



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: 26/07/2016

This text is made available for information purposes only. A summary of this decision will be published in all EU languages in the Official Journal of the European Union.



Brussels, 26.7.2016
C(2016) 4740 final

PUBLIC VERSION

COMMISSION DECISION

of 26.7.2016

**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)

(Only the English text is authentic)

TABLE OF CONTENTS

1.	Subject Matter	3
2.	The Undertaking Concerned	4
3.	Procedural Steps	4
4.	Background	5
5.	The Contested Clauses	6
6.	Preliminary legal assessment in the Statement of Objections.....	7
6.1.	Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement.....	7
6.1.1.	Principles.....	7
6.1.2.	Application to this case	10
6.2.	Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement.....	10
6.2.1.	Principles.....	10
6.2.2.	Application to this case	11
6.3.	Effect on trade between Member States.....	11
7.	Paramount's commitments	11
8.	Commission Notice pursuant to Article 27(4) and assessment of the Final Commitments in the light of the observations received.....	13
9.	Proportionality of the Commitments.....	16
9.1.	Principles.....	16
9.2.	Application to this case	16
10.	CONCLUSION	17

COMMISSION DECISION

of 26.7.2016

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)

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (“TFEU”),

Having regard to the Agreement on the European Economic Area (“EEA Agreement”),

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 Decision of 13 January 2014 to initiate proceedings in this case,

Having expressed concerns in a Statement of Objections of 23 July 2015,

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 Paramount Pictures International Limited (formerly Viacom Global (Netherlands) B.V.) and Viacom Inc. (hereinafter jointly referred to as “Paramount”).
- (2) Paramount has entered into licensing agreements with Sky UK Limited (formerly British Sky Broadcasting Limited) and Sky Plc. (formerly British Sky Broadcasting Group Plc.) (hereinafter jointly referred to as “Sky”) containing clauses that:

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 (“TFEU”). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of “Community” by “Union” and “common market” by “internal market”. Where the meaning remains unchanged, the terminology of the TFEU will be used throughout this Decision.

- (a) prohibit or limit Sky from making its retail pay-television (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 the Republic of Ireland; and/or
 - (b) require Paramount to prohibit or limit pay-TV broadcasters located within the EEA but outside the United Kingdom and the Republic of Ireland from making their retail pay-TV services available in response to unsolicited requests from consumers residing or located in the United Kingdom and the Republic of Ireland.
- (3) These clauses are hereinafter referred to as “the Contested Clauses”.
- (4) In a Statement of Objections adopted on 23 July 2015 (“the SO”), the Commission came to the preliminary conclusion that the Contested Clauses constitute an infringement by Paramount of Article 101 of the Treaty and Article 53 of the 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; and
 - (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.
- (5) While Paramount disagrees with the preliminary conclusions reached by the Commission in the SO, it nevertheless has offered commitments under Article 9(1) of Regulation (EC) No 1/2003 to meet the concerns expressed by the Commission. The present Decision makes those commitments binding on Paramount.

2. THE UNDERTAKING CONCERNED

- (6) Paramount Pictures International Limited has its registered offices in London in the United Kingdom of Great Britain and Northern Ireland. It is the legal successor of Viacom Global (Netherlands) B.V., the legal entity belonging to the Viacom Inc. group that entered into the relevant agreements with Sky.
- (7) Viacom Inc. has its registered offices in New York in the United States of America. It is an entertainment content company active in television, motion picture, online and mobile platforms in over 160 countries and territories.

3. PROCEDURAL STEPS

- (8) On 13 January 2014, the Commission initiated proceedings with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003.
- (9) On 23 July 2015, the Commission adopted the SO, in which it expressed concerns that the Contested Clauses may constitute an infringement of Article 101 of the

Treaty and Article 53 of the EEA Agreement². The SO constitutes a preliminary assessment for the purposes of Article 9(1) of Regulation (EC) No 1/2003. The SO was notified to Paramount on 27 July 2015.

- (10) On 12 October 2015, Paramount submitted its reply to the SO.
- (11) On 18-20 January 2016, an Oral Hearing took place, during which Paramount developed its arguments.
- (12) On 15 April 2016, Paramount offered commitments to meet the concerns expressed in the SO (“the Initial Commitments”).
- (13) On 22 April 2016 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 Notice”), summarising the case and the Initial Commitments and inviting third parties to submit their observations on the Initial Commitments within one month from the date of publication of the Notice.
- (14) The Commission received 25 observations on the Initial Commitments including from pay-TV broadcasters, consumer organisations, film studios, film funds, producers and distributors (individually and through their associations) and football leagues.
- (15) On 27 May 2016, the Commission informed Paramount of the observations received from the respondents.
- (16) On 10 June 2016, Paramount clarified further certain aspects of the Initial Commitments (“the Revised Commitments”).
- (17) On 7 July 2016, Paramount clarified further certain aspects of the Revised Commitments (“the Final Commitments”).
- (18) On 7 July 2016, the Commission consulted the Advisory Committee on Restrictive Practices and Dominant Positions on the draft decision.
- (19) On 14 July 2016 the Hearing Officer issued his final report.

4. BACKGROUND

- (20) Film producers 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.
- (21) Film producers rely on a variety of revenue sources to finance the making of a film. For example, they may 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 agreements”). They may also pre-license certain rights to individual

² The SO also reached the following other preliminary conclusions: (i) the Contested Clauses constitute an infringement by Sky of Article 101 of the Treaty and Article 53 of the EEA Agreement; and (ii) certain clauses in licensing agreements between Sky and respectively Disney, NBCUniversal, Sony, Twentieth Century Fox and Warner Bros constitute an infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement. The Commission's investigation into the conduct of Sky, Disney, NBCUniversal, Sony, Twentieth Century Fox and Warner Bros is still ongoing.

films at the production stage to third parties, including pay-TV broadcasters and/or 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.

- (22) 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 second by DVD/home video, then third by pay-per-view (PPV)/transactional video on demand (TVOD), then fourth 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, including FTA.
- (23) 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.
- (24) Premium films are typically licensed for pay-TV through output agreements. These are generally concluded on an exclusive basis and the licence provided therein 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

- (25) Paramount and Sky have entered into licensing agreements whereby Paramount grants Sky exclusive pay-TV and SVOD rights with regard to certain films in the United Kingdom and the Republic of Ireland.
- (26) In 2009, Paramount and Sky entered into a licensing agreement ("the 2009 Agreement"). In addition to granting an exclusive right to exhibit the licensed content to subscribers in the United Kingdom and the Republic of Ireland, the 2009 Agreement contained the following clauses with regard to transmission via satellite and the internet:
 - (27) First, with regard to satellite transmission, the 2009 Agreement provided that:
 - (a) Sky was not to knowingly authorise reception of broadcast by a viewer outside the United Kingdom and Ireland; and
 - (b) Paramount was not to authorise the availability of any third party descrambling device that would allow viewing of the content in the United Kingdom and Ireland.
 - (28) Second, with regard to internet transmission, the 2009 Agreement provided that Sky was required to prevent the unauthorised internet transmission outside the United Kingdom and Ireland by means of geo-filtering and/or equivalent technology.

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

- (29) In 2014, Paramount and Sky entered into a licensing agreement that amended and restated the 2009 Agreement ("the 2014 Agreement").
- (30) In addition to granting an exclusive right to exhibit the licensed content to subscribers in the United Kingdom and the Republic of Ireland, the 2014 Agreement contained clauses that, with regard to transmission via the internet:
- (a) require Sky to prevent the unauthorised internet transmission outside the United Kingdom and Ireland by means of geo-filtering and/or equivalent technology; and
 - (b) require Paramount not to authorise internet transmission without geo-filtering.

6. PRELIMINARY LEGAL ASSESSMENT IN THE STATEMENT OF OBJECTIONS

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

6.1.1. Principles

- (31) 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, provided the conduct does not meet the conditions of an exemption pursuant to Article 101(3) of the Treaty. Article 53(1) of the EEA Agreement contains a similar prohibition.
- (32) The concept of an agreement within the meaning of Article 101(1) of the Treaty centres around 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.
- (33) 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; and
 - (c) the economic and legal context of which it forms a part⁵.

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 52-53.

- (34) 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.
- (35) 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*'.
- (36) As regards copyright in a film and the right deriving from it, namely that of exhibiting the film, these 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.
- (37) 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 protected subject-matter 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.
- (38) 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 licence agreement is designed to prohibit or limit the cross-border provision of broadcasting services, it is deemed to have as its object the restriction of competition, unless other circumstances falling within its economic and legal context justify the finding that such an agreement is not liable to impair competition¹¹.
- (39) This is the case where an agreement, granting to a licensee the exclusive right to exhibit or transmit protected subject-matter, 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 content, which enables each broadcaster to be granted absolute territorial exclusivity in the area covered by

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, 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 139.

¹⁰ Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others*, ECLI:EU:C:2011:631, paragraph 139.

¹¹ Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others*, ECLI:EU:C:2011:631, paragraph 140.

¹² Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others*, ECLI:EU:C:2011:631, paragraph 141.

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

- (40) 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.
- (41) 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 Copyright Directive - only appropriate remuneration for each use of the protected subject matter¹⁵.
- (42) Thus, with regard to broadcasting, such remuneration must in particular be reasonable in relation to parameters of the broadcast concerned, such as their actual audience and their potential audience¹⁶.
- (43) Finally, as regards the premium paid by broadcasters in order to be granted territorial exclusivity, 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 basis¹⁷.
- (44) 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 of the Treaty, which is completion of the internal market. In those circumstances, such a premium cannot be regarded as forming part of the appropriate remuneration which the right holders concerned must be ensured¹⁸.

6.1.2. *Application to this case*

6.1.2.1. Agreement between undertakings

- (45) In the SO, the Commission reached the preliminary conclusion that the Contested Clauses constitute an agreement between Paramount and Sky within the meaning of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement.

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, paragraph 142.

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

¹⁵ Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others*, ECLI:EU:C:2011:631, paragraph 108.

¹⁶ Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others*, ECLI:EU:C:2011:631, paragraph 110.

¹⁷ Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others*, ECLI:EU:C:2011:631, paragraph 114.

¹⁸ Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others*, ECLI:EU:C:2011:631, paragraph 115.

6.1.2.2. Restriction of competition

- (46) In the SO, the Commission reached the preliminary conclusion that the Contested Clauses:
- (a) prohibit or limit Sky from providing its retail pay-TV services in response to unsolicited requests from consumers residing or located in the EEA but outside the United Kingdom and the Republic of Ireland; and/or
 - (b) require Paramount to prohibit or limit pay-TV broadcasters located within the EEA, but outside the United Kingdom and the Republic of Ireland, from providing their retail pay-TV services in response to unsolicited requests from consumers residing or located in the United Kingdom and the Republic of Ireland.
- (47) The Commission therefore reached the preliminary conclusion that the Contested Clauses are 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 Paramount's content.
- (48) In reaching this 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.
- (49) In the SO, 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 clauses are not liable to impair competition and therefore do not have an anticompetitive object.

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

6.2.1. Principles

- (50) Pursuant to Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement, an agreement is exempted from the prohibition of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement where it satisfies 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; and
 - (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

- (51) In the SO, the Commission examined arguments put forward by Paramount claiming, inter alia, that the Contested Clauses: (i) bring about cost and qualitative efficiencies; (ii) ensure that consumers can enjoy a culturally targeted, local language product, with greater choice and variety of content; (iii) maintain the incentives of Paramount, pay-TV broadcasters and distributors to invest in local content; and (iv) do not eliminate a substantial part of competition between pay-TV broadcasters in the EEA.

- (52) 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

- (53) In the SO, 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:
- (a) they prevent 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 the Republic of Ireland;
 - (b) they require Paramount to prevent pay-TV broadcasters located within the EEA but outside the United Kingdom and the Republic of Ireland from making their retail pay-TV services available in response to unsolicited requests from consumers residing or located in the United Kingdom and the Republic of Ireland.

7. PARAMOUNT'S COMMITMENTS

- (54) The key elements of the Initial Commitments were as follows.
- (55) First, Paramount would not enter into, renew or extend a pay-TV output licence agreement that, with respect to any territory in the EEA, (re)introduces:
- (a) contractual obligations of the type identified in the SO preventing or limiting a pay-TV broadcaster from responding to unsolicited requests from consumers residing and located in the EEA but outside of such broadcaster's licensed territory ("Broadcaster Obligation"); and
 - (b) contractual obligations of the type identified in the SO requiring Paramount to prohibit or limit pay-TV broadcasters located within the EEA but outside a pay-TV broadcaster's licensed territory from responding to unsolicited requests from consumers residing and located inside such broadcaster's licensed territory ("Paramount Obligation").
- (56) Second, Paramount would not:
- (a) seek to enforce or initiate proceedings before a court or tribunal for the violation of a Broadcaster Obligation in an existing pay-TV output licence agreement; and
 - (b) directly or indirectly honour or enforce a Paramount Obligation in an existing pay-TV output licence agreement.
- (57) Third, Paramount would not circumvent in any way either by action or omission the Initial Commitments ("the non-circumvention clause").
- (58) The Initial Commitments would cover both linear pay-TV services and, to the extent included in the licence (or separate licence(s)) with a pay-TV broadcaster, subscription video-on-demand services ("SVOD").
- (59) The duration of the Initial Commitments would be five years from the date on which Paramount would be notified of a Decision pursuant to Article 9(1) of Regulation (EC) No 1/2003.

- (60) A trustee would be appointed to monitor Paramount's compliance with the Initial Commitments.
- (61) The Revised Commitments were identical to the Initial Commitments, save for the following clarifications:
- (a) Paramount added a definition of "Relevant Clauses" (see Clause 1 of the Final Commitments) as meaning "clauses in Pay-TV Output License Agreements that:
 - (1) with regard to satellite transmission, stipulate that:
 - i. overspill in territories other than the licensed territory will not be deemed a breach of contract by the pay-TV broadcaster provided that the broadcaster does not knowingly authorise reception outside of the licensed territory, and/or
 - ii. overspill in the licensed territory will not be deemed to be a breach of contract by Paramount provided that Paramount has not authorised the availability of a third party's descrambling device necessary for reception of content in the licensed territory; and
 - (2) with regard to internet transmission:
 - i. impose an obligation on a pay-TV broadcaster to prevent the unauthorized downloading and/or streaming of films (and, if included, other audiovisual content) outside the licensed territory by means of geo-filtering and/or equivalent technology, and/or
 - ii. stipulate that internet overspill in a pay-TV broadcaster's licensed territory is not a breach of contract by Paramount provided that Paramount has required other pay-TV broadcaster(s) to use geo-filtering and/or equivalent technology, and/or
 - iii. stipulate that internet overspill by a pay-TV broadcaster outside its licensed territory is not a breach of contract by that broadcaster provided that such broadcaster uses geo-filtering and/or equivalent technology";
 - (b) In the definition of "Broadcaster Obligation", Paramount replaced the reference to "contractual obligations of the type identified in the SO preventing or limiting" with a reference to "the Relevant Clauses or equivalent clauses to the extent that they prevent or limit" (see Clause 1 of the Final Commitments);
 - (c) In the definition of "Paramount Obligation", Paramount replaced the reference to "contractual obligations of the type identified in the SO requiring" with a reference to "the Relevant Clauses or equivalent clauses to the extent that they require" (see Clause 1 of the Final Commitments);
 - (d) With regard to the non-circumvention clause, Paramount added the wording "or attempt to circumvent" (see Clause 5 of the Final Commitments); and
 - (e) With regard to the monitoring trustee, Paramount deleted the wording "if this has been appointed" (see Clause 13 of the Final Commitments).
- (62) The Final Commitments are identical to the Revised Commitments, save for the following clarifications:

- (a) In the definition of "EEA" Paramount added the words "and continuing to participate thereafter" after "those countries participating in the European Economic Area as of the Effective Date"; and
- (b) In the definition of "Relevant Clauses", Paramount added the words "(and, if included, other audiovisual content)" to the definition of "clauses in Pay-TV Output License Agreements that with regard to internet transmission, impose an obligation on a Broadcaster to prevent the unauthorized downloading and/or streaming of films (and, if included, other audiovisual content) outside the licensed territory by means of geo-filtering and/or equivalent technology".

8. COMMISSION NOTICE PURSUANT TO ARTICLE 27(4) OF REGULATION 1/2003 AND ASSESSMENT OF THE FINAL COMMITMENTS IN THE LIGHT OF THE OBSERVATIONS RECEIVED

- (63) The main observations of respondents to the Notice, and the Commission's position on those observations, are set out in this section of the Decision.
- (64) 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.
- (65) The Commission rejects this 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 pursued¹⁹.
- (66) Moreover, Section 6 of this Decision sets out the reasons why, in the SO, the Commission could reasonably consider that the Contested Clauses may constitute an infringement by Paramount of Article 101 of the Treaty and Article 53 of the EEA Agreement.
- (67) Second, a number of respondents claim that the Initial Commitments failed to describe in a sufficiently detailed manner the nature of the clauses that Paramount commits to no longer enter into or be bound by, thereby preventing them from commenting on whether the commitments offered by Paramount would meet the competition concerns that the Commission had expressed.
- (68) The Commission rejects this claim. In the first place, it was sufficiently clear from the Initial Commitments²⁰ that, in order to meet the Commission's concerns, Paramount offered not to enter into, or be bound by, any contractual clause in a pay-TV output licence agreement that prohibits or limits cross-border passive sales of retail pay-TV services.
- (69) In the second place, Clause 1 of the Revised Commitments (and of the Final Commitments) provided further clarifications as to the nature of the clauses that Paramount commits to no longer enter into or be bound by, and the Commission

¹⁹ Recital 13 of Regulation (EC) No 1/2003, Case C-441/07 P *Commission v Alrosa*, ECLI:EU:C:2010:377, paragraph 40 and Case T-491/07 RENV *CB v Commission*, ECLI:EU:T:2016:379, paragraph 461.

²⁰ See in particular Clause 2 of the Initial Commitments.

provided the relevant respondents with an opportunity to submit observations on the Revised Commitments.

- (70) Third, certain respondents claim that if the Commission were to make binding the commitments offered by Paramount, this would constitute a misuse of power. Any change that the commitments offered by Paramount would bring about should be achieved through a review of EU copyright law rather than a decision pursuant to Article 9 of Regulation (EC) No 1/2003.
- (71) The Commission rejects this claim. A measure may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken with the exclusive purpose, or at any rate the main purpose, of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case²¹.
- (72) As set out in section 9.2 below, however, the Commission is entitled to make binding the Final Commitments as they meet the concerns the Commission expressed to Paramount and Paramount has not offered less onerous commitments that also address those concerns adequately²². In such circumstances, there cannot be any misuse of powers.
- (73) Fourth, certain respondents claim that the commitments offered by Paramount would have a negative impact and/or create uncertainty on the financing and exploitation of films and adversely affect cultural diversity.
- (74) The Commission rejects this claim. Pursuant to Article 167(4) of the Treaty, the Commission must take into account cultural aspects in its action under the Union competition rules, including Article 9 of Regulation (EC) 1/2003²³. Making the Final Commitments binding in this case would not, however, adversely affect cultural diversity or, more in general, the financing and exploitation of films in the EEA since the Final Commitments would not affect the ability of Paramount or any other right holder to license content on a territorial basis.
- (75) Fifth, certain respondents claim that the commitments offered by Paramount are disproportionate as they affect certain other Paramount licensing agreements in relation to which the Commission has not expressed any concerns.
- (76) The Commission rejects this claim. The Commission expressed concerns in the SO about contractual clauses entered into by Paramount that: (i) prohibit or limit Sky from providing its retail pay-TV services in response to unsolicited requests from consumers residing or located in the EEA but outside the United Kingdom and the Republic of Ireland; and (ii) require Paramount to prohibit or limit pay-TV broadcasters located within the EEA, but outside the United Kingdom and the Republic of Ireland, from providing their retail pay-TV services in response to unsolicited requests from consumers residing or located in the United Kingdom and the Republic of Ireland.

²¹ Case C-331/88 *Fedesa and Others*, ECLI:EU:C:1990:391, paragraph 24; Case T-143/89 *Ferriere Nord v Commission*, ECLI:EU:T:1995:64, paragraph 68; Case T-145/06 *Omya AG v Commission*, ECLI:EU:T:2009:27, paragraph 98.

²² Case C-441/07 P *Commission v Alrosa*, ECLI:EU:C:2010:377, paragraph 41.

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

- (77) The Final Commitments meet these concerns as they will remove the contractual clauses that prevent Sky from making cross-border passive sales in the EEA. They will also remove the contractual clauses that require Paramount to prohibit or limit other pay-TV broadcasters from making cross-border passive sales in the United Kingdom and the Republic of Ireland and any impact that these clauses may have had on Paramount's licensing practices vis-à-vis those broadcasters.
- (78) Sixth, certain respondents claim that the commitments offered by Paramount would negatively affect the rights of third parties. In the first place, certain respondents argue that the commitments would affect the freedom of pay-TV broadcasters other than Sky to contract with Paramount in the EEA and that those broadcasters should be entitled to receive a non-confidential version of the SO and to access the Commission's file. In the second place, another respondent claims that where Paramount holds the rights over a film in only certain EU Member States, the commitments would affect companies that hold the rights or relevant licences in other Member States.
- (79) The Commission rejects these claims. In the first place, while the Commission is required to take account of the principle of contractual freedom when applying the Union competition rules, including Article 9 of Regulation (EC) 1/2003²⁴, contractual freedom includes both the freedom to conclude contracts and the freedom not to conclude contracts. By the Final Commitments, Paramount exercises its 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.
- (80) In the second place, when verifying whether the Final Commitments address the concerns it has expressed to Paramount, the Commission took into consideration the interests of third parties²⁵ by publishing the Notice and the Initial Commitments and giving them an opportunity to submit observations. The Commission's acceptance of the Final Commitments offered by Paramount cannot, however, depend on the position of any other undertaking²⁶.
- (81) In the third place, the fact that the Final Commitments are made binding by the Commission would not deprive third-party undertakings of the possibility of protecting their legal rights before the courts²⁷.
- (82) In the fourth place, pay-TV broadcasters other than Sky do not have the right to receive a non-confidential version of the SO and to access the Commission's file²⁸.
- (83) Seventh, one respondent claims that, pursuant to the commitments offered by Paramount, pay-TV broadcasters in the EEA should be entitled either: (i) to obtain compensation for Paramount's waiver of contractual clauses that grant absolute

²⁴ Article 16 of the Charter of Fundamental Rights of the European Union and Case C-283/11 *Sky Österreich*, ECLI:EU:C:2013:28, paragraph 66.

²⁵ Case C-441/07 P *Commission v Alrosa*, ECLI:EU:C:2010:377, paragraph 41.

²⁶ Case C-441/07 P *Commission v Alrosa*, ECLI:EU:C:2010:377, paragraph 94.

²⁷ Case C-441/07 P *Commission v Alrosa*, ECLI:EU:C:2010:377, paragraphs 88-89 and 91.

²⁸ Case C-441/07 P *Commission v Alrosa*, ECLI:EU:C:2010:377, paragraph 41.

territorial exclusivity; or (ii) to terminate unilaterally their existing licensing agreements with Paramount.

- (84) Such claims go beyond, however, the scope of the concerns expressed to Paramount in the SO. They relate to alleged consequences of Paramount's compliance with the Final Commitments under national laws on the contractual relationship of pay-TV broadcasters with Paramount and not to whether the Final Commitments meet the concerns expressed in the SO to Paramount.
- (85) Finally, two respondents claim that the Initial Commitments meet the Commission's concerns as Paramount 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 and grant absolute territorial exclusivity in relation to Paramount's content.
- (86) These comments are in line with the Commission's assessment of the Initial and Final Commitments.

9. PROPORTIONALITY OF THE FINAL COMMITMENTS

9.1. Principles

- (87) 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 pursued²⁹. 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 pursued³⁰.
- (88) 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 those concerns adequately³¹. When carrying out that assessment, the Commission must take into consideration the interests of third parties³².

9.2. Application to this case

- (89) The Final Commitments adequately address the concerns expressed in the SO.
- (90) The Final Commitments will apply to all retail pay-TV services and lead to the removal of all clauses in any new pay-TV output license agreement, extension or renewal between Paramount and pay-TV broadcasters located within the EEA that:
- (a) contractually prohibit or limit Sky from providing its retail pay-TV services in response to unsolicited requests from consumers residing or located in the EEA but outside the United Kingdom and the Republic of Ireland; and/or

²⁹ Case T-260/94 *Air Inter v Commission*, ECLI:EU:T:1994:265, paragraph 144; Case T-65/98 *Van den Bergh Foods v Commission*, ECLI:EU:T:2003:281, paragraph 201.

³⁰ Case 265/87 *Schröder*, ECLI:EU:C:1989:303, paragraph 21; Case C-174/05 *Zuid-Hollandse Milieufederatie and Natuur en Milieu*, ECLI:EU:C:2006:170, paragraph 28.

³¹ Case C-441/07 P *Commission v Alrosa*, ECLI:EU:C:2010:377, paragraph 41.

³² Case C-441/07 P *Commission v Alrosa*, ECLI:EU:C:2010:377, paragraph 41.

- (b) require Paramount to prohibit or limit pay-TV broadcasters located within the EEA but outside the United Kingdom and the Republic of Ireland from providing their retail pay-TV services available in response to unsolicited requests from consumers residing or located in the United Kingdom and the Republic of Ireland.
- (91) In addition, Paramount will not seek to enforce, or honour, similar clauses in existing pay-TV output agreements in force with pay-TV broadcasters in the EEA.
- (92) Paramount has not offered less onerous commitments that adequately address the concerns expressed in the SO.
- (93) Finally, the Commission has taken into consideration the interests of third parties, including those that responded to the Notice (see Section 8).

10. CONCLUSION

- (94) By adopting a Decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes binding the Final Commitments to meet the Commission's concerns expressed to Paramount in the SO. Recital 13 of Regulation (EC) No 1/2003 states that such a decision should not conclude whether or not there has been or still is an infringement.
- (95) The Commission's assessment of whether the Final Commitments are adequate to address its concerns is based on the SO and the observations received following the publication of the Notice.
- (96) In the light of the Final Commitments, the Commission considers that there are no longer grounds for action against Paramount, and, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings against Paramount should therefore be brought to an end.
- (97) 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

The commitments as listed in the Annex shall be binding on Paramount Pictures International Limited and Viacom Inc., including their successors and any and all of their subsidiaries, for a period of five years from the date of notification of this Decision.

Article 2

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

Article 3

This Decision is addressed to:

Paramount Pictures International Limited

4th Floor, Building 5

Chiswick Park
566 Chiswick High Road
London, W4 5YF
United Kingdom

Viacom Inc.

1515 Broadway, 52nd Floor
New York, NY 10036-5794
United States

Done at Brussels, 26.7.2016

*For the Commission
Margrethe VESTAGER
Member of the Commission*

