

*Decision of the Opposition Division:* Partially rejected the application

*Decision of the Board of Appeal:* Partially annulled the contested decision and dismissed the appeal for the remainder

*Pleas in law:* Infringement of Article 8(1)(b) of Council Regulation No 40/94 as the Board of Appeal failed to take into account all relevant factors when assessing the likelihood of confusion between the conflicting trade marks.

The applicant submits that the contested decision is vitiated both by errors of fact and of law, as well the breach of the applicant's procedural guarantees relating to its right to be heard.

With regards to the alleged errors of fact, the applicant claims that the Commission has failed to acknowledge the system of collective licensing copyrights for musical works and thereby also the Norwegian factual context.

With regards to the alleged errors of law, the applicant submits the following:

## Action brought on 1 October 2008 — TONO v Commission

(Case T-434/08)

(2008/C 313/85)

*Language of the case:* English

### Parties

*Applicant:* TONO (Oslo, Norway) (represented by: S. Teigum and A. Ringnes, lawyers)

*Defendant:* Commission of the European Communities

### Form of order sought

The applicant respectfully requests the Court of First Instance of the European Communities to:

- Annul Article 3 of Commission Decision COMP/C2/38.698 — CISAC;
- In the alternative, annul Article 3 of Commission Decision COMP/C2/38.698 — CISAC with regard to cable retransmission;
- Order the Commission to bear the applicant's costs;

### Pleas in law and main arguments

By means of its application the applicant seeks partial annulment of Commission Decision C(2008) 3435, of 16 July 2008, relating to a proceeding under Article 81 EC and Article 53 EEA (Case COMP/C2/38.698 — CISAC) and in particular, of its Article 3, determining that the EEA CISAC <sup>(1)</sup> members engaged in a concerted practice in violation of Article 81 EC and Article 53 EEA 'by coordinating the territorial delineations of the reciprocal representation mandates granted to one another in a way which limits a licence to the domestic territory of each collecting society'. In the alternative, the applicant seeks annulment of Article 3 of the contested decision with regards to cable retransmission.

First, the applicant claims that the contested decision suffers from a formal error which should result in the decision being repealed. Namely, the applicant argues that its right to be heard has been violated since the final decision differs from the statement of objections on a central point relating to the description of the infringement.

Second, the applicant contests the fact that the inclusion of territorial delineation in the reciprocal agreements, in which it participated, is the result of concerted practices between the EEA CISAC members.

Third, the applicant contends that the Commission erroneously concluded that the parallel territorial delineation as regards retransmission in cable is restrictive of competition in violation of Article 81(1) EC. According to the applicant, the alleged concerted practice on territorial delineation concerns a form of competition that is not in itself protected by Article 81(1) EC. In addition, the applicant argues that the Commission committed an error of fact when assuming that there is a national monopoly in Norway for multi-repertoire licensing of public performance rights covering retransmission in cable networks. Moreover, the applicant submits that, even if the alleged concerted practice was considered to restrict competition, it does not infringe Article 81(1) EC because it is necessary and proportionate to a legitimate objective, having regard to the particular requirements of the management of licensing, performing rights, auditing, monitoring and enforcement in relation to re-transmission by cable.

Fourth, the applicant claims that the territorial delineations of its reciprocal agreements are exempted under Article 81(3) EC. The applicant's submission in this respect is that the abovementioned delineations are indispensable to the upholding of the efficient one-stop-shop principles and the Norwegian extended licensing system, thereby ensuring a minimum degree of administration, whilst at the same time safeguarding the interests of the rights holders.

<sup>(1)</sup> International Confederation of Societies of Authors and Composers.