Collecting societies under European Competition Law scope and the contribution of the Commission and Court of Justice of the European Union in applying competition rules in collective rights management

by

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Introduction

In the Communication from the Commission on the management of copyright in the Internal Market, the term “management of rights” is referred to the “means by which copyright and related rights are administered, i.e. licensed, assigned or remunerated for any type of use”\(^1\). Two types of management can be introduced – individual and collective. While individual rights management is supervising rights by individual rights-holders, collective rights management means a particular system where collective society administers rights together with rights-holders and “monitors, collects and distributes the payment of royalties” on their behalf\(^2\). Nowadays, when creative work can easily travel not only through radio or television but also via Internet, the author cannot monitor his fundamental right himself and collect remuneration from every subject that used or is using his creation. For example, according to WIPO, 60,000 of musical works are being broadcasted every year via television – in the light of individual rights management, television would have to reach every author for the permission, making the management of the activities impractical\(^3\). This is where collecting societies come to help – being mediators between the parties and ensuring that all authors are getting paid.

Collective rights management is the most efficient method to exercise author’s rights. It provides with the balanced system of administration of the right and also offers advantages to those who have access to creative work while paying affordable prices\(^4\). In order to exploit the work legally, administration of rights consists of actions such as licensing the use of work, assigning the right to particular users and remunerating for intellectual work and therefore ‘provides a solution for the fragmentation of rights’\(^5\).

European collecting societies bring not only essential financial representation and protection against illegal exploitation of creative work but also problems related to Competition law in the European Union. First of all, one of the main issues of collecting societies is that they are presumable monopolies (or undertakings having a dominant position) resulting from national legislation.\(^6\) Therefore they have various opportunities to distort the competition – having binding tariffs and competing with those who don’t, or accepting contracts only with the exclusive transfer of rights.\(^7\) When a collecting society is very successful and has influence, there is a risk

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\(^1\) Commission (EC), ‘The management of copyright and related rights in the internal market’ (Communication) COM(2004)261 final, 16 April 2004

\(^2\) Ibid 4


\(^7\) Ibid 355
to abuse the power. It can harm the competition for example, by denying licenses for certain
types of use, set unreasonable licensing conditions, or generally discriminating users or members.
Second of all, decision to exercise power collectively with another collecting society could lead
to infringement of competition law as a concerted practice. In order to grasp new possibilities
within the revolution of technology, collecting societies were able to retrain themselves in the
management of work that travels through the internet. Now they can provide solutions for new
challenges - resulting society on having a dominant position also in the digital market.

It is important to mention that collecting society consist of its members. They can be not only
writers, composers, but also broadcasters, painters, cinematographers, journalists etc. Society has
its own membership rules as well as an internal institutional structure (usually Board of Directors,
various executive committees, Directors, committees of ethics or experts). When it comes to
financial structure, the substantial part of the income comes from the membership fees, also
deductions from the collection of royalties and various other minor finances.

Therefore collective rights management functions in a way that requires certain degree of
regulation. Controlling societies under European Union competition rules is a logical choice in
order to prevent an unlawful conduct. The necessary instruments, such as Articles 101 and 102 of
the Treaty on the Functioning of the European Union can lead to unified control by authorities of
the European Union. The Commission and Court of Justice have to take into consideration the
relevant market, certain actions of undertakings as well as provisional justifications and principle
of proportionality.

When it comes to European Union competition law to collecting societies, the Commission
and the Court of Justice of the European Union intervenes on the three issues: the relationship
between collecting societies and their members, between societies and Users and the reciprocal
relationship between different collecting societies. Commission has to be able to monitor the
balance between different interests in intellectual property world while issuing decisions and
recommendations. At the same time Court of Justice shows its point of view considering articles
101 and 102 of the Treaty on the Functioning of the European Union, reasonable justifications
and implementation of the principle of proportionality within the case-law. It is also crucial for
the authorities to reduce the level vagueness in principles within the case-law at the European
Union level.

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8 Gerald Dwarkin, ‘Monopoly, non-participating rightowners, relationship authors/producers, Copyright Tribunal’ in Herman Cohen Jehoram, Petra Keuchenius and Jacqueline Seignette, Collective Administration of copyrights in Europe (eds) (Kluwer, Deventer, 1995)
Thus institutions at the European Union level agree that collecting societies are subject to competition provisions. Whether or not dominant position can trigger the anti-competitive behavior in the collective rights management – it will be put under light of European Union competition law. However, collecting societies are even more necessary in the present times, protecting not only their members, but also participating in the important development of intellectual work. Does it mean that competition law provisions should be overshadowed for the greater good of the efficiency in management of creative work and the Commission and Court of Justice have only the right of observation? Or vice versa, is the contribution of the European Union authorities is essential for the effective and efficient competition in a collective rights management?

In my thesis, firstly, I will unfold what are collecting societies, their variety, functioning and most importantly – their specificity. A significant part of this work is the history of development and growing importance. It is very little information given to society about collective rights management and organizations that function behind it, therefore my goal will be to explain why they are so significant and influential in intellectual property world, what are their characteristics. Secondly, by disclosing the importance of collecting societies, another party of collective rights management will be introduced (according to the Court of Justice of European Union it could be either the Member of collecting society, the User or another collecting society). Through the presumptive relationship I will look over the actions of collecting societies that put them under the European Union Competition Law regulation scope. Thirdly, I will look more into the legal framework concerning collective rights management - starting from the European Union Competition law instruments that need to be applied in the case of anti-competitive matter within collecting societies, also the Communication from the Commission and its recommendations as well as decisions of Court of Justice of the European Union to the European Union practice in defining markets in media sector, recent decisions and recommendations of the Commission. Also, I will disclose how the Commission is managing to regulate collecting societies so far and if the enforcement of European Union Competition Law on collecting rights management is efficient. In order to review the contribution of Court of Justice of the European Union I will look into the case-law through Court’s perspective.

1. Collective rights management: general overview

1.1 Historical development and growing importance

Origins of collective rights management can be found in 1700s in the theaters of Paris where theatrical companies were willing to encourage the promotion of plays and artists, but didn’t equalize the levels of remunerations for the performances. Pierre-Augustin Caron de Beaumarchais was the French playwright who expressed the idea of collective rights management, resulting to the creation of the General Statutes of Drama in Paris in 1777. First debates about financial matters and collective protection of rights started to emerge. In 1868, Honoré de Balzac and Victor Hugo co-founded the society which collected the royalties from print publishers to French writers.

More collecting societies were established in order to protect the rights of creators and strive for equal and lawful remuneration. Depending on a cultural background, collective rights management spread throughout the world. Trust was given away to collecting societies – they were the ones who could offer practical and efficient methods to maintain lawful circulation of intellectual property. This proliferation can be explained by the mass growth of uses of copyright works and exploitation of creative rights (musical, literary, artistic, as well as the ways of embodiment). Millions of individuals began using high quality devices of music and recording mechanisms, industries and ordinary consumers were affected by the evolution of computerized systems. Computers, satellite transmissions, reprographic techniques became available to all: the government, large businesses, educational institutions. In this way licensing the work individually appeared to be simply impractical. Therefore collective rights management was the only solution to control this chaos altogether. With the encouragement of European Union, collecting societies began to develop within the territory – all sizes and forms, little by little they were starting to obtain complete control over licensing of exclusive rights.

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14 Ibid 4
15 Ibid 4
16 Ibid 4
17 Ibid 5
19 Gerald Dwarkin, ‘Monopoly, non-participating rightowners, relationship authors/producers, Copyright Tribunal’ in Herman Cohen Jehoram, Petra Keuchenius and Jacqueline Seignette, Collective Administration of copyrights in Europe (eds) (Kluwer, Deventer, 1995)
20 Ibid 14
21 Ibid 14
22 Ibid 15
Considering that the maintenance of collective management was efficient, it didn’t limit the problematic issue – static nation of domestic regulation. It was crucial to create international regulatory measures and harmonize the provisions coming from States. In order to launch the harmonization process of national provisions concerning collective rights management, the meeting on International Confederation of Societies of Authors (SICAC) took part in 1926\(^\text{23}\). The goal of the meeting was to start the formation of unified collective rights management principles and methods in every country\(^\text{24}\). Nowadays SICAC aims to guard the development of international network of copyright societies, protects creators and their collecting societies and is seeking to reach the efficient interoperability of the societies\(^\text{25}\).

The development of collecting rights management was pioneered by the national regulation because collecting societies were the best choice to reduce the issues concerning individual licensing. It was an ideal method in improving efficiency within the collection of royalties as well as reliable when protecting from legal exploitation\(^\text{26}\). Even with the new challenge – the growth of use of creative work in a digital world (where rights-holders cannot constantly control access to their work and users cannot easily reach for authorization), collecting societies manage to provide with clearer process of use of work, erase unreasonable costs and eliminate delays\(^\text{27}\). Therefore collecting societies play a role of a guardian of intellectual property rights, often looking trustworthy to the users and the public in general.

1.2 Functional characteristics and variety of collecting societies

From the beginning of its existence, the most important goal of collective rights management was to protect rights of creators and provide with corresponding remuneration for their work. Together with the development came certain membership agreements and conditions, variety in licensing arrangements, distribution agreements and general administration of fundamental right. One can say that the length of right is also an important factor when it comes to functioning of collecting societies – management of right is relevant even after 50/70 years after the death of an author (entitlement of heirs)\(^\text{28}\). Diversity in rights-holders is also essential –


\(^{24}\) Ibid 4


\(^{27}\) Ibid 3

they can be writers, composers or publishers\textsuperscript{29}. Therefore collecting societies follow the migration of the right and carry information for the present and provisional owners\textsuperscript{30}.

Authors (composers, songwriters) usually do not hold their creative work – their economic right is being transferred to publishers, who entrust the management of the right to a collecting society whose function is the management of publishing rights\textsuperscript{31}. Various collecting societies manage different kinds of creative work, therefore “the potential licensee might have to deal with different societies”\textsuperscript{32}. This is the result of various economic, legal and historical factors that determine a collecting society in a particular country. One society could take up significant part in a State because it might perform major tasks of collective rights management. While certain amount of societies compete for the administration of creative work in one country, whereas smaller countries cannot hold more than one collecting society only because of the matter of practicality. For example, LATGA-A is the only collecting society that originates in Lithuania. It is a collective management association, which administers creative work and at the same time ensures the wide exercise of both national and international intellectual property law\textsuperscript{33}. By being a member of international Confederation of Societies of Authors (SICAC) it can represent its members in the international network as well.

There are a lot of different types of collecting societies throughout the European Union. BUMA/STEMRA, originating in the Netherlands, not only collects and distributes remunerations for music authors and publishers, but supports Dutch music as a product itself\textsuperscript{34}. PRS FOR MUSIC – collecting society from United Kingdom exists to collect and pay royalties when music is being recorded and distributed, performed or played in public\textsuperscript{35} while STIM, also known as Swedish Performing Rights Society, administers and grants licenses to authors of music and lyrics too\textsuperscript{36}. Many other collective managers originate in other European countries – SGAE from Spain, protects and manages intellectual property rights in general (audiovisual, musical, theatrical and choreographical work)\textsuperscript{37}, GEMA is a collecting society from Germany, responsible for administrating musical performing and mechanical reproduction rights whereas SABAM, an administrator from Belgium presents itself as “one of the very few authors’ societies in the world to be pluridisciplinary society”\textsuperscript{38} and represents not only music authors and composers, but also

\textsuperscript{30} Ibid 268
\textsuperscript{32} Ibid 402
\textsuperscript{33} “Activities”, LATGA-A, <http://www.latga.lt/apie/veikla>
\textsuperscript{35} “About Us”, PRS FOR MUSIC, <http://www.prsformusic.com/ABOUTUS/Pages/default.aspx>
\textsuperscript{37} “About SGAE”, SGAE, <http://www.sgae.es/acerca-de/informacion-corporativa/>
photographers, sculptors and film directors\textsuperscript{39}. Another society SACEM, situated in France, stands for authors, composers and publishers within and outside the territory and monitors their rights by authorizing performances, collecting royalties and obtaining lists of performers for the purpose of remuneration\textsuperscript{40}.

All of the functions performed within collective rights management can be analyzed through the lens of European Union Competition law as well. When it comes to the members, collecting societies organize the membership, divides remuneration and takes part in the enforcement of members’ rights\textsuperscript{41}. Considering the users, collective rights management grants licenses and collects royalties from licensees\textsuperscript{42}. Third group of activities of collecting societies covers reciprocal relationship with other collecting societies – cooperation arrangements, joint agreements, and exclusive mandates could be considered as relevant features of collective rights management\textsuperscript{43}. Although it can be seen that collecting societies take up crucial part in intellectual property world, according to the case-law of the Court of Justice of the European Union and legislation of the Commission there are certain provisions in European Union Competition law that activities of the society might conflict with. According to the European Union legislation, it is clear what societies cannot do, but difficulties arise when deciding what they can do, what is the extent of freedom to act\textsuperscript{44}.

In the next Chapter the relationships between collecting societies and their members, users and other collecting societies will be amplified. Taking into consideration Competition Law provisions of European Union, actions within the collective rights management will be analyzed through the perspective of Articles 101 and 102 of the Treaty on the Functioning of the European Union.

\textsuperscript{39} "Info & news", SABAM, \url{http://www.sabam.be/en/getpage.php?i=112}
\textsuperscript{40} "Remunerate creators", SACEM, \url{http://www.sacem.fr/cms/site/en/home/about-sacem/remunate_creators}
\textsuperscript{42} Ibid 402
\textsuperscript{43} "Collecting Societies split over online music royalties", EURACTIV, \url{http://www.euractiv.com/en/infosociety/collecting-societies-split-online-music-royalties/article-165739}
2. Collecting societies and others: actions that put them under European Union Competition Law scope

2.1 Collecting societies and their members

Since it has been acknowledged that nowadays individual rights management is simply impractical, writers, composers, broadcasters or performers approach a collecting society, an undertaking who can represent their interests, protect the fundamental right and remunerate for the use of their work. This relationship is based on a contract that not only obliges parties to act in a reciprocal manner, but also sets up certain membership rules. Therefore it is not an ordinary commercial relationship where author is a client – he or she becomes a member of this undertaking. By entering into an agreement with a society, rights-holders seek to benefit from the collective administration – their rights will be enforced more effectively, moral rights will be protected and lobbying ability of the societies could lead to better representation and wider opportunities to get remuneration. But with the good administration certain management issues can relate to European Union Competition law. Membership conditions, selection of particular members, different remuneration or transaction costs rise questions such as the legitimacy of the exclusive licensing or freedom to choose rights administrator. Also if the differentiation of members or administration costs is necessary.

The basic framework of the relationship between collecting society and its members can be traced in the Commission decisions such as GEMA in 1970s and Daft Punk in 2002. GEMA, a collecting society in Germany, had a dominant position during the period of 70-80s. Through its membership conditions, GEMA insisted that members grant their rights exclusively (of every type or category of the right) to this society and impeded the possibility for a member to withdraw an administration of certain right at any time. Certain provisions did not provide with freedom of choosing whole or partial assignment of the right therefore blocked the opportunity to assign different category of rights to different collecting societies. Although after the Decision it was allowed to withdraw from the administration on certain conditions (depending on a time, category and amount of rights) it did not stop collecting societies from requiring exclusive administration of other rights that were not mentioned. Nevertheless the question was whether the

47 Gerald Dwarkin, ‘Monopoly, non-participating rightowners, relationship authors/producers, Copyright Tribunal’ in Herman Cohen Jehoram, Petra Keuchenius and Jacqueline Seignette, Collective Administration of copyrights in Europe (eds) (Kluwer, Deventer, 1995)
practices of a society that have a dominant position are exceeding what is necessary and therefore could fall within the scope of Article 102 of the Treaty on the Functioning of the European Union (hereinafter “TFEU”).

More recent decision on the relationship between collecting society and its members was the Decision of the Commission in Banghalter & Homem Christo v. SACEM (so-called the Daft Punk decision). In this case Daft Punk, the music group, claimed that SACEM, a collecting society from France refused to grant membership to the members of Daft Punk\(^{50}\). It required all the rights to be administered by a collective rights management whereas Daft Punk intended to administer certain rights individually. Prohibiting individual rights management could overstep what is necessary and therefore the actions of SACEM could be determined as an abuse of dominant position and potentially infringe Article 102 of TFEU. Individual control of the exclusive right becomes weaker as collectivization expands\(^{51}\) therefore mandatory requirement of overall assignment of rights can be regarded as an abuse of dominant position\(^{52}\). After the decision, SACEM managed to change certain membership rules and made individual management possible on the administration of specific rights\(^{53}\).

Other problematic issues of the relationship between societies and their members also can be pointed out. The question of discrimination was raised in previously mentioned GEMA decisions where collecting society was not allowed to exclude rights-holders from other Member States\(^{54}\). Differentiation between the members can be detected in situations where although administration costs are equal, transactional costs vary for different styles (types) of work\(^{55}\). The level of fees is another important factor – it is one of the indications of European Union Competition law. Collecting society with a dominant position may deduct greater sums from foreigners than from nationals\(^{56}\).

It is clear that anti-competitive membership rules or certain differentiation will not be bypassed by European Union Competition law provisions. In exchange for the right to manage the artistic work collecting societies cannot refuse to accept foreign members as well as provide with corresponding membership conditions. Rights-holder is still concerned with the most effective management, collecting society seeks to be efficient and to keep the member at the

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\(^{50}\) Commission Decision COMP/C2/37.219 of 12 August 2002 (Banghalter & Homem Christo v SACEM)


\(^{52}\) Commission (EC), ‘The management of copyright and related rights in the internal market’ (Communication) COM(2004)261 final, 16 April 2004


\(^{56}\) Ibid 19
same time. Eventually, when a conflict between collecting society and a member arises, it is important to identify the origins of the dispute and whether it has an impact on competition.  

2.2 Collecting societies and Users

Looking at the relationship between societies and users, they interact with each other in a form of licenses that society is obliged to grant. Collecting societies represent wide repertoire of administrative rights therefore it takes up very strong position when it comes to the relationship with users. Societies can grant various types of licenses and therefore users do not need to approach specific rights-holder for desirable work. Still, they are concerned about some aspects within collective rights management – level of fees and tariffs set by societies as well as relevant licensing conditions. From one point of view, societies are obliged to grant licenses under reasonable conditions whereas users are legally forced to pay for the license.

In the Tournier case, fees charged by the French collecting society SACEM were complained to be unreasonably high. According to the French discothèque owners, they used mainly Anglo-American music, whereas users had to pay royalties to get access to the whole repertoire even though they were interested only in the small part of it. As a result, users unsuccessfully tried to purchase licenses from foreign collecting societies. The contracts with users for the purpose of legitimate use of right usually “cannot be regarded as restrictive of competition” under Article 86 EEC (Article 102 of TFEU) unless the acts of collecting society overstep the necessary limits. Societies can refuse to grant license to users from other Members States only for efficiency reasons. If refusal to grant licenses is a result of agreement or concerted practice between societies of different Members States, this would be regarded as having their object or effect restriction of competition (Article 101(1) of TFEU). If actions do not satisfy conditions of Article 101(3) of TFEU (indispensability, promotion of technical or economical progress, fair share for users and no elimination of competition in a substantial part of the market) they might be found incompatible with article 101 (1) of TFEU. The level of fees charged by society is also important within the relationship between collecting societies and users.

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58 Berend-Jan Drijber, ‘European competition law aspects of copyright collecting societies’ in Herman Cohen Jehoram, Petra Keuchenius and Jacqueline Seignette, Collective Administration of copyrights in Europe (eds) (Kluwer, Deventer, 1995)
60 Case C-395/87 Ministère Public v Jean-Louis Tournier [1989] ECR 2521
61 Ibid para. 31
Significantly higher royalties could be considered as unfair if under price comparison with other Member States it would show appreciable difference.

Few conclusions can be made from Tournier case. Since this case best represents the relationship between collecting societies and users, analysis show that, one must take into consideration the possibility to compare prices within the society. Looking at the specificity of collective rights management price difference between countries is usually legitimate. Comparison of the prices between different types of users within a society shows if a society abuses its dominant position with other users as well. Of course, price comparison between collecting societies in different Member States is also an important evidence for European Union Competition law, especially when societies administer specific types of work and therefore internal comparison would not show an anti-competitive behavior. Also, societies justify their refusal to grant licenses for foreigners by using efficiency excuse. Collective managers are trying to show that by deciding to grant licenses to users established in other Member States they are losing their resources in organizing management. Another interesting point is that SACEM refused to grant license to the part of its repertoire. Refusal would not be found incompatible with article 81 of EC (article 101 of TFEU) if it safeguards interests of rights-holders in general and therefore do not increase certain management costs.

Unreasonably high fees generally are recognized as anti-competitive under Article 102 of TFEU if a society has a dominant position. In Lucazeau case, society was claimed to set higher level of royalties than in other Member States. The rates that were charged to discothèques had no relation to users who paid for other type of music. After a clear comparison on the levels of fees “on a consistent basis”, results can lead to conclusion that an undertaking abused its dominant position under Article 86 of EEC (Article 102 of TFEU). Fees charged to users are one of the two categories of fees imposed by collecting societies. Another category is the one that is being charged to members for the management of rights. However, the list of abuses of dominant collecting society is not exhaustive. Therefore it is impossible to name all types of anti-competitive behavior that societies could potentially perform.

Anti-competitive acts within the relationship between collecting societies and users are most commonly caught by Competition law provisions. Certain analysis and comparisons of the fees in different Member States are needed in order to apply provisional justifications. Users have no competitive concerns regarding their relationship with societies. The only interest to them is the cheapest licenses possible.

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64 Joined cases C-110/88, C-241/88 and C-242/88 Lucazeau v SACEM [1989] ECR 2811
66 Ingo Brinker, Tobias Holzmuller ‘Competition Law and copyright – observations from the world of collecting societies’ 2010 32 European Intellectual Property Review 553-559
In the end both societies and users seek to have their best interests represented. Without collecting societies users would not have the information on where or how to obtain a license and without users, societies would not be able to finance rights-holders. With collective management the process becomes easier and cheaper and for that societies are obliged to provide with appropriate and reasonable conditions in granting licenses.

2.3 Reciprocal relationship between different collecting societies

Collecting societies participate in a competitive market in the media sector. They compete with each other by offering better quality and lower cost for administration. Overall competition for rights-holders influences collecting societies to deal with each other in terms of multilateral or bilateral agreements, to be more qualified within management and charge affordable prices. Nowadays co-operation between societies is necessary in order to provide users with miscellaneous licenses and offer rights-holders a worldwide representation. Nevertheless, collecting societies have to be aware of the fact that they are still operating in one relevant market and therefore refrain from distorting the competition.

The examples on how societies interact with each other can be seen in previously mentioned Tournier judgment, where “reciprocal representation contracts” were held as being non-restrictive of competition by themselves with regard to Article 81 of EC (Article 101 (1) of TFEU). However, if concerted actions by societies take place with the intentions of exclusivity of rights and result to systematic refusal to grant access to their repertoires, it is considered to be a “concerted practice restrictive of competition and capable of affecting trade between the Member States”.

One of the problematic issues within the relationship between collecting societies are mergers. An example would be the Time Warner/EMI merger case. A notification was given to the Commission on a merger of two companies – Time Warner, global media company functioning in film production, distribution and publishing; and EMI, company from United Kingdom dealing with music recording and publishing. Merger was intended to be compound of music recording and publishing. The notification raised doubts that it could create a collective dominant position in the markets of recorder music as well as single dominant position in the market of licensing online music rights. Merged entity would circumvent other collecting societies, forcing them to raise their costs and therefore lose their customers. In order to stay in

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67 Gerald Dwarkin, ‘Monopoly, non-participating rightowners, relationship authors/producers, Copyright Tribunal’ in Herman Cohen Jehoram, Petra Keuchenius and Jacqueline Seignette, Collective Administration of copyrights in Europe (eds) (Kluwer, Deventer, 1995)


69 Ibid, para 23

70 Merger Case No. COMP/M.1852 (Time Warner/EMI) OJ C136/4

this specific market, a society has to hold certain market power that comes from the ability to manage the copyright\textsuperscript{72}. Growing use of the Internet and rapid development of technologies forced collective rights management to enlarge its capabilities. Certain agreements proved to be necessary in order to provide with substantial steps towards on-line licensing. This type of licensing gives possibilities for rights-holders to choose freely a desirable collective rights manager. In the market of multi-territorial licenses, collecting societies were forced to compete with each other therefore offering better technological solutions, cheaper services and efficient management system\textsuperscript{73}. However, collective rights management had to be able to retrain in order to lawfully manage copyrights in on-line world. Few examples of anti-competitive agreements can be examined. The Santiago Agreement was issued by societies from UK (PRS), France (SACEM), Germany (GEMA) and Netherlands (BUMA) and followed by other societies from EEA in 2001\textsuperscript{74}. In the Notification collecting societies wanted to show their willingness to participate in bilateral agreement in order to be able to offer on-line licenses of repertoires of other societies and therefore expand geographical market (by creating one-stop-shop market). Copyright licenses would be valid in all the territories. One-stop-shop principle was always supported, the on-line market was in fact in need for equal protection of copyright as well as enforcement. However, the way in which agreement was formulated raised concerns. There was serious threat of customer allocation as well as restriction of competition under Article 81 of EC (article 101 of TFEU). Although it allowed purchasing multi-territorial license from one society holding repertoires from others, user was forced to obtain a license from society of a country where it is established\textsuperscript{75}. Also, the concept of national monopoly of society in one country cannot be applied to on-line world. If a national collecting society would have the right to manage repertoires of other societies in its own country, this would limit the freedom of user to choose other society. Traditional monopoly is not significant for on-line management therefore the protection of interests of rights-holders can be achieved by simple competition. Users could contact most efficient collecting societies in Europe. Santiago Agreement only encouraged reducing the level of competition between societies that can lead to “unjustified inefficiencies as regards the offer of


\textsuperscript{73} Commission (EC), ‘Impact assessment reforming cross-border collective management of copyright and related rights for legitimate online music services’ (Commission staff working document) SEC(2005) 1254, 11 October 2005

\textsuperscript{74} Commission (EC), ‘Notification of cooperation agreements’ OJ C145/2, 17 May 2001, Case COMP/C2/38.126 – BUMA, GEMA, PRS, SACEM

online music services, to the ultimate detriment of consumers”. Societies tried to justify the agreement on the basis of technical reasons. However, it would never be accepted because technical barriers are incompatible with global use of Internet.

In 2002, Commission was notified by BIEM, an association of collecting societies that manages rights of mechanical reproduction. Barcelona Agreement intended to set out the rules under which societies could provide with the European-wide licenses for mechanical reproduction rights. The Agreement basically mirrored the Santiago Agreement and as a result allocated customers and therefore was also anti-competitive under Article 81 of EC (Article 101 of TFEU).

IFPI Simulcasting Decision is an important example of societies working together and adjusting new better possibilities in licensing via Internet. International Federation of the Phonographic Industry (IFPI) applied for an exemption under article 81(3) of EC (article 101(3) of TFEU). The Agreement considered reciprocal relationship between collecting societies of record producers “to facilitate the grant of international licenses to radio and TV broadcasters who wish to engage in simulcasting”. In this case, there would be a chance for societies to grant a multi-territorial licenses for world-wide Internet users. Collecting societies usually grant licenses in a national territory where they are established, therefore this was a step into number of territories of other countries. Firstly, it was recognized that collecting societies are undertakings under article 101(1) of TFEU as they engage in economic activities and the agreement would take up different competitive markets. It creates new product that cannot be realized without the help of other collecting societies. This will not cause any disadvantages to other collecting societies because the universal tariff assigned to multi-territorial license will reflect their own. Although the agreement was admitted to be an obvious threat on losing competitive level in prices and is capable of affecting trade between Member States (it might bring confusion between the “element of copyright royalty and the element of administrative fee” therefore resulting society on having small margin to manoeuvre), the exemption was granted following article 101(3) of TFEU. After the approval of Simulcasting Agreement, broadcasters were able to reach any collecting society for license. This resulted to national collecting societies competing with each other for online users.

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78 Commission (EC), ‘Decision of 8 October 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/C2/38.014 – IFPI “Simulcasting”) OJ L107/58-84. According to Commission “Simulcasting is simultaneous transmission by radio and TV stations via the Internet of sound recordings included in their broadcasts of radio and/or TV signals”

79 Ibid para 82

Continuing analysis, one can admit that online licensing is the sector which best defines the relationship between collecting societies. Another example of this would be the Decision of Commission relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (CISAC Decision)\(^8\). RTL Group and Music Choice, audio broadcasters have complained that certain European collecting societies refused to grant Community-wide licenses (pan-European licenses) under the reciprocal representation agreement between collecting societies. This agreement was concluded between the members of International Confederation of Authors and Composers Societies (CISAC) by which societies assign each other the right to grant licenses for performances of musical work. It was a non-mandatory reciprocal agreement on performances of public music rights. Usually each collecting societies manage the repertoires in their own territories – it a country they have been established. By this Agreement they allowed each other to grant their repertoires in other countries of collecting societies. Network that was created offered the ability to grant global portfolio of rights. The claimants were concerned that users were able to purchase licenses only in that national territory of collecting society. Also, by stating that one collecting society cannot accept an author who is already a member of other society without the latter’s consent, such membership provision suppressed the freedom to choose a collecting society. The exclusivity clause gave right to society to permit another society to administer the repertoire exceptionally in its territory. It was a preventive clause from licensing own repertoire in other territories. Also, it deprived other collecting societies from managing the same repertoire in national territory. Collecting societies claimed that this parallel behavior was the consequence of historical development of collecting rights management, therefore agreements on exclusive territory existed even before the online market. Eventually, through this concerted practice collecting societies limited the right to manage their repertoires in other territories. Territorial delineation could potentially eliminate offers of global repertoire and multi-territorial licenses. Collecting societies were obliged to eliminate this exclusive membership clause in order to make it easier for the author to choose desirable collective manager. Also, having in mind the specificity of internet licensing, the assignment of repertoire to more than one society per territory was necessary. Although in the decision it was concluded that agreements and practices were anti-competitive and incompatible with article 81 of EC (article 101 of the TFEU), collecting societies were not fined but instead were encouraged to compete more in charging administration fees.

When collecting societies participate in the same relevant market, they compete with each other by offering better services for rights-holders and lower licensing prices for users. In reality, collecting societies believe that greater power can be achieved only if they collaborate. This cooperation usually results to a concerted practice which is anti-competitive, as well as leads to agreements that help in strengthening their dominant position in the countries where they are established. Within on-line licensing it is important for collecting societies not to have monopoly, because it could lead to various infringement of European Union Competition law.

In the last chapter, regulation of Commission and Court of Justice of the European Union and their ability in unifying collective rights management at the European Union level will be examined. Before this, the application of European Union Competition law instruments to collective rights management will be analyzed briefly.
3. Regulation by the European Commission and Court of Justice of the European Union: implementing the European Union Competition law provisions

3.1 The use of European Union Competition law instruments in collective rights management

Before analyzing the contribution of the Commission and the Court of Justice on European Union Competition Law in general, certain competition law aspects related to collective rights management should be introduced. When it comes to the definition of a market, generally, the objective in defining a market is an identification of the relevant competitors of the undertakings. The involved competitors may pressure others from behaving independently and be able to suppress the behavior of undertakings that are in the same market. Looking narrowly into the media sector, one can admit that the sector in which collecting societies operate is a complex area with a lot of distinctive features and different production stages. With the development of online licensing, three relevant product markets can be identified. The first would be the market surrounding rights-holders – collecting societies offer their management services to rights-holders whereas rights-holders seek their rights to be administered and put under the management scheme. The result of this interaction is a membership of an author in the collecting society. The second relevant market consists of reciprocal communication between collecting societies. One society is willing to administer certain rights of other society’s repertoire in exchange of the right to administer the repertoire outside the territory where it is established. The third relevant market would be the on-line licensing market where multi-territorial licenses are circulating. Regardless of relevant product market, geographic market changes within certain factors. With the integration of European Union, regulation of collective rights management became more Union-oriented therefore collecting societies found it beneficial to enter into reciprocal agreements with each other to manage the European-wide repertoire. Development of the Internet determined the lack of efficiency in licensing only within the territory of one country therefore geographically it made the market worldwide.

Market power is also relevant because it shows if the collecting societies have the ability to affect negatively the output and the prices of competitors as well as deprive consumers from choosing the license. Market shares can provide with useful information whether undertakings are having significant competitive influence on the market. Nevertheless, other aspects should

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83 Ibid 30
86 Ibid 40
be taken into consideration, because market shares do not necessarily determine whether a society has a dominant position or provisional monopoly.\(^{87}\)

### 3.1.1 Collecting societies under Article 101 of the Treaty on the Functioning of the European Union

While applying article 101(1) of the Treaty on the Functioning of the European Union (hereinafter “TFEU”), it is already acknowledged that a collecting society is a subject to European Union Competition law and therefore falls within the meaning of an undertaking. The agreements that fall within article 101(1) of TFEU include membership agreements with certain exclusivity provisions, discrimination clauses, decisions by collecting society as well as concerted practices between societies in delineating territories for European licenses (IFPI Simulcasting decision). It is also important to establish if the agreement under article 101(1) of TFEU has as its object or effect “the prevention, restriction or distortion of competition”\(^{88}\) as well as if it has the effect on trade between Member States.

The agreements and their compatibility with article 101(1) of TFEU were already analyzed in Tournier judgment. Court of Justice stated that reciprocal agreements usually are not restrictive in a way to be caught by article 101(1) of TFEU, but if the contracts provide with certain exclusivity clauses that prevent direct access to repertoires of societies, they would be held anti-competitive.\(^{89}\)

The Métropole Télévision case embodies relevant aspects of article 101(1) of TFEU. In Métropole Télévision case, four broadcasting companies from France, Italy and Spain were seeking for the annulment of Commission Decision relating to a proceeding pursuant to article 85 of EEC (now article 101 of TFEU) and European Broadcasting Union (hereinafter “EBU”)\(^{90}\). EBU was a non-profit making trade association whose objectives were to represent the interests of its members. According to the membership conditions of EBU, the categories of members were active members and associate members. Active members were broadcasting organizations or certain groups of organization that provide services in one country and cover all territory. When certain broadcasting companies (applicants of the case) applied to join EBU, the membership application was rejected claiming that organization did not cover the entire national population. Commission was concerned if the internal membership provisions of EBU have as their object or effect restriction or even elimination of competition under article 85(1) of EEC (101(1) of TFEU). According to the Commission, the “joint negotiation and acquisition of rights enable EBU members to strengthen their market position to the disadvantage of their independent


\(^{88}\) Treaty on European Union and Treaty on the Functioning of the European Union (Treaty of Lisbon), Article 101(1)

\(^{89}\) Case C-395/87 Ministère Public v Jean-Louis Tournier [1989] ECR 2521

\(^{90}\) Joined cases T-528/93, T-542/93, T-543/93, T-546/93 Métropole Télévision and Others v Commission [1996] ECR II-00649
competitors". It also finds that trade between Member States is affected because acquisition of rights concerns crossing borders. However, Commission believed that the rules provide benefits for the Eurovision System (the object of broadcasting organizations) within the meaning of article 85(3) of EEC (101(3) of TFEU) and therefore granted an exemption. The opinion of the Court of Justice on application of article 101(3) of TFEU was slightly different. Firstly, Court pointed out that it has to be considered whether membership rules were objective enough for them to be applied in a non-discriminatory manner and be put under the indispensability test. According to the Court, the membership conditions were too vague and imprecise therefore they cannot be regarded as non-discriminatory. Furthermore, Court stated that Commission failed to check if membership rules were appropriate and reasonable before granting an exemption. One can admit that by applying article 101 of TFEU, European Competition authorities deal with collecting societies in the same way as other undertakings. They apply the same competition instruments in order to discover anti-competitive behavior and considers if it can be justified under article 101(3) of TFEU.

The foregoing IFPI Simulcasting Decision is another example of collecting societies breaching article 101 of TFEU. By seeking to create one-stop-shop with multi-territorial licenses for simulcasting, the Agreement originally included certain provisions that restricted customers to negotiate with only one collecting society. These provisions were clearly anti-competitive and constituted a horizontal market sharing under the article 101(1) of TFEU. For exemption to be granted under article 101(3) of TFEU, societies needed to eliminate the customer allocation in order to prove the sufficiency of the rest of the Agreement. Successive Barcelona and Santiago Agreements determined certain customer allocation for licensing mechanical rights and therefore eliminated competition between societies. The provisions infringed article 101(1) of TFEU but did not fulfill requirements in order to be exempted under 101(3) of TFEU. Agreements did not contribute on improvement on production and distribution of goods, did not promote technical progress nor benefit to customers. Instead, they imposed certain restrictions that were not indispensable and threatened to eliminate all competition.

3.1.2 Collecting societies under article 102 of the Treaty on the Functioning of the European Union

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92 Commission (EC), ‘Decision of 8 October 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/C2/38.014 – IFPI “Simulcasting”)’
As a consequence of national legislation, collecting societies resulted into having dominant position or presumable monopoly. In addition, it is not illegal to have a dominant position. When the abuse of this position is detected, a society can be found in breach of article 102 of TFEU. Case-law relating to article 102 of TFEU shows few examples on collective rights management holding a dominant position. In a Greenwich Film Production case, membership conditions of collecting society SACEM required members to assign exclusive rights in order for SACEM to authorize public performances or reproduction of works and collect the royalties. Two members concluded a contract with executive producer company Greenwich Film Production for creating and using their musical work in the film. According to SACEM, Greenwich Film Production was obliged to pay to SACEM certain sums for using the rights of its members and even sums for using the right in the territories where SACEM did not collect any royalties. Greenwich Film Production refused to pay, because a contract was concluded with authors themselves therefore is not obliged to pay any royalties for SACEM regarding public performances. Court suggested that in order to decide if a trade between Member States was affected, the consequences of competitive structure in common market must be taken into consideration. It concluded that the fact that an abuse of society relates only to music performance in the territories outside European Union, it doesn’t preclude the application of article 86 of EEC (102 of TFEU).

In BRT/SABAM case, questions were referred to the Court to decide on the validity of certain contracts concluded by SABAM and two authors in 1963-1967. National court was concerned if SABAM abused its dominant position by requesting global assignment of all present and future copyrights as well as obligation to let SABAM administrate the rights for 5 years after the withdrawal of a membership. Court pointed out that it is important to clarify if SABAM was abusing its dominant position through its statutes and membership conditions. Firstly, for an association to protect rights-holders it must enjoy the position of the assignment of rights. Secondly, it is crucial to establish if a society didn’t exceed the necessary limits for attaining the objectives. Court declares that compulsory assignment of present and future rights for extended period after withdrawal can be regarded as unfair and exceeding the limits and can constitute as an abuse. In Tremblay and others v. Commission case, Commission took an investigation whether market sharing arrangement through reciprocal representation contracts between collecting societies was incompatible with articles 85 and 86 of the EEC (101 and 102 of TFEU). Commission recognized that royalty fees charged by copyright management societies were incompatible with the European Union Competition law. Through concerted practice it was agreed to maintain high prices for exploitation of rights as well as prohibit other societies from dealing with users from other Member States. Commission compared different levels of royalties of societies within the European Union and results showed that tariffs charged by SACEM were considerably different. SACEM tried to justify its actions on the grounds of customary rules.

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94 Case C-22/79 Greenwich Film Production v SACEM [1979] ECR 3275
95 Case C-127/73 BRT v SABAM [1974] ECR 313
According to SACEM, high copyright payments were simply a tradition within the country. However, Court took into consideration the fact that this clause was purely internal and already examined by French national courts.

More recent case concerned STIM, a collecting society from Sweden. STIM not only has the right to collect royalties for public performances but also impose payments for broadcasting companies in proportion of their revenue. Broadcasters brought an action on the grounds that STIM abused its dominant position under article 102 of TFEU (according to broadcasters, society charged unreasonably high fees and calculation of them depending on the turnover was anti-competitive). According to the Court, the concept of the abuse is an objective concept which relates to the behavior of an undertaking – the influence to the structure of a market share, ability of hindering certain degree of competition etc. Court emphasizes that “the fact an undertaking is in a dominant position cannot deprive it of its right to protect its own commercial interest if they are attacked”. However, such behavior would be considered anti-competitive if the actual purpose was to strengthen the dominant position. Therefore the Court advises to ascertain whether an undertaking use the opportunities that arise from the dominant position “in such way as to reap trading benefits which it could not have reaped if there had been normal and sufficiently effective competition”. This type of abuse might be hindered in a price imposition, therefore it is crucial to analyze if royalties collected by STIM was reasonable. In the end Court recognized that level of royalties was proportionate to protect musical works and the amount that is calculated on the basis of a turnover have to be regarded as normal exploitation.

After looking into the case-law on the application of article 102 of TFEU it is important to highlight few points. Firstly, European Union competition authorities are aware of the fact that collecting societies usually have a dominant position or de facto monopoly in a Member State. Secondly, the concept of the abuse is objective, depending on factors that vary case-by-case basis. Thirdly, justifications have to be objective enough and actions proportionate in order to raise a defense to an accusation.

In the next chapter the Commission’s view on the competition law enforcement on collecting societies in European Union will be analyzed more broadly. The regulatory framework and dialogue between Commission and collective rights managers are important instruments for homogenous concept of European-wide management, especially with the development of technologies and on-line use of intellectual work. The reasoning of Court of Justice will be examined in order to see judicial view on the behavior of collecting societies.

3.2 The approach of the European Commission and the Court of Justice of European Union

97 Case C-52/07 Kanal 5 Ltd and TV 4 AB v STIM [2008] ECR I-09275
98 Ibid para 26
99 Ibid para 27
In early 1980’s, collecting societies used to offer contracts that granted administration of exclusively transferred rights. This type of exclusivity did suppress the ability of rights-holders to manage some of their rights themselves. Commission’s initial opinion was that exclusive administration contracts fall within the article 101(1) of TFEU. In GEMA decision, Commission aimed to prevent collecting societies from forcing members to assign their exclusive rights based on restrictive agreements under article 101(1) of TFEU. It also wanted to stop societies from unilaterally refusing to grant memberships to foreign rights-holders therefore breaching article 102 of TFEU. Nevertheless, Commission struggled and stated that certain type of exclusivity should be allowed for certain types of rights. With SABAM case Commission tried to get back to its initial opinion but was dismissed by Court of Justice. According to the Court, prohibition of any type of exclusivity is incompatible with the realities of copyright markets. After SABAM, it brought concerns to the competition authorities – which provisions can be declared to be compatible with the realities of media markets and how can members retain their freedom to move within the societies. Since GEMA decision, Commission was seeking to strike a balance between different interests of societies and rights-holders. For their members, collecting societies had to give the freedom to choose if they want to assign all or part of their rights. Rights-holders were obliged to give notice based on a reasonable timing before withdrawing from the society.

Commission was striving to eliminate all unlawful restrictions in order to promote level of competition. However, it had to take into consideration the specificity and the structure of collective rights management. The ultimate goal of collecting societies is to protect the rights of authors and other rights-holders, which is why they have emerged at a first place. The negative aspect is that societies are inclined towards monopolies: their portfolios consist of undifferentiated rights and they have enough power to retaliate against pressure from other societies. Former national legislation should be also held partially responsible. Therefore Commission had to mediate within the obstacles forming the position of collecting societies and eliminate anti-competitive restrictions at the same time. With the prohibition of exclusivity clause (to some extent), Commission was striving to eliminate territorial restrictions.

Certain factors that forced authorities to rethink regulatory framework was the development of technologies and Internet. Competition law authorities needed to take into consideration that previous regulation might not be able to fully protect all the interests of the

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102 Ingo Brinker, Tobias Holzmuller ‘Competition Law and copyright – observations from the world of collecting societies’ 2010 32 European Intellectual Property Review 553-559
104 Case C-127/73 BRT v SABAM [1974] ECR 313
parties, therefore implementation of competition law to online world will differ from ordinary management. In *Daft Punk* Decision, Commission strongly pointed out that the balance between interests should be overviewed within the perspective of new digital era. Musical group, called Daft Punk wanted to become a part of SACEM, a collecting society from France, but at the same time manage certain part of their rights individually. When SACEM refused to grant membership, it has informed that partial rights management is permissible only if there is another society that manages the rest of rights. Commission analyzed if actions (a refusal to grant membership) breached article 102 of TFEU. According to SACEM, by refusing to recognize individual rights management it protects artists from unreasonable demands of record industries and respects the principle of solidarity at the same time. Commission disagreed and stated that actions of the society were disproportionate because of the development of technology authors actually are able to manage their rights individually and therefore the control on the use of works is more effective. According to Commission, the refusal of partial management can be considered as a ban for individual management which can only be justified on necessity to attain legitimate aims. SACEM could refuse individual management only in exceptional cases. Although this Decision gave the green light to individual rights management, the reasoning of the Commission raised few doubts. One of the main objectives of collecting societies is to protect the rights of authors, the development of technologies cannot change that. Also within the digital world the rights of authors might be abused even by larger exploiters. According to Commission, author can control the use of his right more effectively. Eventually, since the rights management is what societies were established for, they have proper resources as well as experience for better management.

After this, it was clear that European Union will be in need for changes not only relating to new approach to territorial and exclusivity restrictions but also on the growth of digital world. Territorial partitioning was always the negative aspect of collective rights management that competition authorities were seeking to avoid. With on-line licensing coming into the picture, Commission was seeking to allow societies to enter into each other’s territories. Therefore IFPI Simulcasting Decision embodies the effort on common regulation process in on-line licensing.

Through the *IFPI Simulcasting* Decision, Commission suggested a community-wide licensing where one collecting society grants a license (based on reciprocal agreement between societies) to use the work in the Europe territory. The specificity of license is that the user will not need to approach different societies from different territories. In order for users to get advantages from this type of licensing, Commission required collecting societies to adopt a license that would distinguish two types of fees: one for administration of rights and another for

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106 Commission Decision COMP/C2/37.219 of 12 August 2002 (Banghalter &Homem Christo v SACEM)
108 Ibid 17
110 Commission (EC), ‘Decision of 8 October 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/C2/38.014 – IFPI “Simulcasting”)’
use of the work. According to Commission this would show to consumers the actual costs of collecting societies. The problem is, Commission concentrates on a relationship between collecting societies and users whereas the latter have no interest in knowing the management costs. Management costs are important to rights-holders and other collecting societies for the matter of competition. If societies are obliged to reveal their trade secrets, it could cause the reduction of effective competition. On a contrary, one of the goals of Commission is to maintain the level of competition between the collecting societies.

In 2004, Commission adopted the Communication on the Management of Copyright and related rights in the Internal Market. Together with the goals for better functioning in Internal Market, Commission tried to define general conditions on how collecting societies should work, as well as how Commission and Court of Justice deal with the collective rights management within European Union Competition law provisions. Commission stressed out that competition law provisions so far are effective regulatory instrument on collecting societies. The objectives of the Commission to monitor competition provisions in collective rights management were pointed out in 2005. During that time Commission was more concerned about growing popularity of online using of work therefore envisaged relevant issues of collecting societies going into digital world. In the Management Plan of 2005, one of the objectives was to concentrate more on enforcement actions in order to promote effective competition within European Union. It set itself a task to perform an investigation related to on-line licensing. According to Annual Activity Report in 2005 of Directorate General for Competition, one of the important successes in safeguarding and restoring effective competition within the European Union was “investigation into impediments to EU wide on-line licensing by competing collecting societies”. When collecting societies are transposing their national monopolies into digital world, Commission pursues on investigation related to on-line licensing of public performances. It stresses out that it is crucial to have similar regulation towards on-line licensing because the market had expanded from ordinary management of intellectual work to technologically transferred rights. With the new risks of the restriction of competition, Commission had to get into closer dialogues with collecting societies and therefore adopted certain Decisions on collective rights management in upcoming years.

Commission issued a Recommendation on collective cross-border management of copyright and related rights for legitimate online music services where it was more concerned about rights-holders and their ability to enjoy the protection of their copyright. Commission

112 Commission (EC), ‘The management of copyright and related rights in the internal market’ (Communication) COM (04) 261 final, 16 April 2004
pointed out that the formation of new technologies led to evolution of new type of users. Therefore it was crucial to grant multi-territorial license and leave behind discriminatory provisions regarding membership, remuneration, residence, or nationality. After the recommendation Commission went into dialogue with collective rights managers that gave results in 2008. Commission received replies from various stakeholders, including collecting societies themselves. In their reports collective rights managers were not unanimous. Instead of binding rules and common regulatory instrument they prefer soft law with non-binding recommendations.

By CISAC Decision, Commission was seeking to abandon the concept of monopoly within collective rights management. In the analysis Commission confirmed that societies are undertakings and contracts constitute as agreements within article 101(1) of TFEU. It is necessary to consider if reciprocal licensing would occurred in the absence of restrictions. If there is no concentration (where few collective rights managers hold larger portfolios of rights than other societies), collecting societies (according to Commission) can grant access to their repertoires to other societies without dividing territories. Users could purchase multi-territorial licenses from any collecting society they want therefore there would not be territorial delineation in contrary with article 101(1) of TFEU. Commission did not impose any fines but required societies to end the infringements by modifying the agreements. It was considered that the removal of restrictive clauses will allow authors to choose particular society and will make it easier for users to obtain licenses via Internet. After the decision societies revised their reciprocal agreements, but they did not live up to the Commission’s expectations. The Decision did not provide with clear framework on to what extent the contracts need to be changed. As a result, societies did not grant their repertoires to all other rights managers without adding certain individual limitations. However, competition for users is irrelevant for collecting societies - it can damage the remuneration process for authors, as well as push smaller collecting societies who cannot charge lower prices out of the market. Users were concerned that decision will demolish one-stop shops, letting only few societies to remain in the rights management market.

CISAC decision raised doubts if it was successful enough to create world-wide repertoire and to fulfill the requirements of users (for multi-territorial licenses). Consequently, Commission needed to observe how societies are functioning within European-wide licensing and if their contractual limitations were compatible with articles 101 and 102 of TFEU. After the Roundtable in September 2008 (a meeting were Commission and collecting societies examined the ways to reduce barriers that hinder competition in the online commerce), in 2009 it joyfully welcomed the progress within European-wide licensing – SACEM, a collecting society from France confirmed.

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118 Ingo Brinker, Tobias Holzmuller ‘Competition Law and copyright – observations from the world of collecting societies’ 2010 32 European Intellectual Property Review 553-559

119 Ibid 555
about intentions of entrusting other European collecting societies with its repertoire. This could give advantages to consumers in fully benefiting from the use of Internet. According to the former European Commissioner for Competition Neelie Kroes, the willingness of societies to tackle barriers of competition was acknowledged and they therefore must be encouraged to quickly adapt new online-licensing system. The idea to form public consultation system as well as arrange Roundtable meetings was the best solution in order to solve problems related to online licensing. As mentioned earlier, collecting societies did not show enthusiasm on binding regulatory measures within the European Union, therefore authorities turned to more lenient decision-making. Commission invited all interested parties to submit their statements and opinions in order to have well-rounded view on on-line commerce.

While having entered into multiple dialogues on how to improve competition within online licensing, Commission also tries to focus on ensuring that collective rights management complies with European Union Competition law provisions in general. The most recent investigation performed by Commission was on whether national collecting societies from Hungary and Romania as well as the international association of national performer’s collective management organization (hereinafter “SCAPR”) have adopted certain membership clauses that would be restrictive to competition. The questioned membership policy prevented foreign singers from becoming members of national societies as well as imposed certain discriminative requirements for administration. In order to ascertain whether practices were anti-competitive and have breached Article 101 of TFEU, Commission started an investigation and entered into discussions with collecting societies from Hungary and Romania as well as SCAPR. After the allegations, significant changes have been made. SCAPR started amending the recommendations on its membership policy and took active steps in encouraging members to act upon the new membership policy and adopt new model agreement. Collecting societies from Hungary and Romania also made amendments to their membership agreements. Commission reminded of its previous decision relating to authors and composers societies (CISAC) and their exclusive membership clauses that prevented from choosing another rights manager. It therefore equates CISAC to the SCAPR, where SCAPR is an association for performer’s societies. By this, Commission emphasizes that it will continue to monitor whether the actions of collective rights management are compatible with European Union Competition law provisions and therefore the investigation in this particular case will be performed in the same way in the future.

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120 Commission, Competition in a media sector, press releases RAPID ‘Competition: Commissioner Kroes welcomes progress on pan-European music licensing following Online Commerce Roundtable’

121 Commission, Competition in a media sector, press releases RAPID ‘Antitrust: Commission welcomes steps taken by collective rights management bodies in Hungary and Romania to improve competition’
Another authority in the European Union that enforces Competition law provisions is the Court of Justice. If trying to analyze and compare the regulatory framework between Commission and the Court one can admit that when Commission varies between different interests within frequent dialogues, the Court is more conservative and acts upon ordinary instruments of competition law. Since there is still no case-law related to on-line licensing and the development of Internet, Court plays by the rules and applies simple analysis through the perspective of European Union Competition law. Commission is able to cope with the turbulence caused by technological development therefore most of the disputes are being solved within the investigations and decisions. When it comes to collective rights management in very exceptional cases dispute reaches the Court.

In previous chapters it was acknowledged that Court of Justice of the European Union applies competition law in three aspects: in relationship between collecting societies and their members, in relationship between societies and Users as well as in reciprocal relationship between collecting societies. Through its case-law that overcome 30 years, Court had recognized that societies can be considered as undertakings under competition rules. It have developed its own view and reasoning within the case-law related to European Union Competition law provisions, especially article 102 of TFEU and the dominant position of a collecting society. Few judgments of the Court were analyzed in previous chapters, in this chapter more legal principles and Court’s methodology will be examined.

In BRT/SABAM case, Court tried to eliminate the exclusive membership clause\textsuperscript{122}. Members were obliged to assign their rights to collecting societies for 5 years even after membership withdrawal. Court stated that this provision is simply unfair and added that all relevant interests must be taken into consideration in order to ensure the balance between collecting societies and their members. This goal can be achieved if the restrictions (membership, territorial) usually imposed by collecting societies comply with the principle of proportionality. Therefore collecting societies that hold de facto, or in some countries even legal monopoly, cannot overstep the limits guarded by article 102 of TFEU. However, it is one of the concerns of societies – as mentioned before, the monopolies usually are the result of national legislation, countries themselves granted certain rights and it is the specificity of collective management that sometimes might cross the limits for better protection of authors and performers. Court tries to suppress the tension by admitting that certain practices, although could breach article 102 of TFEU, can be permitted if an undertaking performs objectively justified actions\textsuperscript{123}. Actions of collecting society would be therefore justifiable under principles of proportionality and indispensability\textsuperscript{124}. According to the Court, certain general principles embodied in article 102 of TFEU cannot be automatically applied to collecting society because of the specificity of its functioning and objectives. This does not mean that the green light is on for an anti-competitive behavior. Collecting societies have to make sure that the restrictions imposed by them are proportionate.

\textsuperscript{122} Case C-127/73 BRT v SABAM [1974] ECR 313
\textsuperscript{123} Richard Whish, Competition Law, Sixth Edition (Oxford University Press, Oxford 2008)
\textsuperscript{124} Ibid 207
Within the analysis of the legality of conduct, Court also focuses on the overall concept of fees charged by collecting societies. Through judgments, Court was willing to define characteristics of lawful management fee and therefore distinguish it from other payments usually considered as an indicator of abuse of dominant position. In a BASSET case, collecting society requested two types of fees: royalty payment for performances and supplementary fee for mechanical reproduction\textsuperscript{125}. Court was straight-forward – if societies take chances given by national legislation and charge specific fees it does not constitute as incompatible with article 86 EEC (102 of TFEU). Important fact is that while charging fees for performances do not breach competition law provisions, the combination of those fees might\textsuperscript{126}. While considering if there was an abuse of a society, the subject to European Union Competition law is the global fee itself.

Court accepted fee comparison criteria in \textit{Tournier} and \textit{Lucazeau} cases, where it stated that conditions are found to be incompatible with the competition law if royalties in one country are significantly higher than in another Member State\textsuperscript{127}. Court offered to compare the fees in consistent basis. This raised questions, what is the example of justifiable fee that could be compared with? What amount can be held as significantly higher? Who is holding the burden of proof?

In \textit{Tournier} and \textit{Lucazeau} cases Court referred to the fees charged in other Member States. By making a comparison, Court showed that SACEM was charging relatively higher fees than other societies from other Member States. But what if the fees in all the Member States differ significantly? Advice given by the Court is more or less abstract and general, leaving points such as criteria that determines incompatibility with article 102 of TFEU of certain fees to subjective opinion. Other problem that needs to be solved when deciding if a society abused its dominant position is to ascertain whether the fee was significantly higher. Upon the analysis, Court offered more general framework. It stated that significantly higher fee amounts many times more than justifiable one. References to the wording “many times higher” can lead to discussion on what would be the comparable significant difference. The concern here is that different fees of collecting societies are usually legitimate and the extreme situations where prices are many times higher are evidently rare\textsuperscript{128}. When it comes to burden of proof, collecting societies have the ability to justify the price difference by using criteria of objective dissimilarities within collective rights management. The justifiable dissimilarities, according to the Court, would have to be proportional and not depending on the will of collecting societies. Eventually, Court imposed high standards for societies in order to prove the legitimacy of their fees.

There were numbers of different statements of collecting societies to justify their behavior throughout the decisions and case-law of the Commission and Court of Justice of the European

\textsuperscript{125} Case 402/85 Basset v. SACEM [1987] ECR 1747
\textsuperscript{126} Ibid para 8
\textsuperscript{128} Ibid 7
Union. While admitting that societies are undertakings and subjects to European Union Competition law provisions, ordinary instruments of analysis have been used by competition authorities. By defining relevant product and geographic market of the media sector, authorities turn to application of competition law provisions. With the article 101 of TFEU the anti-competitive agreement or concerted practice were tracked down by the Commission and the Court. By CISAC Decision Commission prevented societies from forcing members to enter into exclusive membership agreements. Territorial restrictions had to be eliminated in order to keep up with technological development and adopt on-line licensing system. This could not have been done without intervention of the Commission and open discussion with parties involved in collective rights management. Noticeable concerns were raised if the effort of the Commission to eliminate exclusivity and territorial restrictions actually was sufficient enough to promote competition between collecting societies. Or it actually suppressed competitive level focusing more on the advantages for users and forgetting essential goals of collective rights management – the protection of interests of authors. Court of Justice focuses more on setting general framework to competition law provisions, especially when analyzing an abusive conduct within article 102 of TFEU. Court seeks to ensure the balance between interests and requests simply comply with competition law principles. In order to justify the behavior, society has to prove that it acted under the principles of proportionality and indispensability. At first it might look that Court is more lenient when it comes to the specificity of collective rights management, but eventually it has established high standards of proof for societies in case-by-case basis.

Conclusions

Since the early 1700s when certain theatrical companies promoted artistic works but differentiated remunerations for artists, it was clear that united force to protect the rights of authors will be needed. From the beginning collective rights management was a perfect solution. Undertakings that were responsible for collecting royalties and ensuring non-discrimination became collecting societies. They successfully fulfilled the task of representation therefore became an important part of collective rights management. Within the years societies have developed in a way that were able to offer more practical and efficient methods for overall representations – they were the ones to approach in order to get permission to legally exploit artistic work. Societies became essential – by managing considerable amount of members they were able to maintain lawful circulation of intellectual property. Individual rights management was not practical anymore. By granting licenses to users societies saved time and energy of rights-holders. Instead of going to every user and request for remuneration, rights-holders turned to collective management. By becoming a member of a society, rights-holders gave permission for collective rights managers to grant licenses for the use of their work. Within the technological development individual management became simply impossible. Societies were able to retrain themselves and therefore were the only solution to function properly in mass growth of use of copyright work and technological systems. In this way they took over the control of licensing and spread throughout the world.

This resulted to collective rights management of which it is now. Within the European Union, collective rights management is the system of methods by which copyrights and related rights are administered. It includes any type of licensing, assignment and remuneration. Therefore functioning of collecting societies brings efficiency in overall management of right. It also brings security of right being legally exploited and authors getting paid. It gives guarantees that the interests of members will be represented best and since the evolution of the Internet, through their bilateral and multilateral agreements with other societies, members and Users will get more advantages of multi-territorial licensing. For users, societies can offer wider repertoire of artistic work in affordable prices, for members collective rights management can offer the best representation and appropriate royalties for their work as well as for other societies they can propose to enter into agreements that create more opportunities in management outside the territory. With the development of the Internet societies needed each other more than ever.

Accordingly there are number of collecting societies throughout the territory of Europe. In some countries societies have de facto monopolies as a result of national legislation, where in other countries they enjoy the dominant position. Every society depends on the income that mainly consists of the membership fees. Also they have their own membership rules and internal organization. Societies such as SACEM (France), GEMA (Germany), PRS (United Kingdom), BUMA (the Netherlands), STIM (Sweden), LATGA-A (Lithuania) are multitasking. They perform various functions and represents different type of rights.
Collecting societies bring not only financial representation and protection against unfair use of work. Certain clash with European Union Competition law provisions appears when collective managers perform their tasks. In the matter of impracticality of individual rights management, rights-holders approach collecting societies by becoming their members. Membership conditions were always often criticized to be anti-competitive. Since Commission’s Decision related to GEMA, collecting society from Germany, membership conditions that insisted to grant all rights exclusively to particular society where highly discussed and analyzed under competition law provisions. Anti-competitive clauses only prevented rights-holders to choose freely a desirable collective rights manager. By refusing to grant memberships under certain circumstances societies made it difficult for rights-holders to decide which society would give the best representation of all of their rights. Also, concerns were raised in situations where societies treated different rights-holders differently. The differentiation occurs when societies refuse to accept rights-holders from other Member States or charge different transactional costs from different types of work. Other type of actions that caught the attention of European Union Competition law is within relationship between societies and users. Different levels of fees and tariffs, licensing conditions might be incompatible with Competition law if society oversteps the necessary limits. Refusals to grant licenses to users from other Member States might be a result of an anti-competitive agreement or a concerted practice. If the levels of fees are significantly higher than in other Member State, the behavior might indicate an abuse of dominant position. The last party that participates in collective rights management is collecting societies themselves. By entering into bilateral or multilateral agreements with each other, societies believe that this will result to better representation and wider choice within their repertoires. When it comes to on-line licensing this has to be highly examined, otherwise it could cause society turning into monopoly, limiting the possibility to choose other societies, or licenses in other countries as well as could cause delineation of a territory.

For actions to be found anti-competitive, European competition authorities have to take few points into consideration. First of all, as it was mentioned in case-law of the Court of Justice as well as in the Decisions of a Commission, societies are regarded to be undertakings under competition law provisions. They operate in the product markets – the market of rights-holders, the market of collecting societies and the market of on-line licensing. Geographical market used to be in the territory of European Union, but due to importance of growing use of Internet it became worldwide.

Under Article 101 of TFEU, European Competition authorities analyze if an agreement includes exclusivity provisions or discrimination clauses, if there was a concerted practice in certain mirrored actions and if there was an effect on trade between the Member States. Also, they examine market power and behavior of society that has a dominant position under the article 102 of TFEU. They have to be aware of the fact that societies usually hold dominant position, but the concept of an abuse varies in case-by-case basis. Through European Union Competition law instruments the Commission and the Court of Justice set their own individual framework on dealing with collective rights management. Court of Justice is willing to apply ordinary competition law instruments within its judgment. It tries to set up general framework on
important features of an abusive behavior. By accepting fee comparison criteria on consistent basis between the Member States Court determined that a significantly higher fee can indicate and abusive behavior. However, in order to compare, it did not referred to particular examples of justifiable fee, as well as the amount that would be entitled as appreciably higher. These questions were left to interpret for the parties imposing a burden of proof for collecting societies. Eventually, by determining anti-competitive membership conditions or an abusive behavior the final goal for the Court is to keep the balance between different interests in collective rights management. The balance comes from defining if certain actions or agreements do not exceed principle of proportionality and principle of indispensability. Also, the Court takes into consideration the specificity of collective management therefore the legal framework is more general than specified.

Commission deals with societies from other perspective. In CISAC Decision, the Commission was not so believable in terms of safeguarding European Union Competition law provisions – it did not impose any fines but instead encouraged to enhance the level of competition. Notwithstanding the fact that Commission was lenient towards societies who tried to eliminate competition, this might be explained by the primary goals of European Union Competition law authorities. It all comes down to maintaining the balance between parties and safeguarding competition in the European Union. While the goal for the Commission is to monitor the collective rights management within the territory of the European Union, it is more willing to enter into the dialogues with interested parties. Commission believes that the best decisions are made together with parties who knows how to bring efficiency in managing and offers the legislation that suits dynamics of collective management. However, sometimes while trying to balance between different interests, Commission might lose focus on where the competition actually has to be maintained. The level of competition needs to be under constant supervision when it comes to the relationship between rights-holders and collecting societies. Within this relationship societies have the most influence and wide amount of responsibilities in order to protect the interests of rights-holders. Most importantly, collecting societies are reluctant to common legal framework on their practices therefore support more the soft law in the collective rights management.

After certain doubts raised in the Daft Punk Decision and return of individual rights management one still can admit that without collective rights management, normal circulation of artistic work in a market would be impossible. Collecting societies are the only body within collective rights management that are qualified enough to keep the efficiency level. However, with certain rights come certain obligations. Collecting societies have to maintain competition in the media market whereas European Union Competition authorities have to be able to safeguard European Union Competition law provisions and balance between different interests at the same time. Although Commission is stating that collecting societies behave well under competition law.

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in its Communication\textsuperscript{131}, competition maintenance is significant. In a past few decisions Commission concentrated more on advantages for Users, therefore lost focus of main parties of collective rights management. If societies need to compete for users they could offer cheaper licenses. This would harm the remuneration process for rights-holders. Therefore Commission constantly tries to solve the problems within collective rights management by entering into dialogues and discussions. Recently, improvement of co-operation was detected. According to the latest reports, societies are willing to collaborate with each other for multi-territorial licenses. Commission still monitors the actions of societies and starts investigations where provisional threats of anti-competitive behavior arise. Therefore one can admit that the work of European Union Competition authorities so far is efficient enough. The Commission and the Court of Justice have more power than observing the scenery. They set certain framework for collective rights management and monitor the behavior. European Union Competition law provisions should not be overshadowed by the importance of on-line licensing and the novelties that it brings along.

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