



Reports of Cases

Case T-442/08

**International Confederation of Societies of Authors and Composers (CISAC)
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. *Actions for annulment — Natural or legal persons — Measures of direct and individual concern to them — Whether directly concerned — Criteria — Commission decision finding an anti-competitive practice — Action by an organisation whose activities have served as the framework for the preparation of agreements implementing that practice — Organisation directly affected*

(Arts 81 EC and 230, fourth para., EC)

2. *Actions for annulment — Natural or legal persons — Measures of direct and individual concern to them — Individual concern — Criteria — Commission decision finding an anti-competitive practice — Action by an organisation whose activities have served as the framework for the preparation of agreements implementing that practice — Organisation's position as negotiator affected — Close involvement in the administrative procedure*

(Arts 81 EC and 230, fourth para., EC)

3. *Competition — Administrative procedure — Commission decision finding an infringement — Burden of proving the infringement borne by the Commission — Scope of the burden of proof*

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

4. *Union law — Principles — Fundamental rights — Presumption of innocence — Procedure 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))

5. *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)

6. *Agreements — 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)

7. *Agreements — 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)

1. So far as concerns the admissibility of an action, the condition of direct concern requires that, first, the contested measure must directly affect the legal situation of the applicant and, secondly, it must leave no discretion to its addressees, which are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules without the application of other intermediate rules.

A Commission decision finding an anti-competitive practice implemented by national societies for the collective management of copyright relating to the public performance of musical works by means of reciprocal representation agreements must be regarded as directly affecting a non-governmental organisation whose activities have served as the framework for the preparation of those agreements and which are relevant to assessing whether those national societies are implementing the contested decision by bringing to an end the infringement found and by avoiding similar conduct in the future.

(see paras 66-68, 72)

2. An organisation which is not the addressee of the contested measure is individually concerned by it where the organisation has a specific legal interest in bringing proceedings, in particular because its position as a negotiator has been affected by the measure whose annulment is sought.

That is the case with an organisation challenging a Commission decision finding an anti-competitive practice implemented by national societies for the collective management of copyright relating to the public performance of musical works by means of reciprocal representation agreements, and affecting its role as a facilitator of cooperation between those national collecting societies.

Individual concern is confirmed by the fact that the applicant organisation, the addressee of the statement of objections and closely involved in the administrative procedure as an important interlocutor of the Commission, occupied a clearly defined position as negotiator which was intimately linked to the actual subject matter of the decision, thus placing it in a factual situation which distinguished it from all other persons.

(see paras 73-77)

3. See the text of the decision.

(see paras 91, 138)

4. 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.

(see paras 92-95)

5. 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 meetings 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 96-99, 101, 107, 161)

6. See the text of the decision.

(see para. 123)

7. See the text of the decision.

(see para. 137)