connections have been used for P2P file-sharing, such as that carried out by Media Protector on behalf of Mircom, constitutes the lawful processing of personal data.

The AG stated that the capture of IP addresses in pursuit of online infringers can, in principle, be done on the lawful basis of the legitimate interests of the data controller. Yet the AG commented that the conditions relating to a legitimate interest of the data controller or a third party under GDPR art.6(1)(f) are closely linked to the circumstances relating to the second and third questions above and their assessment by the national court. Accordingly, were the national court to consider that Mircom's request for disclosure of user identity by the ISPs was unjustified, the recording of IP addresses by Media Protector, which preceded that request, could not be said to have been made in the pursuit of a legitimate interest.

If Mircom were an assignee of the claims, then, for the processing in question to be justified, Mircom would have to be able to use the data to identify the debtors under the claims acquired. If Mircom's request for the disclosure of the names belonging to the IP addresses were found to be unjustified in that situation, then it would not be able to use the data in that way, meaning that the processing by Media Protector would also be unjustified.

Take-aways

In ascertaining whether there has been a communication to the public on a P2P network, the question is not whether the pieces exchanged are parts of works that enjoy copyright, but rather whether the process enables making pieces of a file containing a whole protected work available for download.

When assessing whether an entity can benefit from Enforcement Directive, it is important to consider the entirety of the contractual relationship, the facts of the situation and the actual exercise of rights in the works concerned. The substance of the situation is of paramount importance, rather than the name ascribed to the relationship. If, as exemplified in this case, an entity obtains a licence of works that it does not exploit, but simply seeks to rely on the licence in order to acquire licensee status, it may be ineffective to allow the licensee to rely on remedies under the Enforcement Directive.

Finally, the opinion emphasises the importance of protecting a user's personal data, especially in the context of a disclosure of personal data to entities whose actions are "morally dubious".[12] The factors to be assessed in balancing property and privacy rights under a disclosure request may well be similar to those to be considered in assessing the legitimate-interest balance under the GDPR. So in the case of an unscrupulous and disproportionate scheme to extract compensation from file-sharers, it seems likely that a disclosure request will not be justified, and that there will be no lawful basis for processing personal data either.

Groupe Canal+ v Commission—CJEU Overturns Commission Commitments Decision with Implications for the European Film and Television Industry

Sophie Lawrance
BRISTOWS LLP

Isobel Thomas*
BRISTOWS LLP

LT Anti-competitive practices; Broadcasters; Commitments; EU law; Film industry; Geoblocking; Licensing agreements; Proportionality; Television; Third party rights

In the first judgment of its kind, the Court of Justice of the European Union (CJEU) has overturned a Commission decision to accept binding commitments from Paramount Pictures to stop using clauses with contracting parties that granted territorial exclusivity and prevented EU consumers from accessing certain pay-tv services.[1] The CJEU concluded that the Commission failed to take into account the impact of the Paramount commitments on third parties. A controversial EU policy has now been thrown into doubt.

The European Commission has long been concerned about the creation of barriers to trade within the EU, and has routinely used a combination of policy initiatives and competition law to tackle such restrictions. The issues under consideration in this article have their origins in the mid-2010s, at a time when the Commission was increasing efforts to remove barriers to digital goods and services, through measures such as its e-commerce sector inquiry and digital single market strategy.

The competition investigation which led to this case was particularly controversial, as it was seen by some as an attack on the EU television and film industry, which risked reducing cultural diversity and having a major impact on the industry's ability to fund itself.

[12] *Mircom International Content Management & Consulting (MICM) Ltd v Telenet BVBA* (C-597/19) EU:C:2020:1063 at [113].
[1] *Groupe Canal+ v Commission* (C-132/19 P) EU:C:2020:1007.

Background

The Commission can accept binding commitments from undertakings to end investigations into alleged breaches of the competition provisions of the Treaty on the Functioning of the EU (TFEU). Regulation 1/2003[2] art.9 provides that the Commission can issue decisions to make these commitments legally binding for a specified period and/or can confirm that there are no longer any grounds for action.

In 2015, the Commission sent a statement of objections to Sky UK and six US film studios (including Paramount) in relation to agreements that it considered restricted the access of EU consumers outside of the UK to certain pay-tv services. The Commission was concerned by two clauses in particular: first, a clause limiting Sky's ability to respond to sales requests from consumers resident in the EEA but outside the UK and Ireland for pay-tv services (such customer-initiated requests are referred to in competition law as "passive" sales), and secondly, a clause preventing broadcasters other than Sky from offering their pay-tv services in the UK and Ireland. The Commission's preliminary conclusion was that agreements containing these clauses led to absolute territorial exclusivity and constituted "by object" restrictions of competition within the meaning of TFEU art.101, frustrating the EU objective of establishing a single market.

Paramount proposed commitments to the Commission in April 2016 to address concerns, notably that it was prepared to no longer act upon or enforce the clauses leading to the broadcasters' absolute territorial protection. Following market testing, the Commission accepted Paramount's commitments in July 2016, and made them legally binding under Regulation 1/2003 art.9.

Canal+ had an existing pay-tv licensing agreement in place with Paramount covering the French market. Canal+ considered that its contractual rights were affected as a result of the commitments accepted by the Commission and Paramount announcing that it would not enforce the film studio obligation. Canal+ brought an appeal against the Commission decision to accept the commitments in December 2016, challenging the Commission's findings and seeking annulment of the decision, which was dismissed by the General Court in December 2018.[3]

The General Court found in its decision that an examination of any exemption under TFEU art.101(3) was not necessary, as there was no obligation on the Commission to establish all the conditions of an infringement under TFEU art.101(1) in its analysis of the commitments offered by Paramount. The General Court also confirmed that the commitments decision bound only Paramount, and had no effect on third parties contracting with Paramount. The General Court suggested that third parties could seek redress from national courts on the compatibility of the clauses with the provisions of TFEU art.101.

The CJEU dismissed three grounds of the appeal

First, the CJEU agreed with the General Court's rejection of an alleged misuse of powers, which argued that the Commission commitments decision circumvented the legislative process relating to geo-blocking. There was no legislative text that was adopted as a result of the process and the Commission did not misuse its powers in adopting the commitments decision.

Secondly, the CJEU held that the General Court had not erred in finding the relevant clauses in the agreements contrary to competition law. The CJEU concluded that the Commission was only under an obligation to conduct a preliminary assessment of the conduct without having to establish whether there was an infringement of competition law under TFEU art.101(1). In any event, the relevant clauses contained provisions designed to "geo-block" and as such, were likely to give rise to concern.

Thirdly, the CJEU rejected Canal+'s argument that the Commission should analyse each of the markets in which the agreements might have an effect individually. The clauses in question raised valid competition concerns for the whole of the EEA, and the Commission did not have an obligation to examine each market individually. The clauses led to absolute territorial exclusivity and therefore had the effect of partitioning national markets. The CJEU agreed with the reasoning of the General Court, that the relevant clauses threatened the objective of the EU single market.

Infringement of principle of proportionality

Canal+'s main argument on appeal to the CJEU was that the General Court had erred in finding that the Commission decision to accept the commitments did not interfere with the contractual rights of Canal+, or its ability to establish the compatibility of the relevant clauses with TFEU art.101(1) before a national court. The General Court had established in its previous decision, relying on the CJEU judgment in *Alrosa*,[4] that a decision adopting commitments thereby making them legally binding does not prevent third parties from invoking their contractual rights before a national court.

In a ruling which largely followed the earlier AG opinion, the CJEU set aside the judgment of the General Court, considering the crucial role of the principle of proportionality. Canal + emphasised the importance of the Commission verifying the commitments offered

[2] Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.
[3] *Groupe Canal+ v Commission* (T-873/16) EU:T:2018:904; [2019] 4 C.M.L.R. 43.
[4] *Alrosa v Commission* (C-441/07 P) EU:C:2010:377; [2010] 5 C.M.L.R. 11

under Regulation 1/2003 art.9 with respect to the interests of third parties as well as addressing any competition concerns.[5]

The CJEU referred to the *Alrosa* decision and the two-step proportionality test, notably the adequacy of the commitments themselves and the impact of the commitments on third parties.[6] Canal+ argued that the legally binding nature of the commitments automatically implied that Paramount would not honour its contractual obligations in relation to its existing license agreement with Canal+.[7] Unlike before the General Court, Canal+ did not rely on arguments that these sorts of clauses are designed to ensure the promotion of cultural production and diversity, so these arguments remain untested at this level.

The CJEU found that the principle of proportionality requires that the contractual rights of third parties are not rendered "devoid of their meaning" and that disapplying contractual clauses conferring rights on such third parties constitutes an interference with contractual freedoms which goes beyond the provisions of Regulation 1/2003 art.9.[8]

The CJEU disagreed with the General Court finding that national courts could rule on the impact of contracts between Paramount and broadcasters such as Canal+. It held that any order by a national court not honouring legally binding commitments accepted by the Commission would contradict the Commission decision and thus breach Regulation 1/2003 art.16, which requires national courts to avoid conflict with decisions of the Commission regarding the same competition practices. This reinforced the CJEU's finding in its assessment of the proportionality of the commitments with regards to third party rights. The CJEU therefore annulled both the decision of the Commission imposing legally binding commitments and the decision of the General Court rejecting Canal+'s appeal.

Impact of the judgment

Given the focus of the judgment, it does not finally resolve the question of whether the sorts of geo-blocking clauses used in licensing agreements in the film and television sector infringe competition law or not. Nor does it engage with the questions raised about the impact of the Commission's approach on the European film and television industry's ability to finance itself by selling rights separately in each territory. To finally establish the position, the Commission (or another competition authority or private claimant) is therefore likely to need to litigate the issue on the merits.

Offering commitments to the Commission in an investigation can be a favourable way for parties to settle investigations that might otherwise result in considerable fines, and the commitments offered by Paramount initially seemed like a victory for the Commission in its fight against unjustified geo-blocking practices. The Paramount commitments were also followed by similar commitments given by Disney, NBCUniversal, Sony Pictures and Warner Brothers.[9] These must now also be in jeopardy. It seems likely that the Commission will need to give greater weight to the impact of commitments on third parties' rights in future cases.

It remains to be seen how the Commission will respond to the outcome of this case. Paramount's commitments have been in force for close to the five years provided for in the final commitments.[10] Both the Commission, the parties and industry will have some evidence on which to assess how industry has managed to navigate the commitments, and whether the feared financial impact has resulted. And, with the departure of the UK from the EU, the EU interest in reopening the particular issue under investigation in this case, which focussed on agreements implemented in the UK (as well as Ireland), may be reduced.

Manchester Arena Suspect Had a Right to Privacy in his Arrest but Damages for Harm to Reputation Would be an Abuse of Process

Eileen Weinert
SENIOR ASSOCIATE, EVERSHEDS SUTHERLAND (INTERNATIONAL) LLP

Breach of confidence; Freedom of information; Loss of reputation; Misuse of private information; News reporting; Right to respect for private and family life; Terrorist suspects

A suspect in the Manchester Arena bombing, who was named in a *MailOnline* article (the Article), has been awarded £88,000 in compensation for infringement of his right to privacy.[1] Warby J, however, declined to award damages for harm to reputation under ECHR art.8, ruling

[5] *Groupe Canal+ v Commission* (C-132/19 P) EU:C:2020:1007 at [105].
[6] *Alrosa v Commission* (C-441/07 P) EU:C:2010:377.
[7] *Groupe Canal+ v Commission* (C-132/19 P) EU:C:2020:1007 at [107].
[8] *Groupe Canal+ v Commission* (C-132/19 P) EU:C:2020:1007 at [106] and [124].
[9] See European Commission press release IP-19-1590 at *https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1590* [Accessed 26 February 2021].
[10] See *https://ec.europa.eu/competition/antitrust/cases/dec_docs/40023/40023_5274_2.pdf* [Accessed 26 February 2021] cl.3.
[1] *Sicri v Associated Newspapers Ltd* [2020] EWHC 3541 (QB); [2021] 4 W.L.R. 9.