 1.

III. The facts, the procedure and the judgment under appeal

A. The context of the dispute

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

9. In the context of that investigation, 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 (United States), its parent company (together, 'Paramount').

10. In its statement of objections, the Commission set out its preliminary finding concerning the incompatibility with Article 101 TFEU and Article 53 of the Agreement on the European Economic Area ('the EEA') of certain clauses in the licensing agreements which Paramount had concluded with Sky UK Ltd and Sky plc (together, 'Sky').

11. More specifically, the Commission was focussing its investigation on two related clauses in the licensing agreements concluded with Sky.

12. 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, on the other hand, required Paramount, in the context of agreements which it concluded with broadcasters established in the EEA but outside the United Kingdom, to prohibit such 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.

13. By decision of 24 November 2015, Groupe Canal + ('Canal +') was given leave 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 81 and 82 of the EC Treaty. [3]

14. By letter of 4 December 2015 headed '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, inter alia, to Canal + its legal assessment concerning the application of Article 101 TFEU to the facts of the case, followed by a preliminary conclusion in that regard. According to that preliminary conclusion, the Commission proposed to adopt a decision addressed to Sky and to each of the film production companies concerned 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.

15. Further to the initiation of the proceedings and the Commission's preliminary assessment, on 15 April 2016, Paramount offered commitments to address the concerns raised by the Commission, as provided for by Article 9 of Regulation No 1/2003.

[3] OJ 2004 L 123, p. 18.

16. After receiving observations from other interested persons, including Canal +, the Commission adopted the decision challenged before the General Court ('the contested decision'),[4] which provided, in Article 1, that the commitments listed in the annex were to be binding on Paramount and its successors and subsidiaries for a period of five years from the date of notification of the decision.

17. In particular, 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 proceedings ('the relevant clauses') concerning the satellite transmission of audiovisual content and the internet transmission of audiovisual content.

18. As regards satellite transmission, the relevant clauses are, first, the 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, second, the clause according to which reception in the licensed territory is not to constitute a breach of contract by Paramount if Paramount has not authorised the availability of a third party's descrambling devices in that territory.

19. 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.

20. In addition, it is apparent from the third paragraph of Clause 1 of the annex to the contested decision that 'Broadcaster Obligation' refers to the clauses or equivalent clauses prohibiting 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. 'Paramount Obligation' refers to the clauses or equivalent clauses requiring Paramount to prohibit broadcasters located in the EEA but outside the territories for which the broadcaster has exclusive rights from responding to unsolicited requests from consumers residing in those territories.

21. In accordance with Clause 2 of the annex to the contested decision, from the date of notification of the contested decision, Paramount is to abide by the following 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 the 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 existing Pay-TV Output Licence 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).

22. Canal + 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

[4] Decision of 26 July 2016 in Case AT.40023 – Cross-border access to pay-TV.

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 Canal + as regards the use of geo-blocking technologies to prevent retransmission outside the licensed territories.

23. By letter of 25 August 2016, Paramount notified Canal + of the commitment in point 2.2(a) of the annex to the contested decision 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, Canal + 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.

B. The proceedings before the General Court and the judgment under appeal

24. By application lodged at the Registry of the General Court on 8 December 2016, Canal + brought an action under Article 263 TFEU for annulment of the contested decision.

25. By order of 13 July 2017, *Groupe Canal* + v *Commission*,[5] the Bureau européen des unions de consommateurs ('the 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 ('EFAD') and C More Entertainment AB were granted leave to intervene in support of the form of order sought by Canal +. 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 Canal +.

26. In support of its action, Canal + put forward four pleas in law, alleging (i) a manifest error of assessment as regards the compatibility of the relevant clauses with Article 101 TFEU; (ii) infringement of Article 9 of Regulation No 1/2003 as regards the identification of the concerns addressed by the commitments imposed; (iii) breach of the principle of proportionality; (iv) misuse of powers.

27. By its judgment of 12 December 2018, *Groupe Canal* + v *Commission*[6] ('the judgment under appeal'), the General Court dismissed the action brought by Canal +.

C. The proceedings before the Court of Justice and the forms of order sought

28. By an appeal lodged on 15 February 2019, pursuant to Article 56 of the Statute of the Court of Justice, Canal + brought proceedings to have the judgment of the General Court set aside.

29. In its appeal, Canal + asks the Court of Justice to set aside the judgment of the General Court in so far as it dismissed its action for annulment of the contested decision and in so far as it ordered it to pay the costs, to annul the contested decision and to order the Commission to pay the costs in their entirety.

[5] Order of 13 July 2017, *Groupe Canal* + v *Commission*, T-873/16, not published, EU:T:2017:556.

[6] Judgment of 12 December 2018, *Groupe Canal* + v *Commission*, T-873/16, EU:T:2018:904.

30. The Commission asks the Court to dismiss the appeal brought by Canal + and to order it to pay the costs.

31. The French Republic, intervening in the proceedings in support of Canal +, asks the Court to set aside the judgment under appeal in its entirety and to draw all the necessary inferences therefrom.

32. UPC, intervening in support of Canal +, asks the Court to set aside the judgment under appeal in so far as it dismissed the action brought by Canal + for annulment of the contested decision and in so far as it ordered Canal + to pay the costs, to annul the contested decision and to order the Commission to pay the entirety of its costs.

33. EFAD, in support of Canal +, asks the Court to find the appeal well founded in its entirety, to set aside the judgment under appeal in so far as it dismissed the action brought by Canal + for annulment of the contested decision and in so far as it ordered Canal + to pay the costs, to annul the contested decision and, in any event, to order the Commission to pay the entirety of its costs.

34. The BEUC, intervening in support of the Commission, asks the Court to dismiss the appeal in its entirety and to order Canal + to pay the entirety of its costs.

IV. Examination of the appeal

35. In support of its appeal, Canal + puts forward four grounds: (i) the first ground of appeal alleges that the General Court erred in law in finding that the Commission did not misuse its powers in the contested decision; (ii) the second ground of appeal alleges infringement by the General Court of the principle *audi alteram partem*; (iii) the third ground of appeal alleges that the General Court erred in law by failing to state reasons and by conducting an incomplete examination of the facts; (iv) the fourth ground of appeal alleges that the General Court misinterpreted Article 9 of Regulation No 1/2003 and point 128 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU[7] ('the Commission's Best Practices').

36. As requested by the Court, I shall focus my analysis on the third ground of appeal (and in particular on the first part thereof, which raises the question whether, on adopting a decision in accordance with Article 9 of Regulation No 1/2003, the Commission must take account of considerations relating to the application of Article 101(3) TFEU) and on the fourth ground of appeal.

A. The third ground of appeal, alleging that the General Court erred in law by failing to state reasons and by conducting an incomplete examination of the facts

1. Arguments of the parties

37. In the first place, Canal +, supported by EFAD and the French Republic, submits that the General Court erred in law in asserting (in paragraph 39 of the judgment under appeal) that review of the lawfulness of the contested decision may relate only to the following three

[7] OJ 2011 C 308, p. 6.

questions: (a) whether the circumstances set out in the contested decision are capable of establishing competition concerns; (b) if so, whether the commitments made binding address those concerns; (c) whether Paramount did not offer less restrictive commitments than those accepted that adequately addressed the competition concerns.

38. In the second place, in the opinion of the parties mentioned above, the General Court erred in asserting (paragraphs 62 to 66 of the judgment under appeal) that the question of whether the conduct that gave rise to the concerns in question satisfied the cumulative conditions for the application of Article 101(3) TFEU had no bearing on the actual nature of a decision such as the contested decision.

39. In support of their argument, the parties just mentioned point out that it is clear from the judgment of 11 September 2014, *CB* v *Commission* (C-67/13 P, EU:C:2014:2204, paragraph 53), that, in order to determine whether an agreement between undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition 'by object' within the meaning of Article 101 TFEU, the legal and economic context of which it forms a part must be carefully analysed, with account being taken of the nature of the goods or services concerned, as well as of the real conditions of the functioning and structure of the markets in question. It was therefore incumbent on the General Court to determine whether the evidence adduced provided all the information that was necessary for assessing what was a complex situation.

40. It follows, in the submission of these parties, that, by failing to answer the argument that the Commission took no account of the legal and economic context in France into which the clauses at issue fall, the General Court breached its duty to state reasons.

41. On the issue of inadequate reasoning, the French Republic adds that the General Court failed clearly to define the competition concerns that potentially justified the adoption of a decision under Article 9 of Regulation No 1/2003, in that it omitted to investigate whether the relevant clauses were sufficient to be regarded, prima facie, as a restriction of competition by object. In that regard, it submits that it is not enough to make a general reference to the Court's case-law on territorial restrictions on satellite broadcasting. Moreover, the objective of protecting cultural diversity is inseparable from the legal and economic context into which the relevant clauses fall and cannot be dealt with merely in the context of an examination as referred to in Article 101(3) TFEU.

42. Canal + adds that the General Court failed in its duty to take into account the legal and economic context of the relevant clauses and confined itself to observing (in paragraphs 40 to 42 of the judgment under appeal) that, having regard to their content, their objectives and their legal and economic context, the relevant clauses, which led to absolute territorial exclusivity, had as their object the exclusion of all cross-border competition, and that that was sufficient to justify the Commission's concerns.

43. In this connection, UPC adds that the General Court failed to take account of the particular nature of copyright. It ignored the fact that to respond to unsolicited orders from consumers outside the licensed territory ('passive sales') is a breach of copyright. In addition, in copyright, it makes no sense to draw a distinction between an exclusive authorisation right of 'relative' scope and an exclusive authorisation right of 'absolute' scope, since it is legally impossible, and against international, European and national copyright rules, on the one hand to recognise the right of

copyright holders to authorise transactions with an operator for a given territory and, on the other, to prevent them from enforcing compliance with the conditions of the authorisation granted to that operator.

44. EFAD maintains that the General Court ignored the fact that the abolition of geo-blocking measures would lead to the situation where two contracting parties would be unable to include in their contract matters which they are guaranteed by copyright. Passive sales would still be prohibited, even in the absence of such clauses, inasmuch as licensees would not have the necessary rights to distribute works outside the relevant licensed territory.

45. The French Republic states that copyright has as its objective not only to guarantee the right to remuneration, but also to guarantee the right of authors to define the terms under which their works may be exploited, the promotion of intellectual creation and the promotion of cultural diversity.

46. UPC maintains that the General Court failed to take account of the fact that, in France, specific rules have been established, based on EU law, regarding broadcasters, distributors, transmission platforms and the media and that these rules necessarily imply territorial restrictions. In particular, there are investment obligations relating to local production and broadcasting the aim of which is diversity in production and the distribution of European works and French-language originals. The General Court also failed to take account of the fact that, for non-physical content made available over the internet, there is no difference between an 'active' sale and a 'passive' sale. Indeed, since end users are easily able to access websites, there is complete temporal coincidence of the request made by the consumer and the supply of the content requested.

47. As regards the judgment of 4 October 2011, *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631; 'the judgment in *Football Association Premier League and Others*'), Canal +, joined by UPC and the French Republic, asserts that that judgment could show that if such clauses are considered in their legal and economic context it may be possible to rule out the existence of a restriction of competition or the imposition of an analysis of the effects of the agreement (paragraph 140). The General Court thus erred in law by placing particular reliance on that judgment, which did not concern the film industry (paragraphs 43 to 50 of the judgment under appeal), and failing to examine the specific legal and economic context of the film industry, the importance of which, however, was confirmed by the Court in its judgment of 6 October 1982, *Coditel and Others* (262/81, EU:C:1982:334, paragraphs 15 and 16) ('the judgment in *Coditel II*'). Indeed, in that judgment, the Court confirmed that the characteristics of the film industry in Europe (and in particular those relating to dubbing and subtitling for the benefit of different cultural groups, to the possibilities of television broadcasting and to the system of financing film production) demonstrate that an exclusive representation licence is not, in itself, such as to prevent, restrict or distort competition.

48. EFAD, along with UPC and the French Republic, states that, by contrast with American works, which are funded from studios' own resources, the funding for independent European audiovisual works comes mainly from the sale of exclusive rights, territory by territory, to international sales agents, distributors and broadcasters, which, in exchange for exclusive exploitation rights, commit to contributing to the pre-financing of the work. These parties provide funding before a work is produced, on the basis of a forecast of how successful the future work will be in their territory, and guarantee a minimum potential viewing audience. This method of pre-financing is essential in order to garner the resources necessary for the production of

high-quality content and to generate income that will allow investment in new productions. Pay-TV operators and online broadcasters will therefore co-finance a film only in exchange for complete exclusivity in the exploitation of that film in given territories of the EEA. In a high-risk market, reliance on territorial exclusivity has the function of reducing uncertainty and lessening investment risk. The financing of a film is thus different from the financing of a sporting event, such as that at issue in the judgment in *Football Association Premier League and Others*: the use of exclusive territorial licenses for the broadcasting of sporting events is intended to maximise profits, not merely to secure adequate funding. EFAD adds that the General Court ignored the fact that the abolition of clauses that prohibit passive sales and the associated geo-blocking measures would lead to the situation where two contracting parties would be unable to include in their contract matters which they are guaranteed by copyright. Passive sales would still be prohibited, even in the absence of such clauses, inasmuch as licensees would not have the necessary rights to distribute works outside the relevant licensed territory. UPC submits that the absence of any contractual guarantee of compliance with territorial exclusivity would amount in practice to a lack of exclusivity under the licence. The exclusivity of the licence, without the backing of contractual guarantees ensuring observance, would no longer be valued or indeed remunerated as such. Indeed, negotiations between rights holders and broadcasters are based on the grant of territorial exclusivity and on there being a guarantee that no competitor will broadcast in the licensed territory during the period for which exclusive rights are granted.

49. Canal + also asserts that the General Court breached its duty to state reasons, having failed to explain in what way the competition concerns identified by the Commission were well founded, despite the abovementioned considerations drawn from the judgment in *Coditel II*.

50. Moreover, Canal +, along with EFAD, maintains that, in asserting (in paragraphs 57 and 69 of the judgment under appeal) that any reduction in the income which the group derived from customers in France could be offset by the fact that the group would be free to address a customer base situated throughout the EEA, the General Court failed to take account of the particular features of the sector and failed to examine all the relevant facts. In particular, the General Court did not take account of the study by Oxera,[8] which demonstrates that territorial exclusivity is necessary to the funding of European cinema because of the diverse cultural sensitivities in the European Union, that the value of European films varies from one Member State to another and from one linguistic region to another, that the production of European films, and thus cultural diversity in the European Union, is funded primarily by broadcasters on the basis of a system of absolute territorial protection. Any fall in revenue could not, therefore, be compensated by the disappearance of absolute exclusivity, because customers in France would primarily choose to subscribe to operators that broadcast content mainly in the English language.

51. EFAD adds that the cost of a multi-territorial licence would be far higher, and thus prohibitive. The cost of acquiring new subscribers outside a distributor's or broadcaster's traditional territory would entail a drastic reduction in broadcasters' freedom of choice, in terms of production. Broadcasters would in fact be encouraged to focus on productions having the widest possible broadcasting potential, that is to say, those of interest to a general audience, and preferably in English. The relevant clauses are therefore important to the promotion of the European cultural diversity which the European Union pursues. The French Republic adds that the aim of protecting such diversity is inseparable from the legal and economic context into which the relevant clauses fall and cannot be the subject merely of an examination pursuant to Article 101(3) TFEU. EFAD also submits that, in France, Canal + is under an obligation to

[8] *The impact of cross-border access to audiovisual content on EU consumers*, produced by Canal +.

produce European works. Faced with competition from large English-language operators and content aimed at a wide public, its income and its subscriber base could fall, preventing it from purchasing licences for exploitation in various European countries. The little revenue that can be derived from passive sales of the European repertory could in no way compensate the loss of local broadcasters' income and subscribers. An absence of exclusivity would place platforms that already have a global subscriber base at an advantage, at the expense of European players, whose capacity to find new customers is more limited. UPC states that that would bring about a strengthening of the negotiating power of international production groups in dealings with independent French producers and a concentration of the offer in the hands of the most powerful broadcasters. In addition, in the case of passive sales by pay-TV channels, the negotiation of copyright holders' remuneration would not relate to a single work but to a multitude of works, which would entail further complications. More complications would arise from the application of value added tax, the rates of which vary from one Member State to another. The French Republic adds that the proper remuneration of copyright is not only that which can reasonably be connected with the actual or potential number of individuals who enjoy or wish to enjoy the service provided; it also includes the costs of adapting the distribution of the work to the specific requirements of each national market. Furthermore, the technology needed in order to receive audiovisual works can be counterfeited and does not, therefore, make it possible to establish the actual and potential public by subdividing purchase requests by country of origin. In any event, the geographical restrictions inherent in the licences granted to Canal + make it impossible for it freely to address customers located in all the Member States.

52. For those reasons, according to Canal +, the General Court did not give sufficient reasons in relation to the ground of appeal relating to cultural diversity and the necessity of marketing works in the language of the customer.

53. The Commission, supported by the BEUC, maintains, in the first place, that it is clear from the information set out in paragraphs 49 to 58 and 118 of the judgment under appeal that the General Court examined in detail the legal and economic context into which the relevant clauses fall and found that it did not permit the finding that such clauses are not capable of restricting competition. The General Court did, therefore, answer the arguments of Canal +.

54. In addition, according to the Commission, it is clear from the judgment in *Football Association Premier League and Others* (paragraph 140), that the principle that an agreement aimed at partitioning national markets within national boundaries must be deemed to have as its object the restriction of competition fully applies in the field of the cross-border provision of broadcasting services. No special regime applies, therefore, to the film industry.

55. As regards the judgment in *Coditel II*, cited above, that merely confirms that an agreement which confers upon a sole licensee the exclusive right to broadcast a work from one Member State, and so to prohibit its being broadcast by others during a specified period of time, does not, in itself, have an anticompetitive object. On the other hand, where an agreement of that type contains additional obligations designed to ensure the observance of territorial restrictions on the exercise of the licence, the aim of those obligations is, in principle, to restrict competition. Moreover, the judgment in *Coditel II* addressed a context in which cable television companies had shown a work to the public without having the necessary rights in the Member State from which the work was broadcast and without paying any remuneration. That is a different context from the context of the present case, in which Sky, further to the commitments made binding by the Commission, can provide its satellite television broadcasting services to customers residing in

the EEA but outside the United Kingdom and Ireland, in accordance with prevailing regulatory provisions, and has the necessary rights for the territories in question and pays appropriate remuneration that takes the actual and potential public in the other Member States into account.

56. Moreover, the General Court distinguished the context of the judgment in *Coditel II* from the context of the judgment in *Football Association Premier League and Others* and rightly referred in this case to the latter.

57. In the second place, the Commission maintains that the General Court was not required to base its ruling on the content of the study by Oxera, since there are methods for ensuring that copyright is adequately remunerated other than the partitioning of national markets, such as the taking into consideration of the actual and potential public both in the Member State from which the broadcast is made and in any other Member State, such public being determined on the basis of the possession of a decoding device or the computer's IP address, or the possibility of re-negotiating the remuneration in the event that the value of the licensed content is influenced by a significant number of unsolicited requests from customers outside the Member State from which the broadcast is made. Furthermore, the Oxera study contains no specific analysis of the impact of the consequences of the commitments on cultural diversity.

58. In the third place, the Commission observes that the argument which Canal + makes regarding the consequences of the commitments for cultural diversity rests on the premiss that the contested decision will induce viewers primarily to choose to subscribe to operators that broadcast content mainly in the English language. However, many viewers might choose not to subscribe to the television distribution services of television broadcasters established outside their own Member State, for linguistic and cultural reasons. The BEUC adds that only 20% of the French population has the requisite degree of competence to follow and understand audiovisual works in a foreign language without subtitling. According to the Commission and the BEUC, the General Court was right in stating (in paragraphs 57 and 69 of the judgment under appeal) that the contested decision contributes to rather than compromises the objective of promoting cultural diversity, since the commitments assumed open up new opportunities for customers to gain access to Paramount content.

59. The BEUC also submits that the third ground is manifestly inadmissible, since, even though it refers to the existence of errors of law that allegedly vitiate the judgment under appeal, the arguments which Canal + makes seek to challenge the General Court's assessment of certain items of evidence. Canal + confines itself to repeating the arguments which it made at first instance in relation to the supposed need for territorial exclusivity for the purposes of funding the film industry.

2. Assessment

60. I think it appropriate to make a preliminary observation about the subject matter and scope of the present case in order to clarify that the general question (of legislative policy) of the prohibition of geo-blocking[9] is not co-extensive with the specific situation at issue in this

[9] See, most recently, Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC (OJ 2018 L 601, p. 1).

case.[10] The Court is here being asked to conduct a review on appeal of a judgment of the General Court which confirmed the lawfulness of a Commission decision. That decision, in the context of proceedings pursuant to Article 9 of Regulation No 1/2003, accepted and rendered binding the commitments offered by Paramount to alter certain contractual clauses that conferred on certain European broadcasters absolute exclusive territorial rights in relation to the licensed property. Those commitments, which relate to specific contractual clauses and are limited in time (from July 2016 to July 2021) are not – precisely because of their restricted scope and temporal limitation – such as to impinge upon the general question of the prohibition of geo-blocking in the audiovisual sector, which is at present prohibited under the recent Regulation 2018/302, which, however, is due to be reviewed two years from the date of its entry into force.

61. By the third ground of appeal, essentially, it is alleged that the General Court failed to criticise the Commission for not taking adequate account of the legal and economic context surrounding the competition concerns expressed and for not then finding to be applicable – despite the express request of Canal +, intervening in the proceedings – any of the circumstances referred to in Article 101(3) TFEU, which would have compensated for the allegedly anticompetitive nature of the conduct at issue.

62. According to the Court's case-law, the Commission may adopt a decision on commitments when three conditions are fulfilled:[11] (i) the Commission must express competition concerns, without it being necessary for it to establish that the conduct in question constitutes an infringement; (ii) the undertaking must offer commitments that adequately address the concerns expressed by the Commission; (iii) the decision to accept the commitments must in any event comply with the principle of proportionality, which is a general principle of EU law and is a criterion for the lawfulness of any act of the institutions of the European Union, including decisions taken by the Commission in its capacity as competition authority.

63. It is important to emphasise that, as is clear from Article 9 of Regulation No 1/2003, particularly when read in the light of recital 13 of that regulation, 'the Commission is not required to make a finding of an infringement, its task being 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'.[12]

64. In that context, application of the principle of proportionality by the Commission 'is confined to verifying that the commitments in question address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately. When carrying out that assessment, the Commission must, however, take into consideration the interests of third parties'.[13]

65. Each of the three stages into which, according to the Court's case-law, the Commission's decision-making process falls in matters relating to commitments poses significant problems that call for clarification by the Court. Incidentally, I would emphasise that such clarification is all the more necessary in the context of a decentralised system of antitrust enforcement.

[10] See the Commission's defence, which states, in paragraph 11 thereof, that 'the contested decision does not relate to the "end" of "geo-blocking" in the field of audiovisual "services" or "audiovisual content" (paragraphs 19, 20 and 23 of the appeal), but merely to contractual restrictions relating to passive sales outside the territory covered by the licence granted by Paramount to Sky'.

[11] See, most recently, judgment of 29 June 2010, *Commission* v *Alrosa* (C-441/07 P, EU:C:2010:377, paragraph 40 et seq.).

[12] Judgment of 29 June 2010, *Commission* v *Alrosa* (C-441/07 P, EU:C:2010:377, paragraph 40).

[13] Judgment of 29 June 2010, *Commission* v *Alrosa* (C-441/07 P, EU:C:2010:377, paragraph 41).

66. In the first place, it is necessary to clarify the meaning of 'competition concerns' and, consequently, the scope of the judicial review that the Court must carry out. It should be remembered in this connection that, since a decision to accept commitments does not require a finding of an infringement, the Commission does not have to conduct its investigation as exhaustively or state its reasoning as comprehensively as it would in the usual case of proceedings leading to a finding of an infringement of the competition rules. This makes it possible to meet the requirement underlying Article 9 of Regulation No 1/2003, which is to achieve the objective of procedural economy through effective application of the rules on competition laid down in the FEU Treaty that is swift and uses few resources (as the General Court expressly acknowledged, in particular, in paragraph 99 of the judgment under appeal). Proceeding in this way enables the Commission to free up resources which can then be used in dealing with other cases that do call for a decision on whether or not there has been an infringement, in accordance with Article 7 of Regulation No 1/2003.[14] In parallel with that, undertakings which independently decide to offer commitments '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. On the other hand, 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'.[15]

67. Consequently, a decision to accept commitments may be taken by the Commission without having to develop a robust theory of the anticompetitive harm, as would normally be required. However, accepting that a robust theory of harm is not required does not mean that a plausible description of anticompetitive harm is not necessary. Relieving the Commission of the burden of the full investigation and comprehensive reasoning that are normally required does not mean that its concerns may be a mere *petitio principii* or simply an assertion unsupported by an investigation and reasoning - for these, even if simplified, must nevertheless be plausible and capable of providing an answer to the questions that have emerged in the course of the proceedings. The point that seems crucial to me is that the requirement for procedural economy, enshrined in Article 9 of Regulation No 1/2003, must be weighed against other requirements that are very much present in EU competition law. One of those requirements is observance of the rights of defence of the undertaking that is under investigation, which independently chooses to offer commitments, admittedly, but whose decision must be made in a context in which it is assured that any decisions on the Commission's part which leads to the acceptance of its commitments are taken in the course of proceedings in which the arguments the undertaking makes in its defence are actually taken into consideration, and that such decisions are based on a correctly defined 'potential infringement'. If it were otherwise, the system of competition law would be exposed to serious adverse consequences in terms of foreseeability and legitimacy.

68. More specifically, there is a 'paradox of effectiveness' that should not be overlooked. The procedure for the acceptance of commitments was introduced, as I have already observed, in order to increase the effectiveness of competition law. The Commission's practice and that of the national authorities have shown it to be useful in this regard. However, extensive or virtually unlimited recourse to this procedure could result in a significant degree of uncertainty in competition law: what are the contours of anticompetitive conduct in the light of decisions on commitments; what is compatible with competition law and what is prohibited? In addition, the

[14] In her Opinion in *Commission* v *Alrosa* (C-441/07 P, EU:C:2009:555, point 51), Advocate General Kokott makes the valid observation that, by contrast with proceedings under Article 9 of Regulation No 1/2003, in which the Commission relies on the voluntary commitments of the parties, 'in the context of a decision under Article 7 … it would possibly have to identify remedies itself, which would require it to undertake much more extensive and lengthy investigations and also a fuller assessment of the facts'.

[15] Judgment of 29 June 2010, *Commission* v *Alrosa* (C-441/07 P, EU:C:2010:377, paragraph 48).

Commission and the national authorities should not be allowed to succumb to the temptation to regulate, using decisions on commitments not so much as a remedy for anticompetitive conduct, but rather to impose a given form on economic relations in the market.

69. The consequence could be that antitrust law becomes less foreseeable and, ultimately, that its effectiveness and legitimacy are weakened. For that reason, it is necessary that decisions on commitments should always be kept within a system of legal limits, the guardians of which are the European Union and national courts, which must see that such decisions are helpful in strengthening antitrust enforcement and do not run into the dangers of excessive and overabundant use. [16]

70. The conclusion is that decisions to accept commitments must be founded on a 'potential infringement', that is, on an analysis of the undertakings' conduct and of the context surrounding it that supports the conclusion that it is possible, and actually probable, even if not yet certain, that the undertakings in question have been causing harm to competition. It is not a finding, yet the Commission must not confine itself to conjecture or to general hypotheses that are not even summarily tested in the light of the material that has been produced in the proceedings.

71. If the foregoing is accepted, two consequences ensue. The first is that, if the concern relates to an infringement by object, the Commission will be bound to consider the legal and economic context into which that conduct falls. The second is that, if the undertaking that has adopted the conduct under investigation, or indeed other undertakings participating in the proceedings in a different capacity, have adduced evidence to justify the conduct which, prima facie, appears to be anticompetitive, the Commission must, even if only summarily, examine that evidence in its decision.

(a) Analysis of the legal and economic context into which the conduct giving rise to the competition concerns falls

72. The first point relates to the case-law of the Court of Justice which has clearly confirmed that the existence of an infringement by object requires in any case an analysis of the legal and economic context into which the conduct under examination falls. Suffice it to recall in this connection the rich vein of case-law running from *Cartes Bancaires* [17] to the recent *Generics* judgment. [18]

73. In the present case, the General Court, developing on points made briefly by the Commission (in paragraphs 43 and 44 of the contested decision) analysed the legal and economic context of the conduct at issue, taking account of the particular features of the system of funding in the film industry in its determination of the objectives of the television distribution agreements in question. Indeed, paragraphs 49 to 57 of the judgment under appeal are devoted to the legal and economic context into which the relevant clauses fall.

[16] The principle of legal certainty, which is a general principle of law, as stated in the judgment of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530), in paragraph 75, has as its corollary 'the principle of protection of legitimate expectations and requires, first, that rules of law must be clear and precise and, second, that their application must be foreseeable by those subject to them'; see judgment of 11 September 2019, *Călin* (C-676/17, EU:C:2019:700, paragraph 50 and the case-law cited). See, also, to that effect, judgment of 19 December 2019, *GRDF* (C-236/18, EU:C:2019:1120, paragraph 42).

[17] Judgment of 11 September 2014, *CB* v *Commission* (C-67/13 P, EU:C:2014:2204, paragraph 55).

[18] Judgment of 30 January 2020, *Generics (UK) and Others* (C-307/18, EU:C:2020:52, paragraph 82).

74. The references made in this connection to the judgment in *Football Association Premier League and Others*, cited above, are neither irrelevant nor misleading, as Canal + and the interveners supporting the appellant have argued.

75. The partitioning of markets may indeed be regarded, prima facie, as an antitrust infringement, even in the broadcasting sector [19] and even when the property which is the subject matter of an agreement incorporates an intellectual property right. [20]

76. The judgment in *Coditel II*, which the appellant cites in support of its arguments, does not confirm its position that there is no infringement of the competition rules in the present case, given that the Court confined itself in that judgment to stating that 'the mere fact that the owner of the copyright in a film has granted to a sole licensee the exclusive right to exhibit that film in the territory of a Member State and, consequently, to prohibit, during a specified period, its showing by others, is not [however] sufficient to justify the finding that such a contract must be regarded as the purpose, the means or the result of an agreement, decision or concerted practice prohibited by the Treaty'. [21]

77. In the judgment in *Football Association Premier League and Others*, the Court, confirming that the two rulings are not mutually exclusive, as the appellant's position seems to suggest, cited the judgment in *Coditel II* in support of the principle I have just mentioned, which is that agreements that are aimed at partitioning the internal market are not always to be regarded as restrictive by object, although it added that the presence of 'additional obligations' which make exclusive rights 'absolute' may render such agreements restrictive of competition by object.

78. In the judgment under appeal there is therefore no automatic extension to the present case of the judgment in *Football Association Premier League and Others*, merely an adaptation of the principle consistent with the Court of Justice's precedents.

79. Therefore, when an agreement between private persons extends beyond the core benefits which an intellectual property right is designed to confer, it may be an agreement that is restrictive of competition.

80. However, that is all subject to the condition that the legal and economic context into which the additional agreements fall is such as to rule out their lawfulness.

81. The analysis which the General Court carried out (which, as I have mentioned, is a clarification of the Commission's analysis) confirms that approach and applies it to the case at hand.

[19] Judgment of 4 October 2011, *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631), in which the Court stated that 'an agreement which might tend to restore the divisions 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' (paragraph 139) and 'that case-law is fully applicable to the field of the cross-border provision of broadcasting services' (paragraph 140).

[20] That approach was first adopted by the Court in its ruling in *Consten Grunding*, according to which the assignment of a registered trade mark was one of the means of conferring territorial protection on a distributor; see judgment of 13 July 1966, *Consten and Grundig* v *Commission* (56/64 and 58/64, EU:C:1966:41), and, later, judgment of 8 June 1982, *Nungesser and Eisele* v *Commission* (258/78, EU:C:1982:211). Regarding the pharmaceutical sector, see, most recently, judgment of 30 January 2020, *Generics (UK) and Others* (C-307/18, EU:C:2020:52), in paragraph 79 of which the Court stated that 'an industrial or commercial property right, as a legal entity, does not possess those elements of contract or concerted practice referred to in Article 101(1) TFEU, but the exercise of that right might fall within the ambit of the prohibitions contained in the Treaty if it were to manifest itself as the subject, the means or the consequence of an agreement or concerted practice … notwithstanding the fact that it may constitute the legitimate expression of the intellectual property right attached to the patent which empowers the holder of that patent, inter alia, to oppose any infringement'.

[21] Judgment of 6 October 1982, *Coditel and Others* (262/81, EU:C:1982:334, paragraph 15).

82. The General Court indeed took the legal and economic context into account and, specifically, the particular features of the system of funding in the film industry. It suggested a range of alternatives that could, in that particular sector, ensure that copyright holders receive adequate remuneration, thus convincingly demonstrating that the existence of property in which copyright subsists does not absolutely exclude the audiovisual sector from possible infringements of the competition rules resulting from agreements to partition markets.

83. The General Court in fact pointed out that, while it is true that the specific subject matter of intellectual property is intended to ensure for the right holders concerned protection of the right to exploit commercially the marketing or the making available of the protected subject matter, by the grant of licences in return for payment of remuneration, 'the specific subject-matter of … intellectual property does not guarantee the right holders concerned the opportunity to demand the highest possible remuneration. … they are ensured – as recital 10 in the preamble to the Copyright Directive and recital 5 in the preamble to the Related Rights Directive envisage – only appropriate remuneration for each use of the protected subject-matter'. [22]

84. In essence, '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 [Canal +] is henceforth free to address a customer base situated throughout the EEA and not only in France' (paragraph 57 of the judgment under appeal).

85. The examination of the legal and economic context carried out by the Commission and reiterated by the General Court thus confirms that it was hypothetically possible for there to be a 'competition concern' relating to a 'potential infringement' in the terms I have described.

(b) The applicability of the exemptions provided for by Article 101(3) TFEU in proceedings under Article 9 of Regulation No 1/2003

86. The second point is more problematic and is one of the most important aspects of the case under consideration. In the judgment under appeal (in paragraph 62) [23] the General Court in fact maintained that an investigation of whether the conditions laid down in Article 101(3) TFEU are met presupposes a finding of anticompetitive conduct. Following that scheme, the Commission would, if it had a competition concern, first have to determine whether there was an infringement pursuant to Article 101(1) TFEU and then, only after establishing an infringement, could it investigate whether any of the justifications provided for in Article 101(3) TFEU applied. Given that, in the case of decisions accepting commitments, there is no finding of an infringement, there should, according to the General Court, be no investigation of the conditions laid down in Article 101(3) TFEU.

[22] 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).

[23] The Commission expressed the same position at the hearing on 6 February 2020 (pp. 7 and 8 of the full transcript of the hearing).

87. In my opinion, the solution proposed by the General Court would lead to paradoxical outcomes, render meaningless any reference to the existence of a 'potential infringement' as the basis for the concerns which the commitments are supposed to allay and conflict with the logic underlying Article 101 TFEU, which essentially concerns the apportionment of the burden of proof between the Commission and the parties.

88. If the Commission's theory is applied, a decision to accept commitments could result in a twofold paradox. First, conduct that does not conflict with competition law could be precluded (giving a 'false positive', which is one of the gravest dangers of antitrust practice and one that can easily be avoided if an assessment, even a summary assessment, is made of the conduct adopted in the light of Article 101(3) TFEU). Second, the alteration of that conduct brought about by the commitments could undermine the very requirements flowing from Article 101(3) TFEU, the fulfilment of which is so important under primary law that they take precedence over a preliminary assessment carried out in accordance with Article 101(1) TFEU.

89. Moreover, it is only if the first and third paragraphs of Article 101 TFEU are considered together that it is possible to identify, even if only in the light of a summary analysis, a 'potential infringement' justifying the acceptance of commitments. Otherwise, the Commission will be carrying out an analysis that is missing a part which is regarded, by Article 101 TFEU, as essential in order for an infringement to be found. Admittedly, as I have reiterated, in proceedings for the acceptance of commitments there can be no finding of an infringement, but it is necessary that there should at least be a 'potential infringement'. Given that Article 101 TFEU imposes two stages in the identification of an infringement of the competition rules, outlined in the first and third paragraphs of Article 101 TFEU respectively, then even in order to allege a 'potential infringement' the analysis must touch upon both of those stages, even if, it must be stressed, it will be a much less exhaustive analysis and the reasons given will be far more succinct than when proceeding to a finding of an infringement.

90. Lastly, it must be observed that paragraphs 1 and 3 of Article 101 TFEU also serve to outline a method of apportioning the burden of proof.[24] In accordance with paragraph 1, the Commission identifies a possible infringement and defines a theory of anticompetitive harm, and the private individual responds to that and attempts to rebut the Commission's allegations by arguing the fulfilment of the conditions referred to in paragraph 3 of Article 101 TFEU. It is difficult to see why that logic should be upset when the Commission decides to follow the commitments route. The parties to the proceedings must, even in the initial phase, fully enjoy their rights of defence, and by exercising those rights not only do they protect their own interests but, if the arguments they make by reference to Article 101(3) TFEU are well founded, they also help to ensure that conduct which in actual fact promotes the interests underlying Article 101(3) TFEU, which are regarded by the FEU Treaty as overriding interests, is not prohibited.

91. Therefore, I consider that, even in proceedings relating to the acceptance of commitments proposed by an undertaking, the Commission must attend to both of the phases contemplated by paragraphs 1 and 3 of Article 101 TFEU and that it therefore cannot dispense with considering,

[24] According to the normal system for sharing the burden of proof, laid down in Article 2 of Regulation No 1/2003 and reiterated consistently in the case-law, 'it is for the party or the authority alleging an infringement of the competition rules to prove it and … it is for the undertaking or association of undertakings raising a defence against a finding of an infringement of those rules to demonstrate that the conditions for applying the rule on which such defence is based are satisfied, so that the authority will then have to resort to other evidence'; judgment of 26 January 2017, *Duravit and Others* v *Commission* (C-609/13 P, EU:C:2017:46, paragraph 56 and the case-law cited). See, to the same effect, judgment of 17 June 2010, *Lafarge* v *Commission* (C-413/08 P, EU:C:2010:346, paragraph 29).

even if only summarily, given the nature of the proceedings, the arguments raised by the parties or by third-party interveners regarding the fulfilment of the conditions laid down in Article 101(3) TFEU.

92. Applying the principles which I have expressed to the present case, I would observe that the General Court's simple assertion, with which I have taken issue, suggesting that Article 101(3) TFEU is generally inapplicable in proceedings relating to commitments, might not affect the validity of its judgment on this point because, in actual fact, both the Commission and the General Court provided succinct reasoning, consistent with the nature of proceedings concerning the acceptance of commitments, that rules out the failure to state reasons which is the subject of one of the grounds of appeal.

93. The reasoning set out by the General Court in paragraphs 53 to 57 and 67 to 72 of the judgment under appeal, together with the reasoning underlying the Commission's decision, in paragraphs 40 to 44 and 50 to 53, in fact could support the conclusion that the relevant clauses '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 [the intellectual property] rights' (paragraph 67 of the judgment under appeal).

94. Indeed, Article 101(3) TFEU enables the provisions of Article 101(1) TFEU to be declared inapplicable where an agreement between undertakings contributes to 'improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit', provided that 'restrictions which are not indispensable to the attainment of these objectives' are not imposed on the undertakings concerned.

95. The relevant clauses, in the opinion of both the General Court and the Commission, impose restrictions that 'go beyond what is necessary for the production and distribution of audiovisual works that require protection of intellectual property rights'[25] (paragraph 67 of the judgment under appeal), even for the purposes of protecting cultural diversity.

96. Indeed, absolute territorial protection 'manifestly goes beyond what is indispensable for the improvement of … 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 agreement concerned, of any cross-border supply of television broadcast services, even [of] 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)' (paragraph 68 of the judgment under appeal). Such partitioning of the market and the variation in prices to which it gives rise are in fact irreconcilable with the fundamental aim of the Treaty, which is the completion of the internal market (paragraphs 43 and 44 of the contested decision and paragraph 57 of the judgment under appeal).

[25] The specific subject matter of intellectual property does not in fact guarantee the holders of the rights in question the opportunity to demand the highest possible remuneration from broadcasting. That remuneration must be reasonable in relation to the parameters of the broadcast in question, including the actual or potential viewing public (paragraphs 41 and 42 of the Commission's decision and paragraphs 53 and 54 of the judgment under appeal).

97. In the present case, the General Court stated sufficiently its reasoning to the effect that there is an alternative for the funding of cinematic production in EEA countries – and thus also for the protection, inter alia, of the interests of cultural diversity – to the partitioning of markets by means of absolute territorial exclusivity: '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' (paragraph 69 of the judgment under appeal).

98. For that reason, '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' (paragraph 57 of the judgment under appeal).

(c) Interim conclusion

99. In conclusion on this point, I consider that the complaint raised in the third ground of appeal, alleging insufficient reasoning and an incomplete examination of the facts, need not be upheld, inter alia, because of the fact that the requirement that the General Court give reasons for its decisions cannot be interpreted as meaning that it is obliged to respond in detail to every single argument advanced by a party and that, rather, it is regarded as sufficient if the statement of the reasons on which a judgment is based clearly and unequivocally discloses the General Court's thinking, so that the persons concerned can be apprised of the justification for the decision taken and the Court of Justice can exercise its power of review. [26] The fact that the General Court, on the merits, arrived at a different conclusion from the appellant cannot in itself vitiate the judgment for failure to state reasons. [27]

100. The General Court did provide sufficient reasons in relation to the specific legal and economic context of the conduct at issue, and drew conclusions different from those advanced by the appellant but which do not appear to be manifestly incorrect.

101. In so far as concerns the applicability of the exceptions provided for by Article 101(3) TFEU to proceedings under Article 9 of Regulation No 1/2003, although the General Court was mistaken to assert that they are generally inapplicable, the contested decision and the judgment under appeal contain sufficient arguments for those exceptions to be considered as not applying in the present case. For that reasons, I suggest that the Court dismiss the third ground of appeal as unfounded.

[26] Opinion of Advocate General Kokott in *Commission* v *Alrosa* (C-441/07 P, EU:C:2009:555, point 100).

[27] Opinion of Advocate General Kokott in *Commission* v *Alrosa* (C-441/07 P, EU:C:2009:555, point 102).

B. The fourth ground of appeal in which the appellant alleges that the General Court misinterpreted Article 9 of Regulation No 1/2003 and point 128 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU[28] ('the Commission's Best Practices')

1. Arguments of the parties

102. Canal +, supported by the French Republic, asserts that, in ruling (in paragraphs 118 and 119 of the judgment under appeal) that, by their nature, the relevant clauses are aimed at partitioning the national markets of the whole of the EEA, and that their legal and economic context does not permit a finding that they are not capable of harming competition, and that no other commitments offered by Paramount, with less pronounced effects vis-à-vis Canal +, would have been adequate, the General Court misinterpreted Article 9 of Regulation No 1/2003 and point 128 of the Commission's Best Practices.

103. Canal +, along with the French Republic, observes, in the first place, that, by accepting Paramount's commitments relating to all agreements concluded with broadcasters in the EEA, while the competition concerns raised in the Commission's preliminary assessment related only to exclusive rights in the United Kingdom and Ireland, the Commission failed to take account of the particular features of other markets, in particular the French market, in which the regulatory and funding system is distinguished by the fact that the funding of audiovisual creations is primarily provided by broadcasters like Canal +.

104. By confirming the Commission's approach, the General Court breached the principle of proportionality and observance of the rights of third parties, as referred to in the judgment of 29 June 2010, *Commission* v *Alrosa* (C-441/07 P, EU:C:2010:377, paragraph 41). Indeed, the General Court erred in law in concluding, in paragraph 106 of the judgment under appeal, that the Commission had acted within the limits of the powers conferred on it by Article 9 of Regulation No 1/2003 and in pursuit of the objectives of that provision (namely procedural economy and efficiency), without affecting the contractual or procedural rights of Canal + beyond what was necessary in order to achieve those objectives.

105. The French Republic adds that the fact that no other commitments were offered that were capable of adequately responding to the competition concerns identified by the Commission is not a sufficient basis for asserting that the interests of third parties were actually considered. Indeed, given that the commitments are the outcome of negotiations exclusively between the Commission and the undertaking concerned, it is hard to imagine that the interests of third parties could have been taken into consideration in the context of proceedings in which the commitments given would have been compared solely with other commitments possibly suggested by the undertaking concerned.

106. UPC emphasises that the contested decision indeed affects the interests of all players in the film industry. It observes in fact that, in 2018, free television channels and pay-TV channels funded 97.8% of French-origin films having a budget of EUR 4 million or more and 77.2% of films with a guaranteed budget of between EUR 1 million and EUR 4 million. Canal + pre-purchased 113 French-origin films and 93.9% of French-origin films costing more than

[28] OJ 2011 C 308, p. 6.

EUR 7 million. In its analysis, the General Court did not take those circumstances into account, or the fact that the contested decision, if upheld, could completely upset the contractual standards of all the players in the market.

107. In the second place, Canal + maintains that, in accordance with point 128 of the Commission's Best Practices and footnote 76 thereto, commitments must be unambiguous and self-executing and their implementation must not be dependent on the will of a third party which is not bound by them.

108. The General Court breached that principle by asserting, in paragraph 104 of the judgment under appeal, that the Commission's decision does not constitute an interference with the contractual freedom of Canal +, since Canal + could 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. Moreover, by asserting, in paragraph 103 of the judgment under appeal, that it would be for the Commission to reopen the investigation if the national court should require Paramount to breach its obligations under the commitments, the General Court expressly acknowledged that implementation of the commitments is dependent on the will of Canal +, yet it failed to draw all the legal inferences from that conclusion.

109. Canal +, along with the French Republic, maintains, in the third place, that by asserting, in paragraph 100 of the judgment under appeal, that the contested decision could no more than influence the findings of the national court because it merely contains a preliminary assessment, the General Court seriously infringed the rights of third parties. The contested decision in fact deprives Canal + of its contractual freedom, since it will in practice be impossible for it to obtain a ruling of the national court contradicting the Commission and acknowledging the validity of the clauses at issue. In this connection, it is clear from the judgment of 23 November 2017, *Gasorba and Others* (C-547/16, EU:C:2017:891, paragraphs 28 and 29), that national courts cannot overlook decisions taken on the basis of Article 9(1) of Regulation No 1/2003 and must take the Commission's preliminary assessment into account and regard it as an indication, or even as prima facie evidence, of the anticompetitive nature of the agreement in question.

110. The French Republic adds that the effect of a decision such as the contested decision on the findings of the national court is intensified by the commitments negotiated with other multinationals in the sector in question, making it more likely that subsequent commitments will form the standard from which it will be ever more difficult for the national court to depart. Moreover, the fact that the Commission would necessarily reopen an investigation, pursuant to Article 9(2)(b) of Regulation No 1/2003, in the event that the national court finds that the agreement in question does not infringe Article 101(1) TFEU, could dissuade the national court from disputing the Commission's preliminary assessment.

111. The Commission, supported by the BEUC, maintains that the General Court was correct in asserting, in paragraphs 43 to 58 and 118 of the judgment under appeal, that Paramount's commitments addressed competition concerns relating to the whole of the EEA. The relevant clauses in fact constituted additional obligations aimed at subdividing the national markets throughout the EEA, prohibiting or limiting the passive cross-border sale by Sky of television distribution services to customers residing in the EEA but outside the United Kingdom and Ireland, as well as sales by broadcasters established in the EEA but outside the United Kingdom and Ireland to consumers residing in the United Kingdom and Ireland. The commitments

offered by Paramount therefore adequately answer the competition concerns expressed in the statement of objections and Paramount did not offer less onerous commitments that answered those concerns adequately.

112. The Commission, supported by the BEUC, also considers that the General Court was correct in stating, in paragraphs 83 to 108 of the judgment under appeal, that the implementation of Paramount's commitments is not dependent on the will of third parties, including Canal +. Indeed, in offering those commitments, Paramount was exercising its contractual freedom not to be bound by certain contractual clauses, and that decision was not dependent on the will of third parties. Moreover, the Commission's acceptance of the commitments does not deprive Canal + of the possibility of having recourse to the national court in order to protect its own interests in its contractual relations with Paramount. If a national court decides that the relevant clauses do not infringe Article 101(1) TFEU, or that they fulfil the conditions referred to in Article 101(3) TFEU, it will be for that court to determine whether the outcome of the proceedings before it can induce Paramount to breach the commitments entered into as a result of the contested decision. To avoid the outcome of such proceedings causing Paramount to breach its commitments, the national court could refuse to order the performance of the relevant clauses, while at the same time ordering, in accordance with national law, equivalent performance on Paramount's part and the payment of damages. The General Court considered that solution in paragraph 103 of the judgment under appeal.

113. The Commission, along with the BEUC, asserts, in the third place, that the General Court was right to consider, in paragraph 102 of the judgment under appeal, that Canal + might be able to obtain a decision of the national court conflicting with the Commission's decision and acknowledging the lawfulness of the clauses at issue. It is clear from paragraph 29 of the judgment in *Gasorba and Others*, cited above, that a national court must merely take into consideration the Commission's preliminary assessment as expressed in the decision at issue and regard it as an indication, or even as prima facie evidence, of the anticompetitive nature of the clauses at issue.

114. The BEUC maintains that the fourth ground of appeal is inadmissible, in that Canal + is attempting to call into question the findings and assessments made by the General Court in the examination of the third and second grounds, essentially repeating the same arguments as it raised at first instance.

2. Assessment

(a) Breach of the principle of proportionality and observance of the rights of third parties

115. In the fourth ground of appeal, the criticisms levelled against the judgment of the General Court relate essentially to an alleged error of law in the Court's stating that the Commission did not breach the principle of proportionality by making the commitments offered by Paramount binding throughout the EEA, while the competition concerns which the institution expressed in its preliminary analysis only concerned the exclusive territorial rights in the United Kingdom and Ireland, and in its stating that that the Commission's decision would not undermine the rights of third parties, given that they could in any event obtain judicial protection before the national courts in relation to the relevant clauses.

116. The delicate question which the Court is asked to resolve therefore concerns the possibility that the commitments proposed, and accepted by the Commission, might have consequences for the contractual rights of third parties. That question turns on the delicate balance between contractual freedoms and the regulatory principles of, and objectives enshrined in, the Treaties of the European Union, particularly those relating to the protection of competition. It is well known that freedom of contract is one expression of the freedom to conduct a business, which is guaranteed by Article 16 of the Charter of Fundamental Rights of the European Union [29] and is acknowledged in the constitutional traditions common to the Member States. However, as has been emphasised in the case-law of the Court, freedom to conduct a business is not an absolute right, but must be considered in relation to its social function. [30] Accordingly, the freedom to conduct a business may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of that freedom in the public interest. [31]

117. It is into that context, which I have only very briefly described, that fall some of the limitations on the contractual freedom of the parties that are at issue in this case, such as the limitation arising from Paramount's obligation not to include in any new licence agreements clauses which create absolute barriers to intra-EU competition and frustrate the objective of establishing the single market, referred to in Article 3(3) TEU, or the principle asserted in the case-law and recalled by the General Court in accordance with which the rules on copyright guarantee only remuneration that is 'reasonable' in relation to the economic value of the service provided and clauses which provide for a higher level of remuneration might not be permissible if they are premised on the national partitioning of markets resulting from the absolute territorial protection of national licensees.

118. It would not be a novel occurrence for a decision in a competition matter to have an effect on existing contractual relations. However, the peculiarity of the case under consideration is that, with the objective of protecting competition in the internal market, the Commission has accepted commitments proposed by an undertaking that affect the contractual relations between that undertaking and a party that was merely a third party in the proceedings conducted pursuant to Article 9 of Regulation No 1/2003.

119. Can a decision to accept commitments go as far as to compel an undertaking not to perform a contract with a third party? Can the objective of protecting competition justify so significant a sacrifice of the freedom of contract of a third party? These are questions which concern the application of the principle of proportionality to decisions on the acceptance of commitments.

120. The Commission, relying on the judgment of 29 June 2010, *Commission* v *Alrosa* (C-441/07 P, EU:C:2010:377), in particular paragraph 41 thereof, maintains a particularly narrow interpretation of the role to be played by the principle of proportionality in this area. It alleges that the institution must confine itself to only verifying that the commitments at issue address the competition concerns which it has made known to the undertakings concerned, and that the

[29] The protection afforded by Article 16 of the Charter 'covers the freedom to exercise an economic or commercial activity, freedom of contract and free competition. In addition, freedom of contract includes, in particular, the freedom to choose with whom to do business and the freedom to determine the price of a service': see judgment of 20 December 2017, *Polkomtel* (C-277/16, EU:C:2017:989, paragraph 50). To the same effect, see judgments of 12 July 2018; *Spika and Others* (C-540/16, EU:C:2018:565, paragraph 34); of 6 October 2017; *BB construct* (C-534/16, EU:C:2017:820, paragraphs 34 and 35); and of 22 January 2013, *Sky Österreich* (C-283/11, EU:C:2013:28, paragraph 42).

[30] Judgments of 9 September 2004, *Spain and Finland* v *Parliament and Council* (C-184/02 and C-223/02, EU:C:2004:497, paragraphs 51 and 52), and of 6 September 2012, *Deutsches Weintor* (C-544/10, EU:C:2012:526, paragraph 54).

[31] Judgment of 22 January 2013, *Sky Österreich* (C-283/11, EU:C:2013:28, paragraph 46).

latter have not offered less onerous commitments that address those concerns equally adequately. The General Court accepted that view and acknowledged that the Commission had indeed carried out the necessary checks.

121. However, the judgment in *Commission* v *Alrosa* did not limit the application of the principle of proportionality to the checks just mentioned, for immediately after referring to the requirement for those matters to be assessed by the Commission, it carefully noted that, 'when carrying out that assessment, the Commission must, however, take into consideration the interests of third parties'. [32]

122. Thus, the principle of proportionality applies in two directions: on the one hand, it relates to the suitability of the commitments to addressing the Commission's concerns and to the fact that the undertaking has not offered commitments which, while still addressing the Commission's concerns, are less onerous. On the other hand, it applies to the interests of third parties in some way affected by the acceptance of the commitments. In this way the Court acknowledges that, in practice, there may be cases in which a decision relating to commitments also has an effect on the interests of third parties other than the undertakings subject to the Commission's investigation. But, in such cases, in order for the decision to be lawful, it must not fall foul of an assessment carried out in the light of the principle of proportionality.

123. The intensity of the review that is carried out in the light of the principle of proportionality may certainly vary depending on the type of proceedings involved and, in the case of an assessment of the remedies proposed by an undertaking in proceedings that do not entail a finding of infringement, the extent to which the principle of proportionality applies is, as we have seen, limited. [33] However, when the commitments must be assessed not in terms of their suitability to addressing the Commission's concerns, but in terms of their effect on the interests of third parties, the principle then at least requires that the rights which those third parties enjoy and which are important under primary EU law are not entirely sacrificed or, in any event, rendered nugatory.

124. That conclusion is dictated by the very essence of the principle of proportionality, which, as a general principle of EU law 'requires that acts adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question; [and that,] where there is a choice between several appropriate measures, recourse must be had to the least onerous, and [that] the disadvantages caused must not be disproportionate to the aims pursued' [34] and which is 'a criterion for the lawfulness of any act by the Community institutions, including decisions taken by the Commission in its capacity as the competition authority'. [35]

125. Since one effect of the decision accepting the commitments is that the undertaking that offered them must not fulfil the contractual obligations which it entered into vis-à-vis a third party and which are an essential component of the economic equilibrium that the contracting

[32] Judgment of 29 June 2010, *Commission* v *Alrosa* (C-441/07 P, EU:C:2010:377, paragraph 41).

[33] Judgment of 29 June 2010, *Commission* v *Alrosa* (C-441/07 P, EU:C:2010:377, paragraph 47), which states that, 'even though decisions adopted under each of those provisions are in either case subject to the principle of proportionality, the application of that principle nonetheless differs according to which of those provisions is concerned'.

[34] Judgment of 11 January 2017, *Spain* v *Council* (C-128/15, EU:C:2017:3, paragraph 71). See, to the same effect, inter alia, judgments of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraph 54); of 8 April 2014, *Digital Rights Ireland* (C-293/12 and C-594/12, EU:C:2014:238, paragraph 46); and of 23 October 2012, *Nelson and Others* (C-581/10 and C-629/10, EU:C:2012:657, paragraph 71).

[35] Opinion of Advocate General Kokott in *Commission* v *Alrosa* (C-441/07 P, EU:C:2009:555, point 42 and the case-law cited in footnotes 22 and 23).

parties have, each in the exercise of its freedom of contract, established, so grave a sacrifice of the third party's freedom of contract does not seem to be justifiable in the light of the principle of proportionality.

126. In order to escape that conclusion, the Commission and the General Court pointed to the right of the third party (Canal +) to bring legal proceedings against the undertaking which offered the commitments (Paramount) in order to establish its liability under the contract and to obtain damages. Indeed, referring back to the judgment in *Commission* v *Alrosa*, the General Court observed that 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.[36] Applying that point of principle, the national court could hold that the relevant clauses infringe Article 101(1) TFEU or that they satisfy the conditions referred to in Article 101(3) TFEU, and it could also assess the merits of the claim brought before it, in so far as Article 101 TFEU did not preclude the application of the relevant clauses (paragraphs 100, 101 and 102 of the judgment under appeal).

127. The weakness in that argument, highlighted in the appeal brought by Canal +, is that the decision accepting the commitments will in any event have an effect on the court hearing the third-party undertaking, because it imposes a significant legal limit on the national court's discretion. Of course, a decision concerning commitments adopted on the basis of Article 9(1) of Regulation No 1/2003 does not prevent a national court from assessing the practice addressed in the decision differently from the Commission. Nevertheless, 'national courts cannot overlook that type of decision. Such acts are, in any event, in the nature of a decision. In addition, both the principle of sincere cooperation laid down in Article 4(3) TEU and the objective of applying EU competition law effectively and uniformly require the national court to take into account the preliminary assessment carried out by the Commission and regard it as an indication, if not prima facie evidence, of the anticompetitive nature of the agreement at issue in the light of Article 101(1) TFEU'.[37]

128. The case-law I have cited is particularly consistent with the requirement underlying Regulation No 1/2003 to ensure the uniform application of EU competition law in a system of decentralised enforcement. It should be remembered in this connection that, 'in order to ensure compliance with the principles of legal certainty and the uniform application of the Community competition rules in a system of parallel powers, conflicting decisions must be avoided. It is therefore necessary to clarify, in accordance with the case-law of the Court of Justice, the effects of Commission decisions and proceedings on courts and competition authorities of the Member States'.[38]

129. If a Commission decision adopted on the basis of the oft-cited Article 9 did not compel national courts to regard such a decision as prima facie evidence, there would be a dangerous potential for significant divergence in the application of EU competition law across the Member States, placing in jeopardy the system of decentralised enforcement introduced by Regulation No 1/2003.

[36] Judgment of 29 June 2010, *Commission* v *Alrosa* (C-441/07 P, EU:C:2010:377, paragraph 49).

[37] Judgment of 23 November 2017, *Gasorba and Others* (C-547/16, EU:C:2017:891, paragraph 29).

[38] Recital 22 of Regulation No 1/2003.

130. In that context, the ability of a third-party undertaking such as Canal + to win its arguments before a national court and succeed in its claim for damages against Paramount is significantly weakened, since it will be necessary to rebut the presumption that the relevant clauses are unlawful. In short, in order to attain the objective of protecting competition by means of recourse to a procedure that is markedly simplified and therefore offers fewer guarantees of protection by way of the entitlement of parties having an interest in the decision to participate in the proceedings, an excessive sacrifice of the freedom of contract of third parties has been made.

131. Nor is it a valid objection to that conclusion to say that the sacrifice imposed on the freedom of contract of third parties was necessary in order to safeguard competition, or that the Commission was not able to alter the content of the commitments, which were a unilateral act on the part of the undertaking. Suffice it to observe in this connection that the Commission had other means, more suited to the characteristics of the case at hand, of defending the public interest protected by Article 101(1) TFEU. Indeed, it could have rejected the commitments on the ground that they were at odds with the principle of proportionality and conduct proceedings under Article 7 of Regulation No 1/2003 in order to establish or rule out the existence of an infringement. [39]

132. Finally, it should be observed that, as Canal + effectively submitted at the hearing, the solution proposed by the General Court would ultimately result in jeopardising the functionality and efficiency of the mechanism for protecting competition by means of decisions accepting commitments. An undertaking that gave certain commitments that were subsequently rendered binding by the Commission would in fact be exposed to a twofold peril that would seriously undermine legal certainty and the equilibrium of the system: the possibility of incurring contractual liability in national courts in various countries of the European Union and the possibility, even more threatening to the system, of the Commission's reopening the proceedings [40] in the event that a national court compelled the undertaking to breach a commitment rendered binding.

(b) Interim conclusion

133. It follows from the foregoing that, in accepting Paramount's commitments, the Commission failed to take adequate account of the interests of third parties, which in this case were particularly proximate by reason of the agreements that had already been concluded between Paramount and third parties, including the present appellant, and thus breached the principle of proportionality. The General Court erred in law in finding the Commission's decision free from error on this point. Therefore, having regard to this specific aspect, I suggest that the Court should uphold the fourth ground of appeal.

[39] Moreover, 'if commitments offered by one or more undertakings prove to be disproportionate having regard to the Commission's aim of ensuring that competition is not distorted, it must not make those commitments binding. Instead, it must point out to the undertaking(s) that the commitments are disproportionate and, if necessary, suggest changes'; see the Opinion of Advocate General Kokott in *Commission* v *Alrosa* (C-441/07 P, EU:C:2009:555, point 43). In any event, in the words of the same Advocate General, 'the Commission is not required to agree to commitments the appropriateness of which could be assessed only after a thorough examination by the Commission' (point 53).

[40] Pursuant to Article 9(2)(b) of Regulation No 1/2003.

V. Conclusion

134. On the basis of all the foregoing considerations, I suggest that the Court dismiss as unfounded the third ground of appeal and, having regard to the specific aspect I have mentioned, uphold the fourth ground of appeal.