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The EU Court of Justice rejects allegations of an abuse of dominance through unfair pricing by the Belgian collective management organisation for copyright *(SABAM)*

UNILATERAL PRACTICES, DOMINANCE (ABUSE), DISCRIMINATORY PRACTICES, INTELLECTUAL PROPERTY, PRICES, ENTERTAINMENT, JUDICIAL REVIEW, EUROPEAN UNION, COLLECTING SOCIETIES, PRELIMINARY RULING (ART. 267 TFEU)

EU Court of Justice, *SABAM*, C-327/19, 25 November 2020 (French)

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On 25 November 2020, the Court of Justice of the European Union ('CJEU' or 'Court') rendered its judgment on the alleged abuse of dominance by the only Belgian collective management organisation for copyright in musical works (the SABAM). In this decision, the Court confirms that calculation of licensing fees according to a fee scale based on gross receipts from ticket sales does not, per se, consist in unfair pricing in the meaning of Article 102 (a) TFEU. Nevertheless, the Court emphasises that the use of such scale may qualify as an abuse of dominance where the actual amount claimed is excessive, compared to the economic value of the service offered by the collective management organisation. This is the case when the fee scale encompasses a flat-fee system by tranches that does not take accurately account of the actual quantity of protected works performed, considering the existence and cost of alternative identification and quantification methods.

I. The parties

The *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA* (*SABAM*) is the only collective management organisation for copyright in musical works in Belgium [*1*].

Weareone.World BVBA and *Wecandance NV* are companies that have been organising, respectively, since 2005 and 2013, the *Tomorrowland* and *Wecandance* music festivals in Belgium [*2*].

II. The facts

Between 2013 and 2016, *Weareone.World* and *Wecandance* make use of copyright protected works in their own respective music festival. As these works are part of its catalogue, the SABAM invoices licensing fees to both companies according to its applicable "Tariff 211". Under such a tariff, the basic amount of fee to be paid by music festival organisers is calculated based on the gross receipts from ticket sales. Eight separate tranches of gross receipts are applied a degressive rate. Organisers have the opportunity to obtain rebates on the basic amount of fees depending on the proportion of works actually performed that are part of the SABAM's catalogue. When this proportion is lower than 1/3 or 2/3, respectively, the SABAM only invoices 1/3 or 2/3 of the basic amount of fee. When it is 2/3 or higher, the SABAM invoices the total basic amount of fee (hereinafter the '1/3-2/3 rule') [*3*].

As its invoices are left unaddressed, the SABAM brings actions for payment against each festival organisers before the Antwerp Court of Enterprises. In the course of the domestic proceedings, the defendants challenge the validity of Tariff 211, which serves as a legal basis for the calculation of the unpaid invoices. Both defendants argue that, under this tariff, the SABAM is imposing unfair prices that are not reasonably in line with the economic value of the services offered, in violation of Article 102 (a) TFEU. Looking for guidance, the Antwerp Court of Enterprises refers the following question to the Court: is there an abuse of dominance when a collective management organisation for copyright holding a *de facto* monopoly (1) makes use of a fee scale based on gross receipts from ticket sales, with no deduction of elements external to the works performed, or (2) applies a flat-fee system by tranches (under the 1/3-2/3 rule), rather than a tariff calculated on the precise proportion the works actually performed represent in the relevant organisation's catalogue [*4*]?

III. The judgment

Principles applicable to abuses of dominance by collective management organisations

As an introduction, the Court reminds and consolidates the following principles, which apply to abuses of dominance by collective management organisations ('CMOs'):

- CMOs, such as the SABAM, are undertakings that have to comply with Article 102 TFEU;
- CMOs holding a *de facto* monopoly on the territory of a Member State, such as the SABAM, are deemed to enjoy a dominant position in the meaning of Article 102 TFEU;
- CMOs abuse their dominant position when they claim fees that are excessive compared to the economic value of the services performed (i.e. making their catalogue available). This is to be assessed by the national judge in light of all circumstances of the case;
- In that regard, the domestic courts should in particular consider the need to achieve a balance between, on one hand, the interests of authors in being remunerated for the use of their works, and on the other hand, the public interest in using these works under reasonable terms. [*5*]

Fee scales based on gross receipts from ticket sales might result in an abuse of dominance

Confirmation - Fee scales based on gross receipts from ticket sales are not abusive per se

Regarding the first part of the question referred, *Weareone.World* and *Wecandance* argue that a fee scale based on gross receipts from ticket sales is, as such, abusive, as it presents no link with the economic value of the works made available by the SABAM. First, they contend that the ticket price rather results from the costs incurred by the organisers to provide participants with a "global experience", which means that such costs have to be deducted from their gross receipts for the purpose of calculating licensing fees. Second, they criticise the fact that the SABAM can claim, though for the use of the same works, a higher amount of fees from music festivals imposing higher entrance prices. [*6*]

By analogy with its case law regarding collective management organisations for copyright and discos or broadcasters, the Court rejects the defendants' contentions, and confirms that the use of a fee scale based on gross receipts from ticket sales consists in normal exploitation of copyright. Indeed, as a matter of principle, such fee scale is in reasonable link with the economic value of the works made available by the collective management organisation, which itself depends, amongst others, on their individual trade value and on the number of persons enjoying them. According to the Court, it follows that the calculation of licensing fees based on gross receipts from ticket sales should not be deemed abusive *per se*, even if no deduction of some organisational costs is granted. Ruling otherwise would impose an unreasonable burden on the shoulders of collective management organisations for copyright. [*7*]

Caveat – There is an abuse of dominance when the amount of fees claimed is actually excessive

Notwithstanding the above, the Court emphasises that the use of a fee scale based on gross receipts from ticket sales may lead to an abuse of dominance when the actual amount of fees claimed is excessive, compared to the economic value of the service provided, which is for the national judges to verify. In that regard, domestic courts should take due account of all circumstances of the case, including the fee rate, its calculation basis, as well as the nature, extent and trade value of the use of the works. [*8*]

Fee scales encompassing flat-fee systems by tranches might result in an abuse of dominance

Clarification – Fee scales encompassing flat-fee systems by tranches are not abusive per se

With regard to the second sub-question referred, the Court, building on previous case law, clarifies that fee scales encompassing flat-fee systems by tranches are not abusive as such, as they take into account, though only to some extent, the quantity of copyright protected works actually performed. [*9*]

Caveat – There is an abuse of dominance when the flat-fee system by tranches is not accurate enough

Nevertheless, the Court reminds that the use of such fee scales may qualify as an abusive behaviour where an alternative method exists, which allows for a more precise identification and quantification of the works actually performed, without leading to a disproportionate increase in management and monitoring costs of the collective management organisation. [*10*]

That should be assessed by the referring court, considering all circumstances of the case at hand. However, the Court already highlights some factual elements that support the argumentation of the festival organisers. First, the use of the 1/3-2/3 rule is conditioned to the transmission of a list of the works actually performed during the event. When faithful, such a list allows for a more precise identification of the proportion of works coming from the SABAM catalogue. Second, there are also new technological tools, such as music recognition software, that may enable the SABAM to identify such proportion with a higher level of accuracy. Third, the SABAM has already

approved some alternative methods of identification and quantification of the works performed, such as having recourse to authorised control firms, or even replacing the 1/3-2/3 rule with a more accurate one on a temporary basis. [*11*]

IV. Comment

In the view of the authors, three elements must be pointed out in the reasoning of the Court.

First, the combination of broader concepts (such as excessiveness or proportionality) with a case-by-case analysis (to be conducted by national courts), that seems to consist in an attempt to balance imperatives of legal certainty, EU harmonisation and judicial individualisation.

Then, the construction of competition law in a way to try and achieve a balance of conflicting but fundamental interests, such as the protection of (intellectual) property, on the one hand, and the public interest in enjoying protected works under reasonable terms, on the other hand, which is a reference to the recent copyright jurisprudence of the Court. [*12*]

Last but not least, the apparent willingness of the Court to adapt and transpose its previous case law to take account of the technological advance when addressing modern legal issues. In the examined case, for instance, it indeed now seems more difficult for collective management organisations of copyright to shield infringements of antitrust law under an alleged lack of available technology. They are rather encouraged to come up with economic justifications. In the case at issue and, more broadly, in the context of copyright law, this will raise the important question as to how to calculate the trade value of artistic works. Such questions will probably give rise to further litigation and request additional interventions of the Court, until accurate indicators are finally put into music.

[*1*] Judgment of 25 November 2020, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Weareone.World BVBA and Wecandance NV*, C-372/19, EU:C:2020:959, paragraph 7.

[*2*] Ibid., paragraph 8.

[*3*] Ibid., paragraphs 8-12.

[*4*] Ibid., paragraphs 13-14 and 18-19.

[*5*] Ibid., paragraphs 26-33.

[*6*] Ibid., paragraphs 15-17 and 35-36.

[*7*] Ibid., paragraphs 37-47.

[*8*] Ibid., paragraph 48.

[*9*] Ibid., paragraphs 49-51.

[*10*] Ibid., paragraphs 52-54.

[*11*] Ibid., paragraphs 55-59.

[*12*] Judgment of the Court, 29 July 2019, *Spiegel Online GmbH v Volker Beck*, EU:C:2019:625, paragraph 42.