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GEO-BLOCKING AND EU COMPETITION LAW – CASE AT.40023 – CROSS BORDER ACCESS TO PAY TV CONTENT

6 APRIL 2017

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INTRODUCTION

- Case AT.40023 *Cross Border Access to Pay TV Content*
- Background to and overview of the case
- Key substantive issues
- Relevance and impact of the Paramount commitments
- Relationship with wider legislative and cultural debate

OVERVIEW

- Long running case – fact finding started 2012
- Case opened 13 January 2014
 - Covering five territories (six Member States)
 - Six ‘Hollywood Studios’
 - Major Pay-TV broadcaster in each territory
- Focus has been on UK/Rol (and therefore on Sky as the broadcaster):
 - Output agreements
 - Territorial restrictions (imposed on Sky and the Studios)
- Key procedural steps: SO July 2015; Oral Hearing Jan 2016; Paramount commitments Sept 2016 (appealed by Canal+ December 2016)
- Large number of interested third parties – content owners; pay TV operators; European film producers and production associations

JOAQUÍN ALMUNIA STATEMENT ON OPENING OF INVESTIGATION INTO PAY TV SERVICES – 13 JANUARY 2014

“The investigation will allow us to look at the restrictions in agreements between film studios and pay-TV broadcasters that grant “absolute territorial exclusivity” to these broadcasters. Such provisions ensure that the films licensed by the US studios are shown exclusively in the Member State where each broadcaster operators via satellite and the internet. They prevent access by subscribers who are located outside the licensed territory.

I want to be clear on one point: we are not calling into question the possibility to grant licenses on a territorial basis, or trying to oblige studios to sell rights on a pan-European basis.

Rather, our investigation will focus on restrictions that prevent the selling of the content in response to unsolicited requests from viewers located in other Member States – the so-called “passive sales” – or to existing subscribers who travel or move abroad

To illustrate: if you subscribe to a Pay TV service in Germany and you go to Italy for holidays, you may not be able to view the films offered by that service from your laptop during your holidays. Similarly, if I live in Belgium and want to subscribe to a Spanish Pay TV service, I may not be able to subscribe at all if there is territorial exclusivity”

PRESS RELEASE 23 JULY 2015 – COMMISSION SENDS SO

“These antitrust investigations focus on contractual restrictions on passive sales outside the licensed territory in agreements between studios and broadcasters. At the same time, broadcasters also have to take account of the applicable regulatory framework beyond EU competition law when considering sales to consumers located elsewhere. This includes, for online pay-TV services, relevant national copyright laws. In this context, in parallel to its actions under EU competition law, the Commission will propose to modernise EU copyright rules and review the EU Satellite and Cable Directive as part of its Digital Single Market Strategy adopted in May 2015. The aim is to reduce the differences between national copyright regimes and allow for wider access to online content across the EU.”

EU antitrust rules prohibit the restriction of passive sales, i.e. the sales of products cross-border in the internal market responding to demands from customers not solicited by the seller. In its October 2011 ruling on the Premier League/Murphy cases (C-403/08 and C-429/08), the EU Court of Justice specifically addressed the issue of absolute territorial restrictions in licence agreements for broadcasting services. The Court held that certain licensing provisions preventing a satellite broadcaster from providing its broadcasts to consumers outside the licensed territory enable each broadcaster to be granted absolute territorial exclusivity in the area covered by the license, thus eliminating all competition between broadcasters and partitioning the market in accordance with national borders.

As part of its Digital Single Market strategy, the Commission will propose to reform EU copyright rules. It seeks to improve people's access to cultural content online as well as to open new opportunities for creators and the content industry. More specifically, the Commission wants to ensure that users who buy online content such as films, music or articles at home can also enjoy them while travelling across Europe. Currently, service providers, in particular in the audio-visual sector, may be prevented from providing such portability features by copyright licensing arrangements. The Commission also wants to facilitate wider access to online content across borders. In this context, the Satellite and Cable Directive (93/83/EEC) will be reviewed and a public consultation will be launched after the summer. The Commission will notably assess if the scope of the Directive needs to be enlarged to broadcasters' online transmissions.”

ISSUES (1) – THE COMMISSION’S VIEW

- Restrictions give rise to absolute territorial protection
- ‘Additional restrictions’ which go beyond the relevant copyright Directives
- By object infringement of Article 101(1)
- No efficiencies under 101(3)
- *Consten and Grundig* and *Murphy* apply – unlawful restriction of passive sales

ISSUES (2) – LEGAL AND ECONOMIC CONTEXT

- Is the test for an object restriction (*Cartes Bancaires* and *Maxima Latvija*) satisfied? – for the Commission to prove
- Why do the clauses exist?
- Follow the grant of territorial copyright licences – which the Commission agrees are not problematic
- But have great commercial importance also – underpin film production ecosystem as an important source of film financing and key factor in greenlighting decisions
- Confirmed by views of expert third parties – *Oxera and O&O* – May 2016 – unrestricted cross border access would lead to significant consumer welfare loss

ISSUES (3) – LEGAL ARGUMENTS

- So in light of that legal and economic context – what is the correct legal approach?
- Debate as to whether *Consten and Grundig* and *Murphy* apply – both concerned sale of physical goods – here the copyright is intrinsic
- Relevant test is set out in *Coditel II*:

“The characteristics of the cinematographic industry and of its markets in the Community, especially those relating to dubbing and subtitling for the benefit of different language groups, to the possibilities of television broadcasts, and to the system of financing cinematographic production in Europe serve to show that an exclusive exhibition licence is not, in itself, such as to prevent, restrict or distort competition.

Although copyright in a film and the right deriving from it, namely that of exhibiting the film, are not, therefore, as such subject to the prohibitions contained in Article 85, the exercise of those rights may, none the less, come within the said prohibitions where there are economic or legal circumstances the effect of which is to restrict film distribution to an appreciable degree or to distort competition on the cinematographic market, regard being had to the specific characteristics of that market.“
- Given the importance of these clauses in the legal and economic context in which they fall to be analysed – this test its not met

THE PARAMOUNT COMMITMENTS

- Unilateral commitments with potentially very broad scope:
 - Applies to output agreements throughout EEA
 - Agrees not to take action for breach of restriction (but can still enforce copyright)
 - Agrees not to honour obligation to require other broadcasters to geoblock
- However:
 - Decision was likely commercially motivated
 - No practical effect
- Canal+ has appealed - ultimately questioning the Commission's margin of appreciation :
 - Flawed analysis
 - Failure to take account of impact in France
 - Disproportionate impact on third parties (e.g. Canal+)
 - Mis-use of powers in light of legislative process

THE WIDER DEBATE (1)

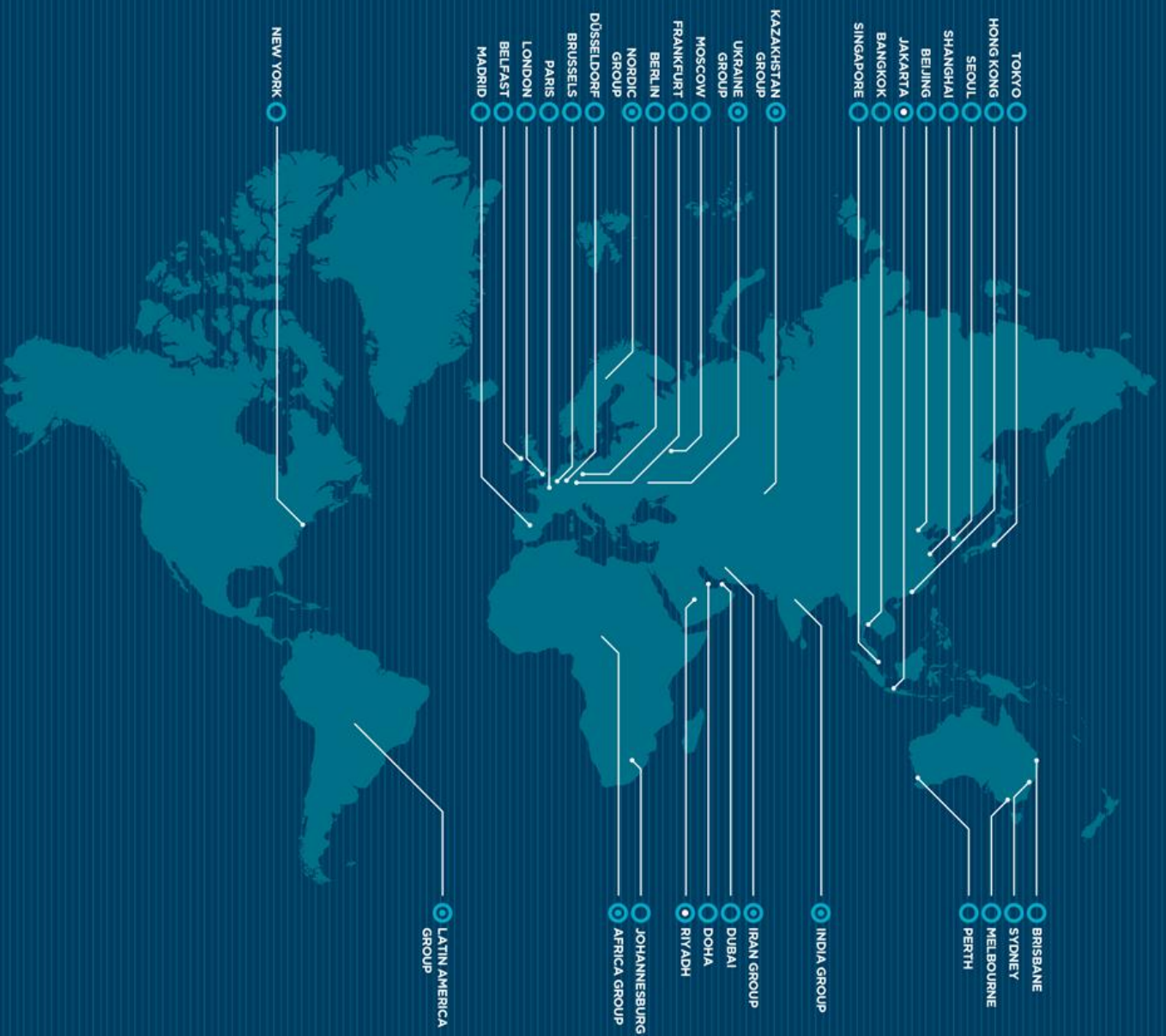
- Case should not be viewed in a vacuum
- Impact on European film production:
 - Possibly has a wider impact than the identified agreements – third party involvement
 - Impact on independent production – has been acknowledged by Commission Vestager:

“it’s a very important point for us to keep the pay TV case as the pay TV case and not allow for the rationale or the logic of that case to spread out to markets that may be somewhat related but in very different situations”.

“We understand that selling exclusive rights can be important to raise the money that film makers need. Our rules recognise that barriers between national markets may be justified under certain conditions, in particular when they are necessary to launch new products. So in the pay TV case, as in every case we do, we’re carefully examining whether the restrictions in the contracts we’re looking at are necessary for the studios.”
- Difficult to see how independent European producers can be treated differently if this is a by object case

THE WIDER DEBATE (2)

- Also needs to be seen along side the Commission's findings in the e-commerce sector inquiry and the on-going copyright reforms
 - Commission's preliminary findings in the e-commerce sector inquiry state that the Commission will:
 - “*assess on a case-by-case basis, having regard to the characteristics of the specific product and geographic markets, whether certain licensing practices may restrict competition and whether enforcement is necessary to ensure effective competition.*”
 - SatCab proposals acknowledges importance of territorial exclusivity and need to avoid forcing pan-European licensing
- So is competition law the right tool?
 - There are a number of issues and stakeholders involved in this process
 - Allowing the legislative process to run its course will allow all stakeholders to be heard
 - Legislation will also give a more certain and comprehensive solution



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