



Reports of Cases

Case T-401/08

Säveltäjain Tekijänoikeustoimisto Teosto ry
v
European Commission

(Competition — Agreements, decisions and concerted practices — Copyright relating to public performance of musical works via the internet, satellite and cable retransmission — Decision finding an infringement of Article 81 EC — Sharing of the geographic market — Bilateral agreements between national collecting societies — Concerted practices precluding the possibility of granting multi-territory and multi-repertoire licences — Proof — Presumption of innocence)

Summary — Judgment of the General Court (Sixth Chamber), 12 April 2013

1. *Agreements, decisions and concerted practices — Adverse effect on competition — Reciprocal representation agreements between national copyright management societies — Exclusive membership clauses of copyright management societies linked with the nationality of authors — Anti-competitive object — Market-sharing arrangement — Partitioning of the market — Particularly serious infringements — Prohibition*
(Art. 81(1) EC)
2. *Agreements, decisions and concerted practices — Adverse effect on competition — Criteria for assessment — Anti-competitive object — Sufficient — Distinction between infringements by subject-matter and by effect*
(Art. 81(1) EC)
3. *Agreements, decisions and concerted practices — Adverse effect on competition — Reciprocal representation agreements between national copyright management societies — Exclusivity clause for the grant of copyright user licences in a defined territory — Anti-competitive object — Market-sharing arrangement — Partitioning of the market — Prohibition*
(Art. 81(1) EC)
4. *Competition — Administrative procedure — Commission decision finding an infringement — Burden of proving the infringement borne by the Commission — Extent of the burden of proof*
(Art. 81(1) EC; Council Regulation No 1/2003, Art. 2)
5. *Union law — Principles — Fundamental rights — Presumption of innocence — Procedures in competition matters — Decision finding an infringement but not imposing a fine — Applicability*
(Art. 81(1) EC; Art. 6(2) EU; Charter of Fundamental Rights of the European Union, Art. 48(1))

6. *Competition — Administrative procedure — Commission decision finding an infringement — Means of proof — Reliance on a body of evidence — Degree of evidential value necessary as regards items of evidence viewed in isolation — Evidence based solely on the conduct of undertakings — Evidential obligations on undertakings disputing the existence of the infringement — Obligations of the Commission challenging the plausibility of the explanations offered by the undertakings*

(Art. 81(1) EC; Council Regulation No 1/2003, Art. 2)

7. *Agreements, decisions and concerted practices — Prohibition — Agreements which continue to produce their effects after they have formally ceased to be in force — Application of Article 81 EC*

(Art. 81(1) EC)

8. *Agreements, decisions and concerted practices — Concerted practice — Parallel conduct — Presumption of the existence of a concertation — Limits — Refusal by national copyright management societies to allow a user established in another Member State direct access to their repertoire — Adverse effect on competition*

(Art. 81(1) EC)

9. *Actions for annulment — Judicial review — Limits on jurisdiction*

(Art. 230 EC)

1. A membership clause in a model contract for reciprocal representation agreements between national copyright management societies ('collecting societies') which aims to allow collecting societies to divide authors according to their nationality or, at the very least, to make it more difficult for an author to affiliate with a collecting society other than the one established in the country of which he is a national, has an anti-competitive object.

On the basis of that clause, the collecting societies divide up and share the internal market. Restrictive agreements of this type are among the examples of agreements explicitly declared to be incompatible with the common market in Article 81(1)(c) EC and must be categorised as obvious restrictions of competition. Such agreements, by obliging the parties to respect distinct markets, often delimited by national frontiers, cause the isolation of those markets, thereby counteracting the Treaties' main objective of integrating the internal market.

(see para. 61)

2. See the text of the decision.

(see paras 62-65)

3. Article 81(1) EC does not, as a general rule, preclude the conclusion of any contract containing a clause which provides a form of exclusivity.

However, an exclusivity clause in a model contract for reciprocal representation agreements between collecting societies which is intended to grant to one sole collecting society, in a defined territory, the exclusive right to grant licences in respect of a given repertoire, thereby creating a monopoly, for each collecting society, over the grant of licences for the exploitation of musical works on the territory in which it is established, has an anti-competitive object.

Moreover, that exclusivity clause also excludes the grant of direct licences, namely licences covering only a collecting society's own repertoire in respect of performances taking place in the national territory of another collecting society. Such an exclusion must be regarded as anti-competitive.

(see paras 72, 73)

4. See the text of the decision.

(see paras 87, 137)

5. In competition matters, any doubt of the Court must benefit the undertaking to which the decision finding an infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point, in particular in proceedings for annulment of a decision imposing a fine.

It is necessary to take account of the principle of the presumption of innocence resulting in particular from Article 6(2) of the European Convention on Human Rights, which is one of the fundamental rights which are general principles of EU law. Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies in particular to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments.

That case-law, developed in cases where the Commission had imposed a fine, is also applicable where, as in the present case, the decision finding an infringement is ultimately not accompanied by the imposition of a fine. In addition, account must be taken of the non-negligible stigma attached to a finding of involvement in an infringement of the competition rules for a natural or legal person. Furthermore, the finding of a concerted practice and an order to bring an end to that infringement expose the undertaking in question to significant consequences, such as the possibility of being fined under Article 24(1)(a) of Regulation No 1/2003.

(see paras 88-92)

6. In competition matters, in order to establish the existence of an infringement of Article 81(1) EC, the Commission must show precise and consistent evidence. However, it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the set of indicia relied on by the Commission, viewed as a whole, meets that requirement.

Since the prohibition on participating in anti-competitive practices and agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place clandestinely, for meetings to be held in secret, and for the associated documentation to be reduced to a minimum. Even if the Commission discovers evidence explicitly showing unlawful contact between operators, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. However, where the context in which meetings between undertakings accused of infringing competition law take place shows that those meetings were necessary to collectively deal with issues in no way related to such infringements, the Commission cannot presume that the object of those meeting was to focus on anti-competitive practices. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.

Where the proof of concertation between the undertakings is based not on a mere finding of parallel market conduct but on documents which show that the practices were the result of concertation, the burden is on the applicants not merely to submit another explanation for the facts found by the Commission but to challenge the existence of those facts established on the basis of the documents produced by the Commission.

Where, however, the Commission's reasoning is based on the supposition that the facts established in its decision cannot be explained other than by concertation between the undertakings, it is sufficient for the applicants to prove circumstances which cast the facts established by the Commission in a different light and thus allow another explanation of the facts to be substituted for the one adopted by the Commission.

In that regard, where the Commission uses certain examples to render implausible the applicant's argument, the Commission has the burden of showing why those examples are relevant. Moreover, the Commission cannot criticise the applicant for failing to provide further specifics regarding its other explanation, inasmuch as it is the Commission which must prove an infringement. Therefore, if the Commission, at the administrative stage, considers that the undertaking concerned has not sufficiently substantiated its explanation, it must continue the examination of the case or find that the concerned parties have not been capable of providing the necessary information to examine whether there were plausible explanations for the parallel conduct of the undertakings concerned.

Before considering the existence of explanations for the parallel conduct other than concertation, it is necessary to examine the question whether the Commission has proven the existence of a concerted practice by factors other than the parallel conduct. It is necessary to examine that issue before examining whether or not the explanations other than concertation are well founded, since, if the Court concludes that such evidence was provided in the contested decision, those explanations, even if they were plausible, would not invalidate the finding of the infringement.

(see paras 93-97, 106, 160)

7. See the text of the decision.

(see para. 122)

8. See the text of the decision.

(see para. 136)

9. See the text of the decision.

(see para. 183)