

SUMMARY OF RESOLUTION S/0208/09 AISGE CINES

On 19 December 2011 the Council of Spain's antitrust authority, the Comisión Nacional de la Competencia (CNC), issued its resolution in infringement proceeding S/0208/09 AISGE CINES.

The case originated with a complaint filed in December 2009 by the Spanish federation of cinema hall operators, Federación de Cines de España (FECE) against Artistas e Intérpretes Sociedad de Gestión (AISGE), the national association authorised as collecting society for intellectual property rights of actors, dubbing artists, dancers and stage managers in relation to equitable remuneration for the public broadcast of audiovisual recordings in cinemas.

On 24 March 2010 the Investigations Division decided to bring an infringement proceeding against AISGE on finding prima facie evidence of an infringement of article 102 of the Treaty on the Functioning of the European Union (TFEU) and article 2 of the Spanish Competition Act 15/2007 of 3 July 2007 (LDC).

AISGE is a collecting society formed in accordance with the Consolidated Text of the Intellectual Property Act (TRLPI). Its principal activity is collective management of the intellectual property of actors and, since 1999, also of dubbing artists, dancers and stage managers.

FECE is a national association composed of owners of cinema halls and associations, business groupings and organisations of cinema hall businesses that in aggregate account for approximately 80% of all the cinema screens existing in Spain.

The CNC Council Resolution held the evidence shows the following in relation to AISGE's activity:

(i) System for establishing general fees of AISGE

In 1995 AISGE notified the Ministry of Culture of the general tariff to remunerate public communication in the form of public projection or exhibition of motion pictures and other audiovisual works.

That fee is fixed jointly with the collecting society for artists and performers, Sociedad de Artistas Intérpretes o Ejecutantes de España (AIE). It was set at 1.06% of the box office receipts, with 0.8% of those revenues going to AISGE and 0.26% to AIE.

In 2005 AISGE, individually, set the fee for public communication in the form of displays of audiovisual works and recordings in cinema halls, raising it to 1.5% of the box office receipts.

This new rate was not applied directly; AISGE established a transitional period, notified to the Ministry of Culture on 6 February 2006, for the years from 2005 to 2012 to avoid the distortions that could arise for users from the new tariff.

Along with fixing the general rate, AISGE developed a system of discounts from the general tariff based on four different elements:

- general contracts signed with associations representing users of the repertoire
- collaboration by users
- non-profit cultural entities
- other circumstances, always within a framework of respect for competition.

(ii) *Agreements with associations of cinema halls*

AISGE has signed diverse agreements with associations of cinema hall operators, as well as individual contracts with cinemas apart from the association agreements.

First, on 1 January 1999 there was signed the 1st Framework Agreement FECE-AISGE-AIE, which was in force until 31 December 2001.

The Agreement fixed the fee that FECE-member cinemas had to pay to AISGE at 0.154% of the box office receipts.

On 1 January 2002 the 2nd Framework Agreement FECE-AISGE-AIE was signed, valid through 31 December 2004, which set the AISGE fee at 0.176% of the total box office receipts in the first year and at 0.200% and 0.216% for the second and third, respectively.

After a period of two years without an Agreement, on 31 July 2007 AISGE and FECE signed the 3rd Framework Agreement, this time without AIE. This agreement remained in force at the time the resolution was issued.

In this Framework Agreement the parties established the conditions in which FECE cinema halls could join the accord, the rules on discounts and an agreed tariff with retroactive effects back to 2005, given that at that time there was no agreement in place between the parties.

The fees agreed between FECE and AISGE range from 0.360% of net box office receipts set for 2005, to 0.600% of those revenues for 2009.

In addition to these agreements with FECE, on 30 May 2008 AISGE signed an accord with SECIES (another association of cinema hall operators), with similar conditions and discounts to the 3rd Framework Agreement FECE-AISGE.

Apart from these agreements with associations, AISGE signed individual deals with cinema halls that did not belong to FECE or SECIES, as well as with FECE-member cinemas during the period in which no Framework Agreement existed.

The sole difference with respect to what is stipulated in the 3rd Framework Agreement FECE-AISGE and in the Agreement with SECIES with respect to the individual agreements with non-association cinemas refers to the absence of the discount for association membership (7.5%).

The individual deals signed by AISGE with FECE-member companies take the general tariff set by AISGE in 2005 as their baseline and, with that starting point, AISGE covenanted with each cinema operator the discounts to be applied and the discount percentages, with differences being seen between the different companies.

(iii) Collection and Distribution by AISGE

AISGE is the entity that manages the equitable remuneration for public broadcast payable to actors, dubbing artists, dancers and stage managers, in accordance with articles 108.6 and 157.4 of the TRLPI.

Likewise by virtue of article 154 of the TRLPI, AISGE must reserve the managed IP owners a share of the rights collected proportionate to the use of their performances.

To make this distribution, in 2005 the General Assembly of AISGE approved rules of distribution that have been modified on diverse occasions since then and which are inspired by the principles of proportionality, equity, non-arbitrariness and predetermination.

The process of distributing the money collected by AISGE consists of the following stages:

- Establishing the fixed sum to be distributed, obtained by applying to the fees collected the so-called "statutory deductions".
- Determining the amount that corresponds to each work. This consists in multiplying the degree of communication of the work (that is, the relative box office weight of each work) by the sum to be distributed and subsequent application of diverse weightings, notably including the use of a correction factor as a function of the protected performances.
- Fixing the amount payable to each artist, which bears relation to the different categories of artists that participate in the protected work.
- Lastly, settlement of the sums, that is, making the cash payment of the compensation to the owners of the rights.

(iv) AISGE agreements with foreign IP rights collection societies

Given that the actors, dubbing artists, dancers and stage managers who own the rights that AISGE is obliged to collect and distribute are not only of Spanish nationality, but also include nationals of other countries, AISGE has signed diverse agreements with foreign collecting societies.¹

An analysis of those arrangements suggests, on the one hand, the existence of groups who qualify as protected IP owners whose rights are managed by AISGE in Spain but who are not protected by the foreign entities with which AISGE has signed agreements for sharing out the intellectual property rights.

Second, a certain heterogeneity is also seen in how the distribution is carried out depending on the entity with which AISGE has signed the agreement to share IP rights.

The existence of these agreements and the conditions in which the rights are paid out to their owners is important, because using screen share as proxy, more than 40% of the money collected by AISGE is settled through foreign entities.

¹ Sociedad Argentina de Gestión de Actores e Intérpretes; Screen Actors Guild; Asociación Nacional de Intérpretes; Asociación Nacional de Artista Intérpretes y Ejecutantes; SWISSPERFORM; Centro Nacional de derechos de Autor de Cuba; Inter Artis Brazil-Associação; Corporación de Actores de Chile; Center for Performers' Rights Administration and the Japan Council of Performers' Organizations.

If the right holders do not receive within five years the amounts payable to them, those sums are placed at the disposal of AISGE, which, when the rights lapse (after 15 years), will allocate 75% of those amounts to social welfare activities and the remaining 25% to increasing its own funds.

In its resolution, the Council's analysis of the above facts notably includes the following points:

The product market affected by the conducts described here is the management of the right to compensation for public communication of performances of actors and performers in the public projection or exhibition of motion pictures and other audiovisual works. AISGE has a demonstrated dominant position in that market as it is the only entity legally authorised to carry on the collective management of those rights for actors, dancers, dubbing artists and stage managers.

After having established that AISGE has a dominant position in the market for management of the right to compensation for public communication of performances of actors and performers in the public projection or exhibition of motion pictures and other audiovisual works, the CNC Council goes on to assess whether (i) the collecting society abused that dominant position when it unilaterally decided on 10 May 2005 to increase the general fee by nearly 100%, from 0.8% to 1.5% and (ii) there was discrimination in the application of different rates for different cinemas and different discounts.

- Increase in the general tariff

In relation to the first of these grounds for a finding of abuse, the CNC Council takes at its starting point the case-law premise that the abusive nature of a tariff is determined by the equitable or inequitable relation that exists between that tariff and the value of the good or service the tariff grants to the end product on which it is charged.

In the light of the facts in the case record, the CNC Council holds that AISGE's conduct in relation to the general tariff and to the tariff fixed through the different agreements signed with FECE is abusive due to the lack of transparency in justifying the tariff and establishing its relation to a variation in the collection management costs or in the economic value of the good.

In this regard, the CNC Council finds that there is no document whatsoever in which the AISGE explains, either to the Ministry of Culture or to the operators obliged to pay the tariff, the elements taken into account in order to raise the general tariff by 100%.

Nor did this increase bear any relation to the increases recorded (0%) in the SGAE/DAMA tariffs,² which AISGE had used to justify previous increases in its charges.

AISGE's capacity to apply a large and unjustified increase in the general tariff is aimed at pressuring the associations and the cinema halls in the negotiation of new agreements and accords, where it managed to multiply by three (from 0.216% to 0.6%) the collection percentages from the cinemas and did so retroactively.

² SGAE and DAMA are the only two organisations authorised by the Ministry of Culture to manage the IP rights of authors of audiovisual works.

The CNC Council rejects all of the arguments submitted by AISGE as to the absence of abuse of dominant position in relation to its pricing policy and as regards the existence of an objective justification for the 100% rise in the general tariff, because the justifications provided by the collecting society do not fit such a large rise in the general tariff.

Accepting that AISGE is competent to fix general tariffs and that these may be used in default of an agreement, the CNC Council recalls that this cannot justify the setting of tariffs without taking into account criteria of fairness and, in line with the Supreme Court, *“criteria that align the pricing of compensation with the actual use and breadth of the repertoire of the various collecting societies in correlation with the distribution of the proceeds amongst the right holders, taking into account a proportionality test in the comparison with the tariffs approved with other televisions”* (Supreme Court judgment of 15 January 2008 in the plenum for appeal 681/2001 EGEDA v Aranzazú, S.A. and the judgment of 18 February TELECINCO-AISGE-AIE).

Since, in the CNC Council's view, such criteria were not used to set the tariffs in 2005, the resolution concludes that it has been proved that AISGE set, from a dominant position and unilaterally, the general tariff in 2005 at an inequitable level, thereby running afoul of the prohibition set out in article 2 LDC and article 102 TFEU, and it must therefore be sanctioned.

- Discrimination in the application of different rates for different cinemas and different discounts

As for discrimination, the CNC Council holds that it exists if the evidence shows that unequal tariffs were applied for equivalent services from one cinema to another, and concludes in this case that the accusation made by the Investigations Division has not been demonstrated.

In the judgment of the CNC Council, the difference in prices that AISGE applied to its different customers for equivalent services between 2005 and 2007 by means of signing individual agreements with cinema halls does not support a conclusion that an infringement has been committed because, first of all, such cases were few and isolated and, second, there is a lack of evidence of the equivalency of the rest of the commercial parameters, so that it cannot be concluded with sufficient certainty that the services which were priced differently were in fact equivalent to each other.

In summary, the CNC Council concludes that the conduct carried on by AISGE is contrary to article 2 of the LDC and article 102 of the TFEU because it involved setting general tariffs that were abusively inequitable, thereby incurring in an abuse of dominant position, which is considered a very serious infringement by article 62.4b) of the LDC.

In relation to the quantification of the sanction, the CNC Council holds that the infringing conduct began on 10 May 2005, with the AISGE's approval of the general tariffs, and continued until the time the resolution is issued, insofar as those general rates remain in effect.

Therefore, in accordance with the conduct's qualification as a very serious infringement, the CNC Council considers it proportionate to apply a rate of 10% to the annual weighting of the AISGE's turnover in the affected market during the time period in which the infringement took place, in order to obtain the Base Amount of the Infringement.

Furthermore, the CNC Council finds that there is an aggravating circumstance in this case, given that AISGE had already been sanctioned by the Spanish competition authority for abuse of dominant position in intellectual property rights whose collection it is responsible for managing (TDC resolution of 27 July 2000, adopted in case 465/99 Audiovisual Intellectual Property).

The CNC Council therefore quantifies this aggravating factor at 15% of the base amount of the sanction.

In view of the above, the CNC Council resolves to levy a fine of €627,855 on AISGE.