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EU Competition Law Newsletter

Highlights

— Digital Markets: The Commission Publishes Draft Online Platform Regulations

— The Court of Justice Annuls Commission Decision That Accepted Paramount Commitments on Cross-Border Pay-TV Restrictions

Digital Markets: The Commission Publishes Draft Online Platform Regulations

On December 15, 2020, the Commission published its proposal for the Digital Markets Act ("DMA"),[1] which would impose a list of *ex ante* obligations on designated large online platforms that meet certain thresholds. The proposed DMA aims at preventing practices by large online platforms that, according to the Commission, either fall outside or cannot be effectively addressed by the existing EU competition rules. The DMA would represent a far-reaching expansion of the Commission's regulatory powers in digital markets, and would significantly increase the regulatory burden on the designated companies.

On the same day, the Commission also published its proposal for the Digital Services Act ("DSA") which would introduce online content moderation rules and regulate the liability of online intermediaries for third party content.[2]

The DMA and DSA proposals follow an impact assessment and public consultation process which were launched in June 2020, and are part of the Commission's efforts to modernize EU competition and online content rules in an era of digitalization.[3] The proposed regulations will have to pass the ordinary legislative procedure *via* the Council of the EU (requiring a qualified majority of EU Member States) and the European Parliament. The Commission expects the DMA and the DSA to be adopted in mid-2022 and to enter into force by 2023, at the earliest.

"Gatekeeper" status

The proposed DMA would apply to companies that offer "core platform services" (currently defined in Article 2) and which fulfill three cumulative criteria: market impact, gateway status, and entrenched market position (as set out in Article 3).

[1] Commission's Press Release QANDA/20/2349, "Digital Markets Act: Ensuring fair and open digital markets", December 15, 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2349; and Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) (COM/2020/842 final), available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM:2020:842:FIN (the "Proposed DMA"). The Commission staff working document accompanying the Proposed DMA is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020SC0363.

[2] Commission's Press Release IP/20/2347, "Europe fit for the Digital Age: Commission proposes new rules for digital platforms", December 15, 2020.

[3] As reported in our June 2020 Newsletter.

"Core platform services" would include online intermediation,[4] online search engines, online social networking, video-sharing platforms, number-independent interpersonal communication services (*e.g.*, messaging apps),[5] operating systems, cloud computing services, and advertising. The Commission would have the power to extend the list of core platform services following a market investigation and publication of a report.

The Commission could designate the platform a gatekeeper if it meets three cumulative conditions:

— **Significant impact on the internal market.** The platform service must have a strong economic position and significant impact. It will be presumed in circumstances where the platform service is provided in at least three EEA Member States, and (i) the annual EEA turnover of the platform's corporate group amounts to at least EUR 6.5 billion in the preceding three financial years; or (ii) its market capitalization is at least EUR 65 billion in the preceding financial year.

— **Gateway for business users to reach end users.** The platform service must have a strong intermediation position connecting a large user base to a large number of businesses. This will be presumed where it has more than 45 million monthly active end users and more than 10,000 yearly active business users in the EU in the preceding financial year.

— **Entrenched and durable position.** The platform service must have a stable market position, which will be presumed if all of the quantitative criteria specified above (turnover, market value, and number of users) are met in each of the preceding three financial years. This condition may be met also if the platform will foreseeably have a stable position in the near future in which case it will be subject to a subset of obligations.[6]

Companies will be required to undertake self-assessment and notify the Commission within three months after having met the quantitative thresholds. The Commission expects the thresholds to be met by 10 to 15 providers of core platform services. It will designate the gatekeeper status following companies' notifications or following *ex officio* market investigations. A platform company will be able to rebut the Commission's gatekeeper designation by providing sufficiently substantiated arguments that it does not meet the underlying conditions (*e.g.*, by showing low entry barriers or customers multi-homing, *i.e.*, using competing platforms). While not expressly stated in the Commission's proposal, a designation ought to be appealable before the European Court of Justice under general EU law principles.

Gatekeepers' *ex ante* obligations

Within six months of its gatekeeper designation, the platform will have to be in compliance with all obligations provided in Articles 5 and 6 of the proposed DMA. These consist of two sets of *ex ante* obligations: (i) a blacklist of seven obligations that gatekeepers have to obey without possibility for the Commission to provide further specification (Article 5); and (ii) a list of ten more open-ended obligations with which gatekeepers must comply, but which the Commission can specify in more detail (Article 6). To ensure that the applicable obligations are "future proof," the Commission would have the power to adapt these obligations following a market investigation.

[4] Including, for example, marketplaces, app stores and online intermediation services in other sectors like mobility, transport or energy.

[5] As defined in Directive (EU) 2018/1972, establishing the European Electronic Communications Code, according to which it means an interpersonal communications service which does not connect with publicly assigned numbering resources, namely, a number or numbers in national or international numbering plans, or which does not enable communication with a number or numbers in national or international numbering plans.

[6] That is to say, if a gatekeeper that is not yet considered to have "an entrenched and durable position" but it is foreseeable that it will have such a position "in the near future." *See*, Proposed DMA, Article 15(4).

Obligations for gatekeepers *(Article 5 of Proposed DMA)*	**Obligations for gatekeepers susceptible of being further specified** *(Article 6(1) of Proposed DMA)*
(a) Requirement for data silos, *i.e.*, for individual user consent for combining personal data collected by one service with data collected from another service	(a) Prohibition on using data that is not publicly available and is "generated through activities by those business users" to compete with the gatekeeper's business users
(b) Requirement to allow business users to offer same products on other platforms with different conditions	(b) Requirement to allow users to be able to uninstall preloaded apps altogether (not merely disable those apps)
(c) Prohibition on app stores from blocking in-app promotions that direct users to alternative places where they can transact with app developers	(c) Allow third-party apps and app stores to be installed outside the core platform service, subject to proportionate measures to protect the integrity of hardware and operating systems
(d) Prohibition against preventing or restricting business users' ability to raise issues with public authorities	(d) Rank third-party and the gatekeeper's own products and services in a fair, non-discriminatory way, and refrain from treating its own products/services more favorably
(e) Prohibition against requiring third-party services to use identification services with core platform services	(e) Prohibition against technical restrictions of users' ability to switch or use multiple apps and services on an operating system
(f) Prohibition against bundling of subscriptions or user registrations for different services	(f) Requirement to provide third-party access to, and interoperability with the operating system, hardware, and software features available to the gatekeeper's own services
(g) Requirement for advertising services to disclose to advertising and publisher customers the prices paid by the advertiser and publisher and revenue shares paid to the publisher	(g) Requirement to give advertisers and publishers free access to their performance measuring tools for "independent verification of the ad inventory"
	(h) Requirement to provide data portability and the tools to facilitate data portability including "continuous and real-time access"
	(i) Requirement to provide business users (including rivals) with "continuous and real-time access" to user data and data generated from users' interactions with their products on the gatekeeper's platform
	(j) Requirement to provide "any third party providers of online search engines" access on FRAND terms to anonymized "ranking, query, click and view data in relation to free and paid search generated by end users on online search engines of the gatekeeper"

Limited defenses. The draft proposal explicitly excludes the absence of harmful competitive effects as a defense, and does not allow gatekeepers to justify behavior on grounds of procompetitive effects or consumer benefits. It appears at this stage that the only rebuttal options might include: (i) suspension, subject to the Commission-defined conditions and obligations, if the obligation puts the "viability" of the service at risk "due to exceptional circumstances beyond the control of the gatekeeper" (Article 8); or (ii) exemption, on grounds of public morality, public health, or public security (Article 9).

The grounds for potential justification are particularly narrow given that during the Commission's consultation process most of the stakeholders suggested that, rather than having certain practices categorically prohibited, the Commission should scrutinize certain practices and prohibit them on a case-by-case basis in circumstances when they are most likely to have detrimental effects.[7]

Monitoring and M&A scrutiny. The designated gatekeepers will be subject to certain monitoring obligations. Within six months of its designation, a gatekeeper will have to submit to the Commission an "independently audited description of any techniques for profiling of consumers." The description would have to be updated at least annually.[8] Additionally, gatekeepers would have to notify all mergers and acquisitions involving another provider of core platform services or any other digital service regardless of whether these transactions meet the EU merger control thresholds.[9] The exact scope of the Commission's review is yet to be clarified. Under the current proposal, the Commission's review would not be suspensory and would not give the Commission any powers to prohibit such transactions.

Enforcement and market investigations

The enforcement of the proposed DMA would be overseen exclusively by the Commission, which plans to have a staff of 80 full-time employees dedicated to overseeing the DMA. The Commission would have enforcement tools that are typically used in antitrust proceedings, such as the powers to request information, conduct dawn raids, issue interim measures, and accept commitments.[10] National competition authorities will be involved through their participation in a Digital Markets Advisory Committee, which the Commission will have to consult before taking certain decisions addressed to gatekeepers (*e.g.*, on non-compliance or fines).

Failure to comply with an obligation set out in Articles 5 and 6, including failure to comply with interim measures or with commitments offered to the Commission, could lead to a fine of up to 10% of global turnover. Systematic non-compliance, defined as three or more non-compliance or fining decisions imposed in a space of five years, would be subject to a fine of up 10% of global turnover or to behavioral or structural remedies.

However, structural remedies, such as the much talked about breaking-up of certain digital platforms, could be imposed only as a last resort if "there is no equally effective behavioral remedy or where any equally effective behavioral remedy would be more burdensome for the gatekeeper concerned than the structural remedy."[11]

The DMA proposal does not provide for the 'New Competition Tool,' which was originally envisaged to give the Commission the ability to initiate market investigations and impose remedies in markets with "structural competition problems."[12] This instrument has been curtailed due to concerns raised by the Commission's internal review panel, the EU Regulatory Scrutiny Board, over its necessity in light of other regulatory powers that the Commission and other authorities already have in relation to digital markets.

As a result, the 'New Competition Tool' has been transformed into the Commission's powers to carry out a market investigation for purposes of adapting the *ex-ante* gatekeeper obligations,

[7] Commission Staff Working Document - Impact Assessment Report - Part 2 - Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector, Annex 2, Section 2.2 (page 17) and Annex 2.1, Section 3.6 (Digital Markets Act) (SWD/2020/363 final).

[8] The description must cover "the basis upon which profiling is performed, including whether personal data and data derived from user activity is relied on, the processing applied, the purpose for which the profile is prepared and eventually used, the impact of such profiling on the gatekeeper's services, and the steps taken to enable end users to be aware of the relevant use of such profiling, as well as to seek their consent" (Proposed DMA, Preamble, para. 61).

[9] *See also* our October 12, 2020 Alert Memorandum "European Commission Announces New Policy To Accept Member State Referrals For Merger Review Even If EC And National Thresholds Are Not Met." The proposed DMA will ensure that the Commission is notified of small transactions even if they do not meet EU and Member State thresholds.

[10] Proposed DMA, Articles 18 to 23.

[11] Proposed DMA, Article 16(2).

[12] As reported in our June 2020 EU Competition Law Newsletter.

designating new companies as gatekeepers, or imposing behavioral or structural remedies for "systematic non-compliance."

Key practical implications

An enforcement shift from an antitrust to regulatory arena with a lower standard of proof. The proposed DMA would complement the Commission's antitrust powers in digital markets. In practice, however, the DMA may become the Commission's instrument of choice in addressing practices in digital markets supplanting the Commission's antitrust enforcement efforts. The *ex-ante* obligations in the proposed DMA would cover nearly all outcomes that the Commission and EU national competition authorities have sought in antitrust investigations in the tech sector thus far.

Furthermore, the proposed DMA would establish a lower standard of proof than existing competition rules for imposing remedies on large online platforms. The proposed DMA categorically prohibits a number of practices regardless of their actual effects on consumer welfare. This approach is justified by the stated objective of the DMA, which is to protect "contestable and fair markets in the digital sector"[13] as values in themselves, without requiring the Commission to show detrimental effects on consumer welfare. We consider this to be a problematic development.

Risks of a patchwork of national rules despite increasing EU-level harmonization. The DMA seeks harmonization in this field by precluding Member States from introducing further obligations on gatekeepers for purposes of ensuring contestable and fair markets. However, Member States would still be allowed to impose rules pursuing other legitimate public interests.[14] This issue is likely to be contentious. A number of Member States have already put in place, or are about to introduce, national rules that aim to address "market failures" in the digital sector.[15]

As recently as on January 14, 2021, the German parliament passed profound amendments to the German Competition Act introducing, among other things, new forms of abuses by undertakings that the German competition authority (the "Bundeskartellamt") have designated to have paramount significance for competition across markets. The amendments entered into force on January 19, 2021[16] and on January 28, 2021, the Bundeskartellamt already announced the first proceedings based on the amendments, by extending the scope of its investigation against Facebook.[17]

Against this background, while the proposed draft of the DMA is an important milestone, it remains to be seen what the exact shape of the DMA will be once the EU legislative process is completed (and in particular once it has passed muster by the European Parliament).

[13] Proposed DMA, Article 1(1).

[14] Proposed DMA, Article 1(5).

[15] These include Austria, Belgium, Bulgaria, Germany, Greece, Iceland, Lithuania and Romania. Also, on December 8, 2020, the Digital Markets Taskforce of the UK Competition and Markets Authority published its advice to the government on a new regulatory regime for digital markets. It would involve introducing *ex ante* measures applicable to certain digital firms that are designated as having "Strategic Market Status," particularly with activities in online marketplaces, app stores, social networks, web browsers, online search engines, operating systems, and cloud computing services. *See also*: https://www.gov.uk/cma-cases/digital-markets-taskforce.

[16] *See* the Bundeskartellamt's Press Release of January 19, 2021, available in English here.

[17] *See* the Bundeskartellamt's Press Release of January 28, 2021, available in English here. As reported in our November-December 2020 German Competition Law Newsletter, on December 10, 2020, the Bundeskartellamt initiated an investigation against Facebook for requiring users of its Oculus virtual reality glasses to also have a Facebook account.

The Court of Justice Annuls Commission Decision That Accepted Paramount Commitments on Cross-Border Pay-TV Restrictions

On December 9, 2020, the Court of Justice annulled the Commission's decision that accepted Paramount's commitments to remove from its licensing agreements with broadcasters any obligation that prevents broadcasters from responding to cross-border requests for pay-TV subscriptions (the "Commitments Decision").[18] The Court of Justice concluded that the Commitments Decision breached the principle of proportionality because it negated contractual rights of Canal+ and other counterparties to Paramount's licensing agreements who were not involved in the Commission's proceedings.

This is the first time a third party has successfully challenged commitments adopted by the Commission. The judgment will have a chilling effect on the Commission's ability and willingness to accept commitments in circumstances where they may have a direct impact on pre-existing third-party rights, particularly where such third parties have not been involved in the Commission's administrative proceedings.

Background

In 2015, the Commission issued a statement of objections against six U.S. film studios, (NBCUniversal, Paramount, Sony, TWDC, Twentieth Century Fox, and Warner Bros.) and U.K. broadcaster Sky. It alleged that certain contractual provisions in the licensing agreements between the studios and Sky which prevented Sky from passively selling Paramount's content in other countries within the EEA amounted to restrictions of parallel trade within the EEA. According to the Commission, such clauses had the object of restricting competition and therefore infringed Article 101(1) TFEU. In 2016, the Commission closed the proceedings by adopting a decision under Article 9 of Regulation 1/2003 that accepted Paramount's commitments:

— not to (re)introduce or enforce any obligation on broadcasters that prevent them from responding to cross-border requests for pay-TV subscriptions ("Broadcaster Obligation"), and

— not to accept or comply with any obligations on Paramount itself to impose Broadcaster Obligations in its pay-TV license agreements with other broadcasters ("Studio Obligation").

Canal+, a French TV broadcaster, who was not a party to the Commission's proceedings, objected to Paramount's commitments. In 2014, Canal+ had concluded with Paramount an exclusive pay-TV licensing agreement for the French market. To protect that exclusivity, its agreement with Paramount also included the Studio Obligation.[19] Canal+ appealed the Commitments Decision before the General Court.[20] Canal+ claimed that Paramount's commitments negatively affected its commercial interests because Canal+ would no longer be protected from cross-border passive sales by Paramount's licensees outside France. The General Court dismissed Canal+'s appeal in December 2018[21] and Canal+ appealed to the Court of Justice.

The Court of Justice Judgment

The Court of Justice upheld Canal+'s claim that the Commitments Decision violated the

[18] *Groupe Canal+ v. Commission* (Case C-132/19 P) EU:C:2020:1007. *See, Cross-border access to pay-TV* (Case COMP/AT.40023), Commission decision of July 26, 2016.

[19] *Groupe Canal+ v. Commission* (Case C-132/19 P) EU:C:2020:1007, para. 125.

[20] As reported in our March 2019 EU Competition Law Newsletter, on March 7, 2019, the Commission accepted comparable commitments offered by Disney, NBCUniversal, Sony Pictures, and Warner Bros, Sky. Canal+ has also challenged this decision before the General Court. *See Groupe Canal+ v. Commission* (Case T-358/19), case pending.

[21] *Groupe Canal+ v. Commission* (Case T-873/16) EU:T:2018:904.

principle of proportionality by disregarding the effects of the Paramount commitments on Canal+, which had not been a party to the Commission's investigation.[22]

The Court of Justice relied on the *Alrosa* precedent confirming that the principle of proportionality required the Commission to "take account of the interests of third parties" when adopting commitments decisions under Article 9 of Regulation 1/2003.[23] According to the Court, the Commission must verify that the rights of third parties "are not emptied of their substance" by the commitments accepted by the Commission.[24]

Applying this principle, the Court went on to find that Paramount's commitments disproportionately infringed the contractual rights of Canal+ and other third parties that licensed TV content from Paramount. The Court of Justice followed the opinion of Advocate General Pitruzzella[25] and annulled the Commitments Decision in its entirety because it breached the principle of proportionality for the following reasons.

— First, Canal+ had not offered the commitments, had not been part of the Commission proceedings, and had not provided any indication that it agreed with the commitments.[26]

— Second, the commitments had the effect of negating Canal+'s existing contractual rights. The commitments obliged Paramount not to impose and enforce contractual clauses that restricted other broadcasters from selling outside their licensed territory, and into Canal+'s exclusively licensed territory. In so doing, they "automatically implied that Paramount would breach certain contractual obligations to Canal+."[27] The intended effect of the commitments was to "automatically put into question" Canal+'s exclusivity to the licensed Paramount content.[28]

— Third, Canal+ could not have mitigated the impact of the commitments by bringing a claim before a national court to uphold the validity of the relevant clauses and to obtain damages from Paramount. Although commitments decisions in principle do not have a precedential effect, the Court of Justice referred to the duty of national courts to avoid judgments that contradict Commission decisions. This meant that national courts could not oblige Paramount to comply with its contractual obligations or award damages for their breach, nor could national courts adopt "negative" decisions finding that the relevant conduct by Paramount did not violate Articles 101 and 102 TFEU.[29]

The Court of Justice distinguished the Canal+ appeal from *Alrosa*, where Alrosa had also relied on the principle of proportionality to challenge a commitments decision. In *Alrosa*, De Beers and Alrosa had entered into a purchase agreement that was conditioned on the Commission giving advance negative clearance. The Commission subsequently opened an investigation into the agreement, which De Beers settled by committing to reduce its purchases from Alrosa. The Court explained that the present case involved an interference with pre-existing rights, whereas Alrosa concerned future or conditional contractual rights (at least in the Court's view).

Conclusion

The Commission and parties that are seeking to offer commitments will likely need to adapt their approach in future cases. The commitments

[22] The Court of Justice dismissed Canal+'s other claims that the Commission (i) misused its powers in light of the then-ongoing legislative process relating to the issue of geo-blocking; (ii) breached the adversarial principle by failing to evaluate Canal+'s argument under Article 101(3) TFEU; and (iii) failed to properly examine Canal+'s arguments regarding the appropriate legal and economic context of these cross-border restrictions.

[23] *Commission v. Alrosa* (C-441/07) EU:C:2010:377, para. 41.

[24] *Groupe Canal + v. Commission* (Case C-132/19 P) EU:C:2020:1007, para. 106.

[25] Opinion of AG Pitruzzella in *Groupe Canal + v. Commission* (Case C-132/19 P) EU:C:2020:355.

[26] *Groupe Canal + v. Commission* (Case C-132/19 P) EU:C:2020:1007, paras. 107 and 124.

[27] *Ibid.*, para. 107.

[28] *Ibid.*, para. 125.

[29] *Ibid.*, paras. 112–113.

adopted must not nullify pre-existing contractual rights of third parties who are not part of the proceedings, and the Court of Justice's reasoning suggests that "rights" should be read broadly, to encompass the essence of the parties' commercial bargain, and not only explicit contractual provisions.

This judgment could mean that commitments will not be available where they implicate existing contractual relations, unless the counterpart(ies) are also party to the Commission investigation and sign on to the commitments. The Commission may remain receptive to accepting commitments that regulate future relationships and future commercial practices with third parties, even if those third parties are not formally involved in the proceedings.

News

Commission Updates

The Commission Publishes Report On The Implementation Of The Damages Directive

On December 14, 2020, six years after the adoption of the Damages Directive,[30] the Commission published a report[31] analyzing its implementation across Member States.[32] The Damages Directive was introduced to harmonize the procedural rules for antitrust damages actions.

The Commission's key observations were as follows:

— **Insufficient experience concerning the implementation of the Damages Directive.** 21 Member States implemented the directive only after the transposition deadline of December 27, 2016. Also, court proceedings in Member States are time consuming, with many actions for damages, based on the implementing rules of the Damages Directive, still pending. The Commission referred to a recent study[33] which found there are approximately 13 years from the purchase of the product or service, that has been subject to an antitrust infringement, and the first civil judgment.

— **The Damages Directive sparked a significant rise in the number of antitrust damages actions.** Such actions are considerably more widespread in the EU than previously, when damages actions were concentrated in three Member States (Germany, the Netherlands, and the UK).[34]

— **Member States had transposed the Damages Directive's substantive rules in a broadly consistent manner.** Several provisions had been implemented *verbatim* or almost *verbatim* by the majority of the Member States, particularly in relation to disclosure, the principle of full compensation, and the passing-on of overcharges. A small degree of divergence exists with regard to the rules governing limitation periods (Cyprus, Ireland and Latvia going beyond the minimum 5-year period envisaged by the Damages Directive) and the quantification of harm (with some Member States setting out in national legislation the exact overcharge level that cartels are presumed to cause – 10% in Latvia and 20% in Hungary and Romania).

[30] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1.

[31] Available at https://ec.europa.eu/competition/antitrust/actionsdamages/report_on_damages_directive_implementation_en.pdf. Article 20(1) of the Damages Directive requires the Commission to review the effects of the implementation of Directive by December 27, 2020, and, if appropriate, submit a legislative proposal.

[32] Commission Staff Working Document, Report from the Commission to the European Parliament and the Council on the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, available at https://ec.europa.eu/competition/antitrust/actionsdamages/report_on_damages_directive_implementation.pdf.

[33] Jean-François Laborde, Cartel damages actions in Europe: How courts have assessed cartel overcharges (2019 ed.), November 2019, Concurrences N° 4-2019, Art. N° 92227, page 7.

[34] Commission Staff Working document accompanying the proposal for the Damages Directive {COM(2013) 404 final} {SWD(2013) 204 final}, paragraph 7; according to a study cited by the Commission's report, the cumulative number of cases, by date of first judgment, was approximately 50 at the beginning of 2014 and, after a sharp increase, amounted to 239 in 2019.

The report also discusses key Court of Justice rulings and the Commission's main actions to facilitate the effective implementation of the Damages Directive, including the adoption of the Passing-on Guidelines[35] and the Confidentiality Communication[36] relating to the protection of confidential information in damages proceedings.

Court Updates

The General Court Rules On Circumstances In Which Sports Organizations May Restrict Participation In Third-Party Events

On December 16, 2020, the General Court partially annulled the Commission's decision in the *International Skating Union's Eligibility rules* case.[37] The General Court upheld the Commission's finding that the International Skating Union's ("ISU") eligibility rules ("Eligibility Rules"), which prescribed severe penalties on participants of third-party events not authorized by the ISU, were in breach of Article 101 TFEU.[38] However, the General Court disagreed with the Commission's conclusion that the exclusive jurisdiction of the Court of Arbitration for Sport ("CAS"), in relation to disputes regarding the Eligibility Rules and third-party event authorization, "reinforced" the restrictive effects of the Eligibility Rules.

Sports organizations' powers to restrict participation in third-party events. The General Court's judgment reaffirms the position that sports organizations may restrict participation in third-party events to the extent such a restriction is objective, transparent, non-discriminatory, proportionate, and inherent in the pursuit of the sports organization's legitimate objectives.

According to the General Court, sports organizations may find themselves in a conflict of interests where they organize events themselves and also have the power to authorize events organized by third parties. Pursuant to the *Meca-Medina*[39] case law, a sports federation may impose restrictions that are limited to what is necessary to pursue sport-specific legitimate objectives. On this basis, the General Court concluded that an *ex-ante* system for authorizing third party events may be justified if it is pursuing legitimate objectives. For example, ensuring that sporting competitions comply with common standards or protecting the federation's economic interests are legitimate objectives that may justify an *ex ante* authorization system.[40]

The General Court upheld the Commission's conclusion that in this particular case the ISU breached Article 101 TFEU because it did not meet the *Meca-Medina* standard, primarily for two reasons:

— The ISU Eligibility Rules for pre-authorizing third-party competitions did not have "clearly defined, transparent, non-discriminatory and reviewable"[41] criteria, and went beyond what was necessary to protect the integrity of speed skating from the risks associated with betting or to ensure that sporting competitions comply with common standards.[42] In particular, the ISU rules granted ISU-broad discretion to refuse the authorization of third-party events, and did not precisely set out the conditions for identifying different categories of infringements by speed skaters that participated in non-authorized third-party competitions.

[35] Communication from the Commission – Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser, C/2019/4899, OJ C 267, 9.8.2019, pp. 4–43.

[36] Communication from the Commission – Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law, C/2020/4829, OJ C 242, 22.7.2020, pp. 1–17.

[37] *International Skating Union v. Commission* (Case T-93/18) EU:T:2020:610 ("*ISU v. Commission*"), paras. 179–181.

[38] *Ibid.*, para. 120.

[39] *David Meca-Medina and Igor Majcen v. Commission* (Case C-519/04 P), ECR 2006 I-06991.

[40] *ISU v. Commission*, para. 108.

[41] *Ibid.*, para. 88.

[42] *Ibid.*, paras. 99–111.

— The ISU Eligibility Rules provided disproportionate sanctions on athletes for participating in non-authorized competitions (lifetime ban or disqualification for 5–10 years, where the average length of a speed skater's career is just eight years). These penalties were capable of dissuading athletes from participating in unauthorized events.

Approval of CAS exclusive jurisdiction. The General Court disagreed with the Commission's conclusion that the exclusive jurisdiction of the CAS, on disputes regarding the Eligibility Rules and third-party event authorization, "reinforced" the restrictive effects of the Eligibility Rules.[43] Referring to the European Court of Human Rights 2018 judgment in *Pechstein*,[44] the General Court recognized the benefits of the CAS (particularly the capability of adjudicating quickly and economically, and facilitating a certain procedural uniformity), while it rejected the Commission's concerns that the CAS process could enable sports organizations to skirt the application of EU competition rules. Ultimately, the General Court annulled the Commission's decision to oblige the ISU to offer an alternative dispute resolution mechanism to the CAS.

[43] *Ibid.*, paras. 163, and 180.

[44] *Pechstein v. Switzerland*, Applications nos. 40575/10 and 67474/10, ECtHR judgment of October 2, 2018, CE:ECHR:2018:1002JUD004057510, para. 98.

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