



EUROPEAN COMMISSION
Competition DG

CASE AT.40023 Cross-border access to pay-TV

(Only the English text is authentic)

ANTITRUST PROCEDURE Council Regulation (EC) 1/2003

Article 9 Regulation (EC) 1/2003

Date: 7/3/2019

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Brussels, 7.3.2019
C(2019) 1772 final

PUBLIC VERSION

COMMISSION DECISION

of 7.3.2019

**relating to a proceeding under Article 101 of the Treaty on the Functioning of the
European Union and Article 53 of the EEA Agreement**

(Case AT.40023 - Cross-border access to pay-TV)

(Text with EEA relevance)

(Only the English text is authentic)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

Having regard to 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 Treaty¹, in particular Article 9(1) thereof,

Having regard to the Decisions of 13 January 2014, 23 July 2015 and 12 January 2018 to initiate proceedings in this case,

Having expressed concerns in a Statement of Objections of 23 July 2015 and in a Supplementary Statement of Objections of 12 January 2018,

Having given third parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation (EC) No 1/2003 on the commitments offered to meet those concerns,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer,

Whereas:

1. SUBJECT MATTER

- (1) This Decision is addressed to Universal Studios International B.V., Universal Studios Limited and Comcast Corporation (together "NBCUniversal"), CPT Holdings Inc., Colgems Productions Limited and Sony Corporation (together "Sony Pictures"), Warner Bros. International Television Distribution Inc. and Warner Media LLC

¹ OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("Treaty"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the Treaty should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The Treaty also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the Treaty will be used throughout this Decision.

(together "Warner Bros."), The Walt Disney Company and The Walt Disney Company Limited (together "Disney") and Sky UK Limited and Sky Limited (together "Sky"). This Decision refers to NBCUniversal, Sony Pictures, Warner Bros. and Disney as "the Studios".

- (2) The Studios, Twentieth Century Fox Telecommunications International Inc. (together with Twenty-First Century Fox Inc., "Fox"), Paramount Pictures International Limited (formerly Viacom Global (Netherlands) B.V.) (together with Viacom Inc., "Paramount Pictures") entered into licensing agreements with Sky containing clauses that:
 - (a) prohibit or limit Sky from making its retail pay-TV services available in response to unsolicited requests from consumers residing or located in the European Economic Area ("EEA") but outside the United Kingdom and Ireland;
 - (b) require NBCUniversal, Sony Pictures, Warner Bros., Fox and Paramount Pictures to prohibit or limit pay-TV broadcasters located in the EEA but outside the United Kingdom and Ireland from responding to unsolicited requests from consumers residing or located in the United Kingdom and Ireland ("the Contested Clauses")².
- (3) In a Statement of Objections ("SO") adopted on 23 July 2015 and in a Supplementary Statement of Objections ("SSO") adopted on 12 January 2018, the Commission came to the preliminary conclusion that the Contested Clauses constitute an infringement by the Studios, Fox, Paramount Pictures and Sky of Article 101 of the Treaty and Article 53 of the Agreement on the European Economic Area ("EEA Agreement") because:
 - (a) the Contested Clauses have as their object the restriction of competition within the meaning of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement;
 - (b) there are no circumstances falling within the economic and legal context of the Contested Clauses that would justify the finding that they are not liable to impair competition;
 - (c) the Contested Clauses do not satisfy the cumulative conditions for an exemption under Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement.
- (4) The Commission's preliminary conclusion took into account the specific economic and legal context of which the Contested Clauses form part, including the financing model of the films licensed by the Studios, Fox and Paramount Pictures, the ownership of the rights in those films and the level of investment in film production by Sky. That preliminary conclusion was therefore without prejudice to the Commission's assessment of whether similar clauses forming part of a different economic and legal context could have as their object the restriction of competition

² This Decision uses the present tense throughout, irrespective of whether: (i) one or more of the parties to the Contested Clauses may have subsequently decided not to honour or enforce those clauses; or (ii) one or more of the pay-TV output license agreements containing the Contested Clauses may have expired.

within the meaning of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement or satisfy the cumulative conditions for an exemption under Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement.

- (5) While the Studios and Sky disagree with the preliminary conclusions reached by the Commission in the SO and the SSO, they nevertheless have offered commitments under Article 9(1) of Regulation (EC) No 1/2003 to meet the concerns expressed by the Commission. This Decision makes those commitments binding on the Studios and Sky.

2. THE UNDERTAKINGS CONCERNED

2.1. NBCUniversal

- (6) Comcast Corporation has its registered offices at One Comcast Center, Philadelphia PA 19103, United States.
- (7) Universal Studios International B.V. has its registered offices at Koningin Wilhelminaplein 2, 1062 HK Amsterdam, The Netherlands.
- (8) Universal Studios Limited has its registered offices at 1 Central St. Giles, St. Giles High Street, London, WC2H 8NU, United Kingdom.
- (9) Comcast Corporation ultimately holds all or almost all of the capital of Universal Studios International B.V. and Universal Studios Limited.
- (10) Universal Studios International B.V. is the legal entity that entered into the agreement with Sky UK Limited containing the Contested Clauses.
- (11) Universal Studios Limited is the legal entity to which Universal Studios International B.V. assigned as of 1 January 2015 the agreement with Sky UK Limited containing the Contested Clauses.

2.2. Sony Pictures

- (12) Sony Corporation has its registered offices at 1-7-1 Konan, Minato-ku, Tokyo 108-0075, Japan.
- (13) CPT Holdings, Inc. has its registered offices at 10202 West Washington Boulevard, Culver City, CA 90232, United States.
- (14) Colgems Productions Limited has its registered offices at Sony Pictures Europe House, 25 Golden Square, London, W1F 9LU, United Kingdom.
- (15) Sony Corporation ultimately holds all or almost all of the capital of CPT Holdings, Inc. and of Colgems Productions Limited.
- (16) CPT Holdings, Inc. and Colgems Productions Limited are the legal entities that entered into the agreement with Sky UK Limited containing the Contested Clauses.

2.3. Warner Bros.

- (17) Warner Media, LLC. (formerly Time Warner Inc.) has its registered offices at One Time Warner Center, New York, NY 10019-8016, United States.
- (18) Warner Bros. International Television Distribution Inc. has its registered offices at 4000 Warner Boulevard, Burbank, CA 91522-0002, United States.

- (19) Warner Media, LLC. ultimately holds all or almost all of the capital of Warner Bros. International Television Distribution Inc.
- (20) Warner Bros. International Television Distribution Inc. is the legal entity that entered into the agreement with Sky UK Limited containing the Contested Clauses.

2.4. Disney

- (21) The Walt Disney Company has its registered offices at 2711 Centerville Road, Suite 400, Wilmington, DE 19808, United States.
- (22) The Walt Disney Company Limited has its registered offices at 3 Queen Caroline Street, Hammersmith, London, W6 9PE, United Kingdom.
- (23) The Walt Disney Company ultimately holds all or almost all of the capital of The Walt Disney Company Limited.
- (24) The Walt Disney Company Limited is the legal entity that entered into the agreement with Sky UK Limited containing the Contested Clauses.
- (25) On 14 December 2017, Disney announced its intention to acquire all or almost all of the capital of Twenty-First Century Fox Inc. and Twentieth Century Fox Telecommunications International Inc.

2.5. Sky

- (26) Sky Limited (formerly Sky Plc. and, before that, British Sky Broadcasting Group Plc.) has its registered offices at Grant Way, Isleworth, Middlesex, TW7 5QD, United Kingdom.
- (27) Sky UK Limited (formerly British Sky Broadcasting Limited) has its registered offices at Grant Way, Isleworth, Middlesex, TW7 5QD, United Kingdom.
- (28) Sky Limited ultimately holds all or almost all of the capital of Sky UK Limited.
- (29) Sky UK Limited is the legal entity that entered into the agreements with Disney, NBCUniversal, Sony Pictures, Warner Bros., Fox and Paramount Pictures containing the Contested Clauses. It operates pay-TV broadcasting systems in the United Kingdom and in Ireland. It has over [13]* million customers. Sky [UK Limited]* offers mixed content, which includes basic and premium channels bundled in bouquets/packages from which subscribers can select. In addition, Sky [UK Limited]* offers standalone premium packages ("Single Sports" and "Single Movies"). Sky [UK Limited]* also offers the standalone Internet-delivered service Now TV.
- (30) On 9 October 2018, Comcast Corporation acquired more than 75% of the ordinary share capital of Sky Limited.

** corrected*

3. PROCEDURAL STEPS

- (31) On 13 January 2014, the Commission initiated proceedings pursuant to Article 2(1) of Commission Regulation (EC) No 773/2004 against, *inter alia*, Universal Studios International B.V., CPT Holdings, Inc., Warner Bros. International Television Distribution Inc., Paramount Pictures International Limited (formerly Viacom Global (Netherlands) B.V.), Viacom Inc, British Sky Broadcasting Limited and British Sky Broadcasting Group Plc.
- (32) On 23 July 2015, the Commission initiated proceedings pursuant to Article 2(1) of Commission Regulation (EC) No 773/2004 against, *inter alia*, Comcast Corporation, Colgems Productions Limited, Sony Corporation, The Walt Disney Company, The Walt Disney Company Limited and Time Warner, Inc.
- (33) On the same date, the Commission adopted an SO in which it expressed concerns that the Contested Clauses may constitute an infringement by Disney, Universal Studios International B.V., Comcast Corporation, Sony Pictures, Warner Bros., Fox, Paramount Pictures and Sky of Article 101 of the Treaty and Article 53 of the EEA Agreement. For the purpose of this Decision, the SO constitutes a preliminary assessment as referred to in Article 9(1) of Regulation (EC) No 1/2003.
- (34) Between 14 October 2015 and 3 November 2015, Disney, Universal Studios International B.V., Comcast Corporation, Sony Pictures, Warner Bros., Fox, Paramount Pictures and Sky submitted their replies to the SO.
- (35) Between 18 and 20 January 2016, the Commission gave Disney, Universal Studios International B.V., Comcast Corporation, Sony Pictures, Warner Bros., Fox, Paramount Pictures and Sky the opportunity to develop their arguments at an oral hearing.
- (36) On 26 July 2016, the Commission adopted a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003 making commitments offered by Paramount Pictures to meet the concerns expressed to them by the Commission in the SO binding on Paramount Pictures (“the 2016 Commitment Decision”).
- (37) On 12 January 2018, following changes to NBCUniversal's corporate structure, the Commission initiated proceedings pursuant to Article 2(1) of Regulation (EC) No 773/2004 against Universal Studios Limited.
- (38) On the same date, the Commission adopted an SSO addressed to NBCUniversal in which it reached the preliminary conclusion that the Contested Clauses may constitute an infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement by NBCUniversal. For the purpose of this Decision, the SSO constitutes a preliminary assessment as referred to in Article 9(1) of Regulation (EC) No 1/2003.
- (39) On 12 January 2018, the Commission adopted a letter of facts addressed to the Studios, Fox and Sky, informing them about further evidence that the Commission had not expressly relied upon in the SO and the SSO but might be relevant to support the preliminary conclusions reached in the SO and the SSO.
- (40) On 25 October 2018, Disney offered commitments to meet the Commission's concerns expressed in the SO (“Disney's initial commitments”).
- (41) On 9 November 2018, the Commission published a notice in the *Official Journal of the European Union* pursuant to Article 27(4) of Regulation (EC) No 1/2003 (“the first Notice”), summarising the case and Disney's initial commitments and inviting

third parties to submit their observations on those commitments within one month from the date of publication of the first Notice.

- (42) On 12 and 13 December 2018, NBCUniversal, Sony Pictures, Warner Bros. and Sky offered commitments to meet the Commission's concerns expressed in the SO and the SSO.
- (43) On 21 December 2018, the Commission published a notice in the Official Journal pursuant to Article 27(4) of Regulation (EC) No 1/2003 ("the second Notice"), summarising the case and the commitments offered by NBCUniversal, Sony Pictures, Warner Bros. and Sky, and inviting third parties to submit their observations on those commitments within one month from the date of publication of the second Notice.
- (44) The Commission received observations from 10 respondents on Disney's initial commitments and the commitments offered by NBCUniversal, Sony Pictures, Warner Bros. and Sky, including from pay-TV broadcasters, consumer organisations, film studios, film funds, producers and distributors (individually and through their associations) and football leagues.
- (45) On 14 January 2019 the Commission informed Disney of the observations on Disney's initial commitments.
- (46) On 5 February 2019, Disney clarified certain aspects of its commitments ("Disney's revised commitments") in light of the commitments offered by NBCUniversal, Sony Pictures, Warner Bros. and Sky. This Decision hereinafter refers to Disney's revised commitments and the commitments offered by NBCUniversal, Sony Pictures, Warner Bros. and Sky as "the Commitments".
- (47) On 7 February 2019, the Commission informed NBCUniversal, Sony Pictures, Warner Bros. and Sky of the observations on their proposed commitments.
- (48) On 21 February 2019, the Commission consulted the Advisory Committee on Restrictive Practices and Dominant Positions on the draft decision in this case.
- (49) On 26 February 2019 the Hearing Officer issued his final report.

4. BACKGROUND

- (50) Major film studios typically control all rights to a given film. Those rights are licensed to content aggregators that bundle content into one or multiple channels. The resulting channels or bundles of channels are sold to pay-TV broadcasters that retail the content to end users. Pay-TV broadcasters are typically vertically integrated from content and channel aggregation to retail supply of pay-TV services.
- (51) Film producers rely on a variety of revenue sources to finance the making of a film. As regards major film studios, they typically use long-term agreements under which they license to pay-TV broadcasters their entire future film production for a given period of time (so-called "output license agreements"). Film producers may also pre-license certain rights to individual films at the production stage to third parties, including pay-TV broadcasters and other distributors, in order to receive up-front funding (so-called "pre-sales agreements"). Another way to finance film production is to co-finance or co-produce a film.

- (52) Films are currently exploited through release windows³ during which content is made available to consumers and for which rights are licensed separately. Typically, a film is released first in cinemas, followed by DVD/home video, then by pay-per-view (PPV)/transactional video on demand (TVOD), then by pay-TV (both linear channels and subscription video on demand (SVOD)), followed, finally, by Free-To-Air (FTA) TV. A film that has progressed through some or all of the release windows is categorised as “library film” and consequently can be exhibited in all or some of the above-mentioned windows.
- (53) For the pay-TV window, the audio-visual content transmitted includes the most recent successful films (“premium films”), sports events and other content (such as TV series, TV shows, documentaries). Premium films are one of the important drivers in attracting subscribers to pay-TV services. Pay-TV broadcasters are willing to pay for exclusive broadcasting rights for such films in order to differentiate their offer.
- (54) Major film studios typically license premium films for pay-TV through output license agreements. These are generally concluded on an exclusive basis and the licence relates to a specific territory. The licensed territory often coincides with the territory of a Member State or a small cluster of linguistically homogeneous neighbouring territories.

5. THE CONTESTED CLAUSES

- (55) The Studios, Fox and Paramount Pictures have entered into output license agreements with Sky whereby the Studios, Fox and Paramount Pictures grant Sky exclusive pay-TV and SVOD rights with regard to certain films in the United Kingdom and Ireland.
- (56) In addition to granting Sky an exclusive right to exhibit the licensed content to subscribers in the United Kingdom and Ireland, the agreements contain the following clauses.
- (57) First, the agreements between NBCUniversal and Sky, between Sony Pictures and Sky, between Fox and Sky, and between Paramount Pictures and Sky contain clauses that prohibit or limit Sky from making available via satellite its retail pay-TV services in response to unsolicited requests from consumers located in the EEA but outside the United Kingdom and Ireland.
- (58) Second, the agreements between the Studios and Sky, between Fox and Sky, and between Paramount Pictures and Sky contain clauses that prohibit or limit Sky from making available via Internet transmission its retail pay-TV services in response to unsolicited requests from consumers located in the EEA but outside the United Kingdom and Ireland.
- (59) Third, the agreements between NBCUniversal and Sky, between Sony Pictures and Sky, between Warner Bros. and Sky, between Fox and Sky and between Paramount Pictures and Sky contain clauses that require NBCUniversal, Sony Pictures, Warner Bros., Fox and Paramount Pictures to prohibit or limit pay-TV broadcasters located

³ Movies are released in different formats in distinct or overlapping times called ‘release windows’.

in the EEA but outside the United Kingdom and Ireland from responding to unsolicited requests from consumers residing or located in the United Kingdom and Ireland.

6. PRELIMINARY LEGAL ASSESSMENT IN THE STATEMENT OF OBJECTIONS AND SUPPLEMENTARY STATEMENT OF OBJECTIONS

6.1. Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement

6.1.1. Principles

- (60) Article 101(1) of the Treaty prohibits, as incompatible with the internal market, agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. However, the prohibition pursuant to Article 101(1) may be declared inapplicable if the conduct meets the conditions for an exemption pursuant to Article 101(3) of the Treaty.
- (61) The concept of an agreement within the meaning of Article 101(1) of the Treaty requires the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention. For there to be an agreement within the meaning of Article 101(1) of the Treaty, it is therefore sufficient that the undertakings in question should have expressed their common intention to conduct themselves on the market in a specific way⁴.
- (62) Certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects. To determine whether an agreement reveals such a sufficient degree of harm to competition that it may be considered a restriction of competition by object, regard must be had *inter alia* to:
- (a) the content of its provisions;
 - (b) the objectives it seeks to attain;
 - (c) the economic and legal context of which it forms a part⁵.
- (63) In addition, although the intention of the parties is not a necessary factor in determining whether an agreement is restrictive, there is nothing prohibiting the Commission from taking that aspect into account⁶.

⁴ Joined Cases C-2/01 P and C-3/01 P *BAI and Commission v Bayer*, ECLI:EU:C:2004:2, paragraph 97.

⁵ Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others v Commission*, ECLI:EU:C:1983:310, paragraph 25; Case C-209/07 *Beef Industry Development Society and Barry Brothers*, ECLI:EU:C:2008:643, paragraphs 16 and 21; Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline v Commission*, ECLI:EU:C:2009:610, paragraph 58; Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others*, ECLI:EU:C:2011:631, paragraph 136; Case C-67/13 P *Groupement des Cartes Bancaires v Commission*, ECLI:EU:C:2014:2204, paragraphs 52 and 53.

⁶ Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others v Commission*, ECLI:EU:C:1983:310, paragraphs 23-25. Joined Cases C-501/06 P, C-513/06 P,

- (64) In *Grundig*⁷, the Court established a distinction between the existence and the exercise of intellectual property rights with regard to an agreement for the assignment of a trademark aimed at partitioning the internal market. The Court held that rights under national trademark law, such as the right to assign the trademark, cannot be exercised so as '*to frustrate the Community's law on cartels*'.
- (65) As regards copyright that protects a film and the right deriving from it, namely that of exhibiting a film, these rights are not as such subject to the prohibitions contained in Article 101 of the Treaty. The exercise of those rights may, nonetheless, come within the prohibitions of Article 101 of the Treaty⁸.
- (66) In that regard, the mere fact that a right holder has granted to a sole licensee the exclusive right to exhibit a film in the territory of a Member State or to broadcast a film protected by copyright from a Member State, and consequently to prohibit its showing or transmission by others, during a specified period is not sufficient to justify the finding that such an agreement has an anti-competitive object⁹.
- (67) None the less, 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 market¹⁰. Thus, where a license agreement relating to a film protected by copyright is designed to prohibit or limit the cross-border provision of broadcasting services, it is deemed to have as its object the restriction of competition, unless other circumstances falling within its economic and legal context justify the finding that such an agreement is not liable to impair competition¹¹.
- (68) This is the case where an agreement granting a licensee the exclusive right to exhibit or transmit a film protected by copyright, including via satellite and internet transmission, contains clauses imposing additional obligations designed to ensure compliance with the territorial limitations upon exploitation of those licences¹². Such clauses prohibit broadcasters from effecting any cross-border provision of services relating to the licensed film, which enables each broadcaster to be granted absolute

C-515/06 P and C-519/06 P *GlaxoSmithKline Services v Commission*, ECLI:EU:C:2009:610, paragraph 58.

⁷ Joined Cases 56/64 and 58/64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission*, ECLI:EU:C:1966:41.

⁸ Case 262/81 *Coditel v Cine-Vog*, ECLI:EU:C:1982:334, paragraph 17.

⁹ Case 262/81 *Coditel v Cine-Vog*, ECLI:EU:C:1982:334, paragraph 15; Joined Cases C 403/08 and C-429/08 *Football Association Premier League and Others*, ECLI:EU:C:2011:631, paragraph 138; Case T-873/16 *Groupe Canal + v Commission*, ECLI:EU:T:2018:904, paragraph 44.

¹⁰ Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others*, ECLI:EU:C:2011:631, paragraph 139; Case T-873/16 *Groupe Canal + v Commission*, ECLI:EU:T:2018:904, paragraphs 45 and 46.

¹¹ Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others*, ECLI:EU:C:2011:631, paragraph 140; Case T-873/16 *Groupe Canal + v Commission*, ECLI:EU:T:2018:904, paragraphs 47 and 48.

¹² Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others*, ECLI:EU:C:2011:631, paragraph 141; Case T-873/16 *Groupe Canal + v Commission*, ECLI:EU:T:2018:904, paragraphs 8 and 51 to 57.

territorial exclusivity in the area covered by its licence and, thus, all cross-border competition between broadcasters in the field of those services to be eliminated¹³.

- (69) Regarding the protection of intellectual property rights, the specific subject matter of the intellectual property is intended in particular to ensure for the right holders concerned protection of the right to exploit commercially the marketing or making available of the protected subject-matter, by the grant of licences in return for payment of remuneration¹⁴.
- (70) The specific subject matter of the intellectual property does not, however, guarantee the right holders concerned the opportunity to demand the highest possible remuneration. Consistently with its specific subject matter, they are ensured - as stated by recital 10 of the preamble to the Directive 2001/29/EC of the European Parliament and of the Council¹⁵ - only appropriate remuneration for each use of the protected subject matter¹⁶.
- (71) Thus, with regard to the broadcasting of a film protected by copyright, such remuneration must in particular be reasonable in relation to the parameters of the broadcast concerned, such as its actual audience and its potential audience¹⁷.
- (72) As regards the premium paid by broadcasters in order to be granted territorial exclusivity in relation to a film protected by copyright, it admittedly cannot be ruled out that the amount of the appropriate remuneration also reflects the particular character of the broadcasts concerned, that is to say, their territorial exclusivity, so that a premium may be paid on that basis¹⁸.
- (73) None the less, such a premium cannot be paid to the right holders concerned in order to guarantee absolute territorial exclusivity which is such as to result in artificial price differences between the partitioned national markets. Such partitioning and such an artificial price difference to which it gives rise are irreconcilable with the fundamental aim of the Treaty, which is completion of the internal market. In those

¹³ Case 258/78 *L.C. Nungesser KG and Kurt Eisele v Commission*, ECLI:EU:C:1982:211, paragraph 53; Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others*, ECLI:EU:C:2011:631, paragraphs 142 and 144; Case T-873/16 *Groupe Canal + v Commission*, ECLI:EU:T:2018:904, paragraph 50.

¹⁴ Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others*, ECLI:EU:C:2011:631, paragraph 107.

¹⁵ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10.

¹⁶ Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others*, ECLI:EU:C:2011:631, paragraph 108; Case T-873/16 *Groupe Canal + v Commission*, ECLI:EU:T:2018:904, paragraph 53.

¹⁷ Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others*, ECLI:EU:C:2011:631, paragraphs 109 and 110; Case T-873/16 *Groupe Canal + v Commission*, ECLI:EU:T:2018:904, paragraph 54.

¹⁸ Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others*, ECLI:EU:C:2011:631, paragraph 114; Case T-873/16 *Groupe Canal + v Commission*, ECLI:EU:T:2018:904, paragraph 56.

circumstances, such a premium cannot be regarded as forming part of the appropriate remuneration which the right holders concerned must be ensured¹⁹.

6.1.2. *Application to this case*

6.1.2.1. Agreement between undertakings

- (74) In the SO and the SSO, the Commission reached the preliminary conclusion that the Contested Clauses constitute agreements between the Studios and Sky, between Fox and Sky, and between Paramount Pictures and Sky within the meaning of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement.

6.1.2.2. Restriction of competition

- (75) In the SO and the SSO, the Commission reached the preliminary conclusion that the Contested Clauses:
- (a) prohibit or limit Sky from making its retail pay-TV services available in response to unsolicited requests from consumers residing or located in the EEA but outside the United Kingdom and Ireland;
 - (b) require NBCUniversal, Sony Pictures, Warner Bros., Fox and Paramount Pictures to prohibit or limit pay-TV broadcasters located in the EEA but outside the United Kingdom and Ireland from responding to unsolicited requests from consumers residing or located in the United Kingdom and Ireland.
- (76) The Contested Clauses are therefore liable to impair competition and have an anticompetitive object because they are designed to prohibit or limit cross-border passive sales of retail pay-TV services and grant absolute territorial exclusivity in relation to the content of the Studios, Fox and Paramount Pictures.
- (77) In reaching that preliminary conclusion, the Commission had regard to the content of the Contested Clauses, the objectives they seek to attain and the economic and legal context of which they form part.
- (78) In the SO and the SSO, the Commission also reached the preliminary conclusion that there are no circumstances falling within the economic and legal context of the Contested Clauses, including the nature of the services affected and the conditions of the functioning and structure of the markets in question, that would justify the finding that the Contested Clauses are not liable to impair competition and therefore do not have an anticompetitive object.
- (79) In support of that preliminary conclusion, the Commission had regard to internal documents of, or correspondence between, the Studios, Fox or Sky indicating, in the Commission's view, that the Studios, Fox and Sky discussed:
- (a) the possibility for, and possible consequences of, pay-TV broadcasters located in the EEA, including Sky, responding to unsolicited requests for access to retail pay-TV services from consumers residing or located in the EEA via satellite or Internet transmission;

¹⁹ Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others*, ECLI:EU:C:2011:631, paragraph 115; Case T-873/16 *Groupe Canal + v Commission*, ECLI:EU:T:2018:904, paragraph 56.

- (b) alternative remuneration mechanisms in the event such unsolicited requests are significant and affect the value of the content licensed by the Studios or Fox to Sky or other pay-TV broadcasters located in the EEA.

6.2. Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement

6.2.1. Principles

- (80) Pursuant to Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement, the prohibition of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement may be declared inapplicable if an agreement meets the following four cumulative criteria:
 - (a) it contributes to improving the production or distribution of goods or services or to promoting technical or economic progress;
 - (b) it allows consumers a fair share of the resulting benefit;
 - (c) it does not impose restrictions that are not indispensable to the attainment of those objectives;
 - (d) it does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

6.2.2. Application to this case

- (81) In the SO and the SSO, the Commission examined arguments put forward by, *inter alia*, the Studios and Sky claiming that the Contested Clauses: (i) bring about quantitative and qualitative efficiencies; (ii) reduce uncertainty and transaction costs; (iii) avoid unnecessary and inefficient litigation and renegotiation; (iv) ensure that consumers can enjoy a culturally targeted, local language product; (v) maintain the incentives of the Studios, pay-TV broadcasters and distributors to invest in content; (vi) confer material benefits to consumers; (vii) are indispensable to achieve the pro-competitive efficiencies brought about by the Contested Clauses; and (viii) do not eliminate a substantial part of competition between pay-TV broadcasters located in the EEA.
- (82) The Commission reached the preliminary conclusion that the Contested Clauses do not meet any of the cumulative conditions for exemption under Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement.

6.3. Effect on trade between Member States

- (83) In the SO and the SSO, the Commission reached the preliminary conclusion that the Contested Clauses are capable of having an appreciable effect on trade between Member States and between the Contracting Parties to the EEA Agreement in so far as those clauses:
 - (a) prohibit or limit Sky from making its retail pay-TV services available in response to unsolicited requests from consumers residing or located in the EEA but outside the United Kingdom and Ireland;
 - (b) require NBCUniversal, Sony Pictures, Warner Bros., Fox and Paramount Pictures to prohibit or limit pay-TV broadcasters located in the EEA but outside the United Kingdom and Ireland from responding to unsolicited requests from consumers residing or located in the United Kingdom and Ireland.

7. DISNEY'S REVISED COMMITMENTS AND THE COMMITMENTS OFFERED BY NBCUNIVERSAL, SONY PICTURES AND WARNER BROS.

- (84) The key elements of Disney's revised commitments and the commitments offered by NBCUniversal, Sony Pictures and Warner Bros. are set out in recitals 85 to 94.
- (85) First, the Studios will not enter into, renew or extend a pay-TV output license agreement that, with respect to any territory in the EEA, (re)introduces any:
- (a) clauses that prevent or limit pay-TV broadcasters located in the EEA from responding to unsolicited requests from consumers residing and located in the EEA but outside of the licensed territory of such pay-TV broadcasters;
 - (b) clauses that require the Studios to prohibit or limit other pay-TV broadcasters located in the EEA but outside a given pay-TV broadcaster's licensed territory from responding to unsolicited requests from consumers residing and located in that pay-TV broadcaster's licensed territory.
- (86) Second, the Studios will not:
- (a) seek to enforce or initiate proceedings before a court or tribunal for the violation of an obligation described in recital (85) in an existing pay-TV output license agreement;
 - (b) honour obligation described in recital (85) to which the Studios are subject pursuant to any existing pay-TV output license agreement.
- (87) Third, the Studios must not in any way circumvent, or attempt to circumvent, the commitments either by action or omission.
- (88) Fourth, the commitments cover both linear pay-TV services and, to the extent included in the licence (or separate licence(s)) with a pay-TV broadcaster, on an SVOD basis (for a companion on demand service, if any, included within the customer's subscription to the relevant pay-TV service operated by such pay-TV broadcaster, complementary to that pay-TV service).
- (89) Fifth, the commitments cover the Studios including their successors and all of their current and future subsidiaries over which they exercise positive sole control within the meaning of Council Regulation (EC) No 139/2004.²⁰
- (90) Sixth, the duration of the commitments will be five years from the date on which the Studios receive formal notification of this Decision. With respect to future subsidiaries, the commitments will start applying one month following the closing of the acquisition of full control of that future subsidiary.
- (91) Seventh, nothing in the commitments should be interpreted as a limitation on or a waiver by the Studios of rights that they would otherwise have to enter into pay-TV output license agreements that require a pay-TV broadcaster to employ geo-filtering technology and/or equivalent measures for the verification purposes permitted under

²⁰ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L24, 29.1.2004, p.1).

Regulation (EU) 2017/1128 of the European Parliament and of the Council²¹ and in compliance with Union law.

- (92) Eighth, nothing in the commitments should be interpreted as limiting or waiving the Studios' rights under copyright law and their right to engage in licensing or enforcement practices in the EEA that are legally permissible under Union law.
- (93) Ninth, nothing in the commitments should be interpreted as limiting or waiving the rights of the Studios or a pay-TV broadcaster to decide unilaterally to employ geo-filtering technology and/or equivalent measures to limit access to its retail pay-TV and/or SVOD service(s) by consumers residing and/or located in or outside of the EEA.
- (94) Tenth, a trustee will be appointed to monitor the Studios' compliance with the commitments.

8. SKY'S COMMITMENTS

- (95) The key elements of the commitments offered by Sky are set out in recitals 96 to 105.
- (96) First, Sky will not enter into, renew or extend a pay-TV output license agreement with the Studios, Fox or Paramount Pictures that, with respect to any territory in the EEA, (re)introduces any:
 - (a) clauses that prevent or limit Sky from responding to unsolicited requests from consumers residing and located in the EEA but outside of Sky's licensed territory;
 - (b) clauses that require the Studios, Fox or Paramount Pictures to prohibit or limit other pay-TV broadcasters located in the EEA but outside a given pay-TV broadcaster's licensed territory from responding to unsolicited requests from consumers residing and located in that pay-TV broadcaster's licensed territory.
- (97) Second, Sky will not:
 - (a) seek to enforce or initiate proceedings before a court or tribunal for the violation of an obligation described in recital [(96)(b)]* in an existing pay-TV output license agreement with the Studios, Fox or Paramount Pictures;
 - (b) honour any obligation described in recital [(96)(a)]*, to which Sky is subject pursuant to any existing pay-TV output license agreement with the Studios, Fox or Paramount Pictures.
- (98) Third, Sky must not in any way circumvent, or attempt to circumvent, the commitments either by action or omission.

** corrected*

²¹ Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market (OJ L 168, 30.6.2017, p. 1).

- (99) Fourth, the commitments cover both linear pay-TV services and, to the extent included in the licence (or separate licence(s)) with Sky, on an SVOD basis (for a companion on demand service, if any, included within the customer's subscription to the relevant pay-TV service operated by Sky, complementary to that pay-TV service).
- (100) Fifth, the commitments cover Sky including its successors all of its current and future subsidiaries over which they exercise positive sole control within the meaning of Regulation (EC) No 139/2004.
- (101) Sixth, the duration of the commitments will be five years from the date on which Sky receives formal notification of this Decision. With respect to future subsidiaries, the commitments will start applying one month following the closing of the acquisition of full control of that future subsidiary.
- (102) Seventh, nothing in the commitments should be interpreted as a limitation on or a waiver by Sky of rights that it would otherwise have to enter into pay-TV output license agreements with the Studios, Fox or Paramount Pictures that require a pay-TV broadcaster to employ geo-filtering technology and/or equivalent measures for the verification purposes permitted under Regulation (EU) 2017/1128 and in compliance with Union law.
- (103) Eighth, nothing in the commitments should be interpreted as limiting or waiving Sky's rights under copyright law and to engage in licensing or enforcement practices in the EEA that are legally permissible under EU law.
- (104) Ninth, nothing in the commitments should be interpreted as limiting or waiving rights of Sky, the Studios or a pay-TV broadcaster to decide unilaterally to employ geo-filtering technology and/or equivalent measures to limit access to its retail pay-TV and/or SVOD service(s) by consumers residing and/or located in or outside of the EEA.
- (105) Tenth, a trustee will be appointed to monitor Sky's compliance with the commitments.

9. COMMISSION NOTICES PURSUANT TO ARTICLE 27(4) OF REGULATION (EC) NO 1/2003 AND ASSESSMENT OF THE COMMITMENTS IN THE LIGHT OF THE OBSERVATIONS RECEIVED

- (106) The main observations of respondents to the first Notice and to the second Notice, and the Commission's position on those observations, are set out in this section.
- (107) First, certain respondents claim that the Contested Clauses do not raise concerns under Article 101 of the Treaty and Article 53 of the EEA Agreement.
- (108) The Commission rejects that claim. In a decision pursuant to Article 9 of Regulation (EC) No 1/2003, 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 and having regard to the aims pursued²².

²² Recital 13 of the preamble to Regulation (EC) No 1/2003, Case C-441/07 P *Commission v Alrosa*, ECLI:EU:C:2010:377, paragraph 40, Case T-491/07 RENV *CB v Commission*, ECLI:EU:T:2016:379,

- (109) Moreover, Section 6 of this Decision sets out the reasons why, in the SO and the SSO, the Commission could reasonably consider that the Contested Clauses may constitute an infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement.
- (110) Second, certain respondents claim that the Commitments would have a negative impact on/or would create uncertainty regarding the financing and exploitation of films and adversely affect cultural diversity.
- (111) The Commission rejects that claim. Pursuant to Article 167(4) of the Treaty, the Commission should "take cultural aspects into account in its action [...] in order to respect and to promote the diversity of [...] cultures." Consequently, the Commission takes into account cultural aspects in its action under the Union competition rules, including Article 9 of Regulation (EC) No 1/2003²³. Making the Commitments binding in this case will not adversely affect cultural diversity or, more in general, the financing and exploitation of films in the EEA since the Commitments only bind the Studios and Sky and will not affect the ability of the Studios or any other right holder to license content on a territorial basis.
- (112) Third, one respondent claims that the Commitments are disproportionate as they affect certain other licensing agreements entered into by the Studios in relation to which the Commission has not expressed any concerns.
- (113) The Commission rejects that claim. The Commission expressed concerns in the SO and the SSO about contractual clauses that, *inter alia*:
- (a) prohibit or limit Sky from making its retail pay-TV services available in response to unsolicited requests from consumers residing or located in the EEA but outside the United Kingdom and Ireland;
 - (b) require NBCUniversal, Sony Pictures or Warner Bros. to prohibit or limit pay-TV broadcasters in the EEA, but outside the United Kingdom and Ireland, from providing their retail pay-TV services in response to unsolicited requests from consumers residing or located in the United Kingdom and Ireland.
- (114) The Commitments meet those concerns as they will remove the contractual clauses in the pay-TV output license agreements between the Studios and Sky that prevent Sky from making cross-border passive sales in the EEA. They will also remove contractual clauses that require the Studios to prohibit or limit other pay-TV broadcasters from making cross-border passive sales in the United Kingdom and Ireland and any impact that those clauses may have had on the licensing practices of the Studios vis-à-vis those broadcasters.
- (115) Fourth, certain respondents claim that the Commitments would negatively affect the rights of third parties. One respondent argues that the Commitments would affect the freedom of pay-TV broadcasters other than Sky to contract with the Studios in the EEA. Another respondent claims that the Commitments would affect the position of smaller broadcasters and new entrants.

paragraph 461 and Case T-873/16 *Groupe Canal + v Commission*, ECLI:EU:T:2018:904, paragraphs 63 and 89.

²³ Case T-451/08 *Stim v Commission*, ECLI:EU:T:2013:189, paragraphs 73 and 87.

- (116) The Commission rejects those claims. Firstly, while the Commission is required to take account of the principle of contractual freedom²⁴ when applying the Union competition rules, including Article 9 of Regulation (EC) No 1/2003²⁵, contractual freedom includes both the freedom to conclude contracts and the freedom not to conclude contracts. By the Commitments, the Studios and Sky exercise their contractual freedom not to conclude, or be bound by, any contractual clause that prevents or limits cross-border passive sales and thus, grants absolute territorial exclusivity in the EEA.
- (117) Secondly, when verifying whether the Commitments address the concerns it has expressed in the SO and the SSO, the Commission took the interests of third parties into consideration²⁶ by publishing the first Notice and the second Notice and the Commitments and giving them an opportunity to submit observations. The Commission's acceptance of the Commitments offered by the Studios and Sky cannot, however, depend on the position of any other undertaking²⁷.
- (118) Thirdly, the fact that the Commitments made binding by the Commission on the Studios and Sky will not deprive third-party undertakings of the possibility of protecting their legal rights before the courts²⁸.
- (119) Fourthly, in accordance with the Commitments:
- (a) Sky will not reintroduce any obligations described in recital [(96)(b)]* in its pay-TV output license agreements with the Studios, Fox or Paramount Pictures. It will also not seek to enforce or initiate proceedings before a court or tribunal for the violation of such obligations;
 - (b) the Studios will not reintroduce any obligations described in recital (85)(a) in their pay-TV output license agreements with Sky or other pay-TV broadcasters located in the EEA. They will also not seek to enforce or initiate proceedings before a court or tribunal for the violation of such obligations.
- (120) The Commitments will therefore apply to any territory in the EEA to the benefit of Sky and of other pay-TV broadcasters located in the EEA, including small broadcasters and new entrants.
- (121) Fifth, certain respondents consider that no meaningful distinction can be drawn between active and passive sales in relation to the cross-border provision of pay-TV services via the Internet.

* corrected

²⁴ Article 16 of the Charter of Fundamental Rights of the European Union.

²⁵ Case C-283/11 *Sky Österreich*, ECLI:EU:C:2013:28, paragraph 66 and Case T-873/16 *Groupe Canal + v Commission*, ECLI:EU:T:2018:904, paragraphs 86 to 89.

²⁶ Case C-441/07 P *Commission v Alrosa*, ECLI:EU:C:2010:377, paragraph 41; Case T-873/16 *Groupe Canal + v Commission*, ECLI:EU:T:2018:904, paragraphs 114 to 117.

²⁷ Case C-441/07 P *Commission v Alrosa*, ECLI:EU:C:2010:377, paragraph 94.

²⁸ Case C-441/07 P *Commission v Alrosa*, ECLI:EU:C:2010:377, paragraphs 88-89 and 91; Case T-873/16 *Groupe Canal + v Commission*, ECLI:EU:T:2018:904, paragraph 101.

- (122) The Commission rejects that claim. Firstly, the case law treats restrictions on the cross-border provision of physical goods and restrictions on the cross-border provision of intangible, copyright protected, audiovisual content such as films in the same manner²⁹. Secondly, following the 2016 Commitment Decision, restrictions on the cross-border provision of retail pay-TV services via Internet transmission have been removed from the pay-TV output license agreements between Paramount Pictures and pay-TV broadcasters located in the EEA.
- (123) Sixth, certain respondents claim that the Commission cannot make the Commitments binding because Regulation (EU) 2018/302³⁰ excludes audiovisual services from its scope.
- (124) The Commission rejects that claim. Recital 34 of the preamble to Regulation (EU) 2018/302 expressly states that the Regulation does not affect the application of the rules on competition and, in particular, of Article 101 of the Treaty.
- (125) Seventh, one respondent claims that the Commitments meet the Commission's concerns as the Studios and Sky will no longer be able to enter into, or be bound by, any contractual clause that prohibits or limits cross-border passive sales of retail pay-TV services across the EEA, to the benefit of all European consumers accessing the Studios' content.
- (126) Those comments are in line with the Commission's assessment of the Commitments.

10. PROPORTIONALITY OF THE COMMITMENTS

10.1. Principles

- (127) The principle of proportionality requires that the measures adopted by institutions of the Union must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued³¹. Where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued³².
- (128) In the context of Article 9 of Regulation (EC) No 1/2003, application of the principle of proportionality requires the Commission to assess that the commitments in question address the concerns expressed by the Commission and that the undertakings concerned have not offered less onerous commitments that also address

²⁹ Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others*, ECLI:EU:C:2011:631, paragraph 139; Case T-873/16 *Groupe Canal + v Commission*, ECLI:EU:T:2018:904, paragraphs 55 and 58.

³⁰ 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. OJ L 60I, 2.3.2018, p. 1.

³¹ Case T-260/94 *Air Inter v Commission*, EU:T:1994:265, paragraph 144; Case T-65/98 *Van den Bergh Foods v Commission*, EU:T:2003:281, paragraph 201.

³² Case 265/87 *Schröder*, EU:C:1989:303, paragraph 21; Case C-174/05 *Zuid-Hollandse Milieufederatie and Natuur en Milieu*, EU:C:2006:170, paragraph 28.

those concerns adequately³³. When carrying out that assessment, the Commission must take into consideration the interests of third parties³⁴.

10.2. Application to this case

- (129) The Commitments adequately address the concerns expressed in the SO and the SSO.
- (130) First, the Commitments will lead to the removal of all clauses in any new pay-TV output license agreement, extension or renewal between the Studios or their future subsidiaries and pay-TV broadcasters located in the EEA that prohibit or limit pay-TV broadcasters from making their retail pay-TV services available in response to unsolicited requests from consumers residing and located in the EEA but outside the licensed territory of such pay-TV broadcasters.
- (131) Second, the Commitments will lead to the removal of all clauses in any new pay-TV output license agreement, extension or renewal between the Studios or their future subsidiaries and pay-TV broadcasters located in the EEA that require the Studios or their future subsidiaries to prohibit or limit other pay-TV broadcasters located in the EEA but outside a given pay-TV broadcaster's licensed territory from making their retail pay-TV services available in response to unsolicited requests from consumers residing and located in that pay-TV broadcaster's licensed territory.
- (132) Third, the Commitments will lead to the Studios or their future subsidiaries not seeking to enforce, or honour, similar clauses in existing pay-TV output license agreements in force with pay-TV broadcasters located in the EEA.
- (133) Fourth, the Commitments will lead to the removal of all clauses in any new pay-TV output license agreement, extension or renewal between Sky and the Studios, Fox or Paramount Pictures that prohibit or limit Sky from making its retail pay-TV services available in response to unsolicited requests from consumers residing and located in the EEA but outside the licensed territory of Sky.
- (134) Fifth, the Commitments will lead to the removal of all clauses in any new pay-TV output license agreement, extension or renewal between Sky and the Studios, Fox or Paramount Pictures that require Studios, Fox or Paramount Pictures to prohibit or limit other pay-TV broadcasters located in the EEA but outside Sky's licensed territory from making their retail pay-TV services available in response to unsolicited requests from consumers residing and located in Sky's licensed territory.
- (135) Sixth, the Commitments will lead to Sky not seeking to enforce, or honour, similar clauses in existing pay-TV output license agreements in force with the Studios, Fox or Paramount Pictures.
- (136) Seventh, the Studios and Sky have not offered any less onerous commitments that adequately address the concerns expressed in the SO and the SSO.

³³ Case C-441/07 P *Commission v Alrosa*, EU:C:2010:377, paragraphs 41 and 61; Case T-76/14 *Morningstar v Commission*, EU:T:2016:481, paragraphs 45, 58 and 86; Case T-873/16 *Groupe Canal + v Commission*, ECLI:EU:T:2018:904, paragraphs 36 and 114.

³⁴ Case C-441/07 P *Commission v Alrosa*, EU:C:2010:377, paragraph 41; Case T-76/14 *Morningstar v Commission*, EU:T:2016:481, paragraph 45; Case T-873/16 *Groupe Canal + v Commission*, ECLI:EU:T:2018:904, paragraphs 114 to 117.

- (137) Eighth, the Commission has taken into consideration the interests of third parties, including those that responded to the first Notice and the second Notice (see Section 9).

11. CONCLUSION

- (138) By adopting this Decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes binding the Commitments to meet the Commission's concerns expressed in the SO and the SSO. Recital 13 of the preamble to Regulation (EC) No 1/2003 states that such a decision should not conclude whether or not there has been or still is an infringement.
- (139) The Commission's assessment of whether the Commitments are adequate to address its concerns is based on the SO, on the SSO and on the observations received following the publication of the first Notice and the second Notice.
- (140) In the light of the Commitments, the Commission considers that there are no longer grounds for action against the Studios and Sky, and, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings against the Studios and Sky should therefore be brought to an end.³⁵
- (141) The Commission retains full discretion to investigate and open proceedings under Article 101 of the Treaty and Article 53 of the EEA Agreement as regards practices that are not the subject matter of this Decision.

HAS ADOPTED THIS DECISION:

Article 1

- (1) The commitments listed in Annex I shall be binding on the Walt Disney Company and The Walt Disney Company Limited for a period of five years from the date of notification of this Decision.
- (2) The commitments listed in Annex II shall be binding on Universal Studios International B.V., Universal Studios Limited and Comcast Corporation for a period of five years from the date of notification of this Decision.
- (3) The commitments listed in Annex III shall be binding on CPT Holdings Inc., Colgems Productions Limited and Sony Corporation for a period of five years from the date of notification of this Decision.
- (4) The commitments listed in Annex IV shall be binding on Warner Bros. International Television Distribution Inc. and Warner Media LLC for a period of five years from the date of notification of this Decision.
- (5) The commitments listed in Annex V shall be binding on Sky UK Limited and Sky Limited for a period of five years from the date of notification of this Decision.

³⁵ The Commission's investigation into Fox is therefore still ongoing. However, if Disney were to acquire all or almost all of the capital of Fox (see recital (25)), Disney's revised commitments would cover Fox, since Disney would exercise positive sole control over Fox (see recital (89)).

Article 2

There are no longer grounds for action by the Commission in this case.

Article 3

This Decision is addressed to:

The Walt Disney Company

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Wilmington, DE 19808

United States of America

The Walt Disney Company Limited

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Comcast Corporation

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United States of America

Universal Studios International B.V.

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The Netherlands

Universal Studios Limited

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WC2H 8NU

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Sony Corporation

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United States of America

Colgems Productions Limited

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United States of America

Sky Limited
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TW7 5QD
United Kingdom

Sky UK Limited
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Isleworth
Middlesex,
TW7 5QD
United Kingdom

Done at Brussels, 7.3.2019

For the Commission

(Signed)

Margrethe VESTAGER
Member of the Commission