

COMMISSION DECISION

of 4 October 2006

relating to a proceeding pursuant to Article 81 of the EC Treaty and 53 of the EEA Agreement

(Case COMP/C2/38.681 –The Cannes Extension Agreement)

(Only the English, French and German texts are authentic)

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty², in particular Article 9(1) thereof,

Having expressed concerns in the preliminary assessment of 23 January 2006,

Having given interested parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation (EC) No 1/2003³,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer,

WHEREAS:

1. INTRODUCTION

- (1) The Commission initiated proceedings in this case against thirteen European collecting societies managing mechanical copyright in music and the five major multi-national music publishers (“the Parties”). The subject matter of the proceedings consists of two clauses of an agreement among the Parties, the “Cannes Extension Agreement”, which amended and extended the duration of a previous agreement among them, the “Cannes Agreement”. In its preliminary assessment the Commission considered that the two clauses of the Cannes Extension Agreement, clause 9(a), which imposes conditions on the possibility of collecting societies to grant rebates or other discounts to record companies and clause 7(a)(i), which limits the possibility of collecting societies to engage in commercial publishing or record producing activities, raised concerns as to their compatibility with Article 81 of the EC Treaty and Article 53 of the EEA Agreement.

2. PARTIES

- (2) Elliniki Etairia Prostasias tis Pneumatikis Idioktisias A.E. (AEPI), Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte m.b.H. (AustroMechana), Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA), Mechanical-Copyright Protection Society Limited (MCPS), Mechanical-Copyright Protection Society Ireland (MCPSI), Nordic Copyright Bureau (NCB),

² OJ L 1, 4.1.2003, p.1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 8.3.2004, p.1).

³ OJ C 122, 23.5.2006, p. 2.

Société Belge des Auteurs Compositeurs et Editeurs (SABAM), Société pour l'Administration du Droit de Reproduction Mécanique des Auteurs, Compositeurs et Editeurs (SDRM), Sociedad General Autores y Editores (SGAE), Società Italiana degli Autori ed Editori (SIAE), Sociedade Portuguesa de Autores (SPA), Stichting Stemra (STEMRA) and Schweizerische Gesellschaft für die Rechte der Urheber musikalischer Werke (SUISA) ("the collecting societies") are collecting societies managing mechanical copyright of music. BMG Music Publishing International, EMI Music Publishing, Sony/ATV Music Publishing, Universal Music Publishing Group and Warner Chappell Music ("the major publishers") are companies active in the music publishing sector.

3. THE AGREEMENT

- (3) The Cannes Extension Agreement is an agreement between the major publishers and the collecting societies regarding the relations between the two groups in the administration and licensing of mechanical copyright⁴ of music works for the reproduction of sound recordings on physical carriers (CDs, tapes etc), especially in the context of Central Licensing Agreements.
- (4) Under a Central Licensing Agreement, a record company can conclude a single licensing agreement with a single collecting society covering the whole of the EEA territory or a part thereof. The record company pays all royalties due to the collecting society in question, which has the duty to distribute royalties to other collecting societies for the use of their repertoire. Each collecting society is then responsible for distributing royalties to its members (authors and/or publishers).
- (5) Central Licensing Agreements, which were first introduced in the mid-1980s, have brought substantial improvements for commercial users by allowing them to reduce transaction costs for obtaining licenses for the necessary rights related to the pan-European production and distribution of sound recordings. They are also beneficial to right-holders as they allow easier access to repertoire and, as a result, better exploitation of it.
- (6) However, Central Licensing Agreements also led to conflicts between right-holders, especially the major publishers, and collecting societies as well as among collecting societies. Such conflicts related to the level of administration fees that were deducted from royalties due to right-holders, as well as to the manner in which royalties were distributed to right-holders.
- (7) In order to resolve such conflicts and to set down the terms for the administration of mechanical copyright for the reproduction of sound recordings on physical carriers by collecting societies, the major publishers and the collecting societies concluded the Cannes Agreement, on 13 November 1997. Although only the major publishers were part to the agreement, it was agreed that any improved terms would apply also to other right-holders.

⁴ The term "mechanical copyright" is a term used by industry to describe jointly the reproduction right and the distribution right of authors, which are necessary for the production and sale of copies of a work.

- (8) The Cannes Agreement provided for a maximum administration fee that could be charged by collecting societies to their members for handling the licensing of rights and set a number of terms relating to the transparency of the collecting societies' accounts to members, technical improvements, audits etc. It was notified to the Commission under the procedure provided for in Council Regulation 17: First Regulation implementing Articles 85 and 86 of the Treaty⁵ on 10 December 1997. The Commission issued a comfort letter on the agreement on 9 November 2000.
- (9) On 18 November 2002 the Parties concluded the Cannes Extension Agreement which, on the one hand, extended the duration of the Cannes Agreement and, on the other hand, introduced amendments and new terms on issues that the Parties believed required mutual understanding.
- (10) The Cannes Extension Agreement extended the duration of the Cannes Agreement for 3½ years starting on 1 July 2002, so that it would expire on 31 December 2005.⁶ It further provided that beyond that date the agreement would be automatically extended for periods of one year unless any party to the agreement served notice of termination.⁷ The Cannes Extension Agreement has changed the maximum level of the administration fee and the manner in which it is calculated, clarified the expenses that are covered by it and introduced certain new provisions regarding the relations between the collecting societies and the major publishers.
- (11) Two clauses of the Cannes Extension Agreement raise concerns as to their compatibility with Article 81 of the Treaty and Article 53 of the EEA Agreement. These are: clause 9(a) which concerns the granting of rebates to record companies and clause 7(a)(i) which concerns the possibility of collecting societies engaging in commercial publishing or record producing activities.

4. PROCEDURAL STEPS UNDER REGULATION (EC) NO 1/2003

- (12) On 27 February 2003 the record company Universal International Music BV filed a complaint with the Commission, alleging that Clause 9(a) of the Cannes Extension Agreement was contrary to Article 81 of the Treaty.
- (13) The Cannes Extension Agreement was subsequently notified to the Commission on 1 July 2003 under Regulation No 17. However, the notification procedure was discontinued on 1 May 2004 due to the entry into force of Regulation (EC) No 1/2003
- (14) On 23 January 2006 the Commission opened proceedings with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003 and adopted a preliminary assessment as referred to in Article 9(1) of Regulation (EC) No 1/2003, stating the Commission's competition concerns. This assessment was notified to the Parties by letter of 24 January 2006.

⁵ OJ L3, 21.2.1962, p.204/62.

⁶ Cannes Extension Agreement, clause 2(a).

⁷ In this case the Cannes Extension Agreement is terminated with regard to this party only but continues to apply to parties not having served termination notice. Subsequent notices need only be given 6 months in advance. Cannes Extension Agreement, clause 2(a)(i), (ii) and (iii).

- (15) During February 2006, all of the Parties submitted commitments to the Commission in response to its preliminary assessment.
- (16) On 23 May 2006 a notice was published in the *Official Journal of the European Union* pursuant to Article 27(4) of Regulation (EC) No 1/2003⁸, summarising the case and the commitments submitted by the Parties and inviting interested third parties give their observations on the commitments within one month following the publication date.
- (17) By a letter to the Commission, dated 5 July 2006, Universal International Music BV withdrew its complaint.

5. PRELIMINARY ASSESSMENT

5.1. Relevant markets

5.1.1. Central Licensing Agreements

- (18) Collecting societies license their combined repertoire (rights transferred to each collecting society by its members and rights managed by a collecting society by virtue of reciprocal representation agreements with other collecting societies), or parts of it, to commercial users (record companies) for a single territory (their territory of establishment) or for multiple territories. The latter type of licensing takes place through Central Licensing Agreements. In this case, the relevant market does not include all kinds of licensing of mechanical copyright for the reproduction of sound recordings to physical carriers but is limited to Central Licensing Agreements.
- (19) Central Licensing Agreements constitute a separate market from the one for the licensing of music copyright to record companies for a single territory. In the market for Central Licensing Agreements collecting societies license their combined repertoire, as is the case with single territory licensing, but for the whole of the EEA, or a substantial part thereof (multiple territories). The commercial users concerned are mainly the major record companies that are active in most, if not all, Member States and require a single licence for multiple territories. In addition some of the biggest independent record companies also conclude Central Licensing Agreements, although not necessarily EEA-wide. Single territory licences do not constitute a substitute for Central Licensing Agreements for this category of commercial users, due to the increased transaction costs that are involved when dealing with a multitude of collecting societies, in order to obtain the same set of rights as can be obtained with a single Central Licensing Agreement. A further element that demonstrates the lack of substitutability between Central Licensing Agreements and single territory licences is the fact that since the mid-1980's, when Central Licensing was first introduced, none of the major record companies have replaced Central Licensing Agreements with a series of single territory licensing agreements.
- (20) A commercial user can enter into a Central Licensing Agreement with any collecting society located within the EEA to cover the whole of the EEA territory. The geographical scope of the market is, therefore, EEA wide.

⁸

See footnote 2.

5.1.2. Music Publishing and Record Production

- (21) In the music publishing market companies compete for signing-up authors (composers and authors of lyrics) and in the promotion and exploitation of the work of authors they have signed, through the conclusion of agreements with record companies. Music publishers do not carry out the licensing of copyright and collect royalties themselves but entrust these duties to the collecting societies. The five major publishers, that control approximately 70% of the publishing market at EEA level, are active in the whole of the EEA. They consequently compete for signing up authors and promoting their works in the whole of the EEA. However, the market also presents characteristics of a national market, such as the fact that rights are still managed (administered and monitored) at a national level.
- (22) In the record production market, companies compete for discovering artists (singers and musicians), signing them, producing records and distributing them. This market has similar characteristics to the publishing market. Four major record companies⁹ control approximately 80% of the market EEA-wide. The record production market also presents characteristics of a national market principally as a result of cultural differences.
- (23) The music publishing and record production markets are characterised by the presence of the five major publishers and four major record companies respectively (“the majors”). In addition there are – Europe-wide – hundreds of smaller, “independent” publishers and record companies. These “independents” do not represent a serious threat to the position of the major publishers and record companies in either market. This is because they are mostly active on a national level, specialised in particular kinds of music and do not have the Europe-wide presence of the major publishers and record companies.
- (24) In the context of this case, an important question is to what extent the collecting societies are potential entrants in these markets and, as a result, whether they represent a source of potential competition for the major publishers and record companies.
- (25) The collecting societies meet the objective requirements for entering the publishing market, in the sense that they are large organisations, have very good knowledge of the market and have close contacts with authors as a result of their rights’ management activities. These factors, in combination with the rapid evolution that the music industry as a whole has been experiencing in recent years, mean that entry by the collecting societies in the publishing market is possible in the medium term.
- (26) The same reasoning applies *mutatis mutandis* for the record production market. In addition, some collecting societies already engage in some non-commercial record production activities through especially dedicated funds, the so-called cultural funds.

⁹ EMI, SonyBMG, Universal and Warner. Sony and BMG have merged their record producing activities while their publishing activities remain separate.

5.2. Provisions of the Agreement raising concerns

5.2.1. Clause on rebates

- (27) Clause 9(a) of the Cannes Extension Agreement provides as follows: “...Given that royalties and other sums collected by the Societies are destined for their members, no Society may under any circumstance give any money to any record company or allow any record company to retain or be paid money in the form of a rebate or reduction of tariff or any other form (by way of lump sum, provision of services or royalty reduction or any other return of value) unless agreed in writing with the relevant member. ...”
- (28) The potential effects of this clause need to be assessed in view of the particularities of the market for licensing music copyright to record companies through Central Licensing Agreements. In that market there is currently very little scope for price competition among collecting societies.
- (29) The royalty rate charged for the licensing of music copyright for the reproduction of sound recordings on physical carriers, as well as the manner in which it is calculated, are set by an agreement between BIEM¹⁰ – the association of collecting societies – and IFPI¹¹ – the association of record companies¹². As a result, a record company will pay the same royalty rate regardless of which collecting society it decides to conclude a Central Licensing Agreement with.
- (30) In this context, the only element of price competition among collecting societies in the framework of Central Licensing Agreements appears to be the granting of rebates. These rebates are funded by a part of the administration fees that collecting societies deduct from royalties paid to them. Collecting societies grant such rebates to record companies in exchange for the increased turnover that Central Licensing Agreements bring to collecting societies and for other efficiencies in administration that such contracts enable collecting societies to achieve.
- (31) Clause 9(a) of the Cannes Extension Agreement does not contain an express prohibition of rebates, paid out of administration fees, to record companies. However the conditions that it imposes appear to make it highly impracticable for a collecting society to grant such a rebate and could be interpreted as imposing an indirect prohibition on such rebates. Concretely, clause 9(a) requires a collecting society to obtain the written agreement of “the relevant member” in order to be able to offer a rebate. A Central Licensing Agreement usually covers the whole of a society’s repertoire (including repertoire that it manages by virtue of reciprocal representation agreements). As a result, in order to be able to offer a rebate to a record company, a collecting society would have to obtain the written consent of all of its members and, arguably, also the members of other collecting societies or the other collecting societies themselves. Given that each collecting society comprises thousands of

¹⁰ Bureau International des Sociétés gérant les droits d’Enregistrement et de Reproduction Mécanique.

¹¹ International Federation of the Phonographic Industry.

¹² BIEM – IFPI, “Standard Contract for the Phonographic Industry”. This contract has currently expired. Despite this formal expiry, collecting societies and record companies continue to apply the terms of this contract in their business with each other.

members, and that the refusal of even a small number of members to grant their agreement would prevent the collecting society from granting the rebate, this condition, if strictly enforced, could be said to have effects equivalent to a direct prohibition of rebates.

- (32) According to the Parties, the aim of Clause 9(a) is not to restrict competition but to function as a transparency mechanism. They claim that, since collecting societies collect royalties on behalf of their members, to whom the money belongs, they are not entitled to give any rebate that would be detrimental to the members' interests. They therefore maintain that it is normal that before "giving away" any such income to the record companies, collecting societies should obtain the consent of their members.
- (33) Even if, as the Parties claim, the aim of Clause 9(a) is to make the commercial decisions of the collecting societies more transparent towards their members, it would appear that there are less restrictive means to achieve this.

5.2.2. *Non-compete clause*

- (34) Clause 7(a)(i) of the Cannes Extension Agreement provides as follows: "... Should a Society find it right to enter into what could be considered as commercial activity, the said activity should be carried out only in relation to the promotion of the interests of that Society's members and should not be in any case detrimental to that Society's members' interests and shall never be an activity that would be undertaken by a Publisher or a record company¹³ except that the use of *de minimis* amounts of so-called cultural funds for the purpose of producing or supporting the production of recordings of members repertoire in circumstances where otherwise such recordings would not happen shall be permitted provided that such activity shall not be intended to be profit-making in nature except to the extent that any publisher or other rights holder shall specifically grant the exercise of the rights to the Society in question. Nor shall any Society act in any significant manner where it (or any entity controlled by or in any way associated with it) shall be both licensor and licensee of any rights."
- (35) On the basis of a preliminary assessment this clause appears to have the object and may have the effect of crystallising the current structure of the industry by fending off any potential competition among collecting societies, publishers and record companies in the future.
- (36) As mentioned earlier¹⁴, the publishing market is characterised by the presence of five major publishers representing approximately 70% of the market EEA-wide and a large number of small or very small independent publishers that are generally active on single territories. Collecting societies are large organisations, with experience in the sector that, should they decide to enter the publishing market, could represent in the medium term a substantial source of competition to the publishers.
- (37) The situation is somewhat similar in the record production market, except that in that market four major record companies control approximately 80% of the market. For the

¹³ Emphasis added.

¹⁴ Recitals 21 to 23.

same reasons as in the publishing market, collecting societies would also appear to be in a position to represent a source of substantial competition in this market.

- (38) Potential entry by any collecting society in either of these two markets and the possible emergence of new business models seems, however, to be precluded by clause 7(a)(i).
- (39) According to the submissions of the major publishers, the aim of clause 7(a)(i) is to ensure that the collecting societies do not find themselves in situations of conflict of interest with their members, towards whom they have a fiduciary duty as trustees. Such a conflict of interests would arise if, by undertaking commercial activities in either of these two markets, collecting societies put funds belonging to their members at risk, used funds belonging to the major publishers in order to compete against them or acted in a partial way in the licensing of rights as a result of finding themselves in a position of both licensor and licensee.
- (40) Even if it could be considered legitimate on the part of the major publishers to prevent collecting societies from using royalties belonging to them in order to enter the two markets in question, other right-holders, and especially individual authors, might find it to their interest to also entrust the collecting society of which they are members with the publishing of their work and/or the production of recordings of their work. Clause 7(a)(i) could have the result that even if other right-holders desired to entrust a collecting society with such activities and agreed that royalty income coming from their works should be used for this purpose, a collecting society would not be able to undertake such activities because this is prohibited by the agreement with the publishers.
- (41) Moreover, not all of the funds in the hands of a collecting society belong to its members. A collecting society could, potentially, fund such commercial activities using a portion of the administration fees it charges its members.
- (42) Competing with publishers in the publishing market does not automatically prevent collecting societies from respecting their fiduciary duties towards the publishers. The situation where two undertakings compete in one market, while one is using the services of the other in another market, is not uncommon in many sectors of the economy. In the music industry, for example, independent record companies compete with the majors in record production activities but subsequently often rely on the latter's distribution network for the distribution of their records.

6. COMMITMENTS PROPOSED

- (43) In February 2006 all of the parties to the Cannes Extension Agreement proposed two commitments within the meaning of Article 9(1) of Regulation (EC) No 1/2003. The commitments cover both clauses of the Cannes Extension Agreement that raised concerns as to their compatibility with Article 81 of the EC Treaty and Article 53 of the EEA agreement.

6.1. Commitment concerning clause 9(a)

- (44) As regards clause 9(a) of the Cannes Extension Agreement, the parties proposed to reformulate the wording of the clause so as to provide that collecting societies can grant rebates, paid out of the administrative fees that they retain from the royalty, to record companies by means of a decision of the competent body of the society and without needing the approval of their members each time. Concretely the proposed wording of clause 9(a) provides the following:

“... A Society may grant a discount to a record company in the form of a rebate or reductions of tariff or any other form if so decided by the competent body of the Society. This includes, but is not limited to, the following situations (a) giving a discount on a tariff as regards a new form of exploitation for an introductory period or (b) applying normal arm’s length commercial conditions such as an allowance for paying on time or early or for improved accounting returns or some similar provision or (c) concluding agreements with associations of users providing for a discount in return of specific services of the members of the association and/or the association facilitating the collection of the remuneration dues from the members of the association to the Society or (d) agreeing a settlement of a dispute between a Society and a record company. All discounts with the exception of the aforementioned situations (a) to (d) shall be included into the Rate (in accordance with Clause 3(a)(i)) and shall not reduce the income for the Societies’ members.”

6.2. Commitment concerning clause 7(a)(i)

- (45) With regard to the clause 7(a)(i) the Parties have proposed to delete the clause from the Cannes Extension Agreement and not to enter into an agreement with a similar effect in the future.

7. COMMISSION NOTICE PURSUANT TO ARTICLE 27(4) OF REGULATION (EC) No 1/2003

- (46) On 23 May 2006 a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003 was published in the *Official Journal of the European Union*. It invited the interested third parties to submit their observations on the commitments within one month following the publication date.
- (47) In response to the notice, the Commission received observations from the complainant, Universal International Music B.V. and two music industry associations. These observations did not contain any points such as to make the Commission reconsider its concerns as stated in the preliminary assessment and did not give rise to the identification of any new concerns.
- (48) According to the Commission’s analysis the commitments are adequate to meet the Commission’s concerns as expressed in its preliminary assessment. In view of the results of the market test, the adequacy of the commitments is confirmed.

8. CONCLUSION

- (49) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes commitments, offered by the undertakings concerned to meet the Commission's concerns expressed in its preliminary assessment, binding upon them. Recital 13 of the Preamble to the Regulation (EC) No 1/2003 states that such a decision should not conclude whether or not there has been or still is an infringement. The Commission's assessment of whether the commitments offered are sufficient to meet its concerns is based on its preliminary assessment, representing the preliminary view of the Commission based on the underlying investigation and analysis, and the observations received from third parties following the publication of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003.
- (50) In the light of the commitments offered, it is concluded that there are no longer grounds for action by the Commission. The proceedings in this case should therefore be brought to an end.
- (51) The Commission retains full discretion to investigate and open proceedings under Article 81 of the Treaty and Article 53 of the EEA Agreement as regards similar arrangements among the parties that are not the subject-matter of this Decision.

HAS ADOPTED THIS DECISION:

Article 1

The commitments set out in the Annex shall be binding on the undertakings referred to in Article 3.

Article 2

The proceedings in this case shall be brought to an end.

Article 3

This Decision is addressed to:

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Done at Brussels, 4 October 2006

For the Commission
Neelie KROES
Member of the Commission

ANNEX

THE COMMITMENTS

Commitment with regard to clause 7(a)(i)

The Parties undertake within 30 days of the date on which the Parties are notified of the Commission's final decision under Article 9(1) of Council Regulation (EC) No 1/2003 closing the Commission's case concerning the CEA, to (a) delete Clause 7(a)(i) of the CEA and (b) not to enter into any clause with similar effect for the future and (c) send a copy of the signed document to the Commission.

Commitment with regard to clause 9(a)

The Parties undertake, within 30 days of the date on which the Parties are notified of the Commission's final decision under Article 9(1) of Council Regulation (EC) No 1/2003 closing the Commission's case concerning the CEA, to (i) clarify the wording of Clause 9(a) of the CEA in accordance with the text set out in Annex 1 hereto and (ii) provide the European Commission with a copy of the signed document.

Annex 1

9. LICENSING AGREEMENTS

(a) Part 4 of the Schedule sets out a list of all CLAs at the date hereof. A summary of all new agreements (and all amendments and/or extensions thereto) shall be notified (on a confidential basis) in writing to the Publishers by the Society or Societies entering into it so that Part 4 of the Schedule can be amended as between the parties hereto to reflect such change. A Society may grant a discount to a record company in the form of a rebate or reductions of tariff or any other form if so decided by the competent body of the Society. This includes, but is not limited to, the following situations (a) giving a discount on a tariff as regards a new form of exploitation for an introductory period or (b) applying normal arm's length commercial conditions such as an allowance for paying on time or early or for improved accounting returns or some similar provision or (c) concluding agreements with associations of users providing for a discount in return of specific services of the members of the association and/or the association facilitating the collection of the remuneration dues from the members of the association to the Society or (d) agreeing a settlement of a dispute between a Society and a record company. All discounts with the exception of the aforementioned situations (a) to (d) shall be included into the Rate (in accordance with Clause 3(a)(i)) and shall not reduce the income for the Societies' members.