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)
(notified under document C(2016) 4740 final)
(Only the English text is authentic)
(2016/C 437/04)

On 26 July 2016, the Commission adopted a decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement. In accordance with the provisions of Article 30 of Council Regulation (EC) No 1/2003 (1), the Commission herewith publishes the names of the parties and the main content of the decision, having regard to the legitimate interest of undertakings in the protection of their business secrets.

Introduction
1. The Decision makes legally binding the commitments offered by Paramount Pictures International Limited (formerly Viacom Global (Netherlands) B.V.) and Viacom Inc. (hereinafter jointly referred to as 'Paramount') under Article 9 of Council Regulation (EC) No 1/2003 (Regulation (EC) No 1/2003) in a proceeding under Article 101 of the Treaty on the Functioning of the European Union (the Treaty) and Article 53 of the EEA Agreement.

2. This Decision concerns the film licensing agreements Paramount has entered into with Sky UK Limited (formerly British Sky Broadcasting Limited) and Sky Plc. (formerly British Sky Broadcasting Group Plc.) (hereinafter jointly referred to as 'Sky').

Procedure

4. On 15 April 2016, Paramount offered commitments pursuant to Article 9 of Regulation (EC) No 1/2003 to meet the Commission’s competition concerns ('Initial Commitments'). 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 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. The Commission received 25 observations from third parties on the Initial Commitments. On 27 May 2016, the Commission informed Paramount of the observations received from the respondents.

5. On 10 June 2016, Paramount clarified certain aspects of the Initial Commitments ('the Revised Commitments'). On 7 July 2016, Paramount clarified further certain aspects of the Revised Commitments and submitted a new version of the commitments ('the Final Commitments').

6. On 7 July 2016, the Commission consulted the Advisory Committee on Restrictive Practices and Dominant Positions. On 14 July 2016, the Hearing Officer issued his final report.

The Commission’s competition concerns
7. Paramount has entered into licensing agreements with Sky whereby Paramount grants Sky exclusive pay-TV and subscription video-on-demand (SVOD) rights with regard to certain films in the United Kingdom and the Republic of Ireland.

8. 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:

9. 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.

10. 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.


12. 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.

These clauses are hereinafter referred to as 'the Contested Clauses'.

13. 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 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 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.

14. 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.

15. 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.

16. 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. 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.

**Paramount's commitments**

17. The main aspects of the Initial Commitments were as follows.

18. 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').
19. 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.

20. 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).

21. 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. A trustee would be appointed to monitor Paramount’s compliance with the Initial Commitments.

22. The Revised Commitments were identical to the Initial Commitments, save for the following clarifications in Clause 1 of the Final Commitments: (i) the addition of a definition of ‘Relevant Clauses’; (ii) the replacement in the definition of ‘Broadcaster Obligation’ of 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’; and (iii) the replacement in the definition of ‘Paramount Obligation’ of 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’. With regard to the monitoring trustee, Paramount deleted the wording ‘if this has been appointed’ (Clause 13 of the Final Commitments).

23. The Final Commitments are identical to the Revised Commitments, save for the following clarifications in Clause 1 of the Final Commitments: (i) the addition in the definition of ‘EEA’ of the words ‘and continuing to participate thereafter’; and (ii) the addition in the definition of ‘Relevant Clauses’ of the words ‘(and, if included, other audiovisual content)’.

**Conclusion**

24. The Final Commitments address adequately the concerns expressed in the SO as they 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 in the EEA that:

(i) 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

(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 available in response to unsolicited requests from consumers residing or located in the United Kingdom and the Republic of Ireland.

In addition, Paramount will not seek to enforce, or honour, the above-mentioned clauses in existing pay-TV output agreements in force with pay-TV broadcasters in the EEA.

25. The Decision makes the Final Commitments offered by Paramount legally binding. The non-confidential version of the Decision will be made available on the website of the Directorate-General for Competition.

26. 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.