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THE LEGAL FRAMEWORK FOR COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS IN THE EU

Evita van Dam
SNR 2048021

LLM International Business Law

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Supervisor: Prof A. Ruiz Feases
Second reader: Prof dr. P. Delimatsis

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ABSTRACT

This thesis compares how the market of collecting societies in the EU is regulated before and after the Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market entered into force. It provides an assessment, based on economic reasoning, of the impact of the CMR Directive on the internal market, the development of cross-border services, cultural diversity and on the relations between collecting societies, users and members. I describe strengths and weaknesses of the CMR Directive and make suggestions for improvement.

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CHAPTER 1: INTRODUCTION

1 Background

This thesis compares how the market of collecting societies in the EU is regulated before and after the Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (CMR Directive) entered into force.[1] Collecting societies are organizations that manage copyright on behalf of authors and publishers.[2] The raison d'être of collecting societies is the reducing of transaction costs in licensing multiple users. In the EU, each Member State has its own collecting society. Via reciprocal representation agreements, collecting societies have agreed on how to interact with each other. This results in the practice that each collecting society predominantly licenses users on its own national territory. Each collecting society therefore can maintain a dominant position within its own national territory. The elimination of competition via reciprocal representation agreements raises concerns under competition law. Next to that, abusive behaviour of collecting societies towards members and users should be limited.

At the same time, the EU has the objective to create a single market and to remove obstacles to further integration of the market. The fact that collecting societies license rights only for their own national territory clashes directly with the EU's ambition to create a Digital Single Market.[3] Users of copyrights are only allowed to access and use the license of a collecting society within the territory that is managed by this particular society, which leads to the so-called 'geo-blocking'.[4] Therefore, most stakeholders agree that collecting societies need to provide for a one-stop-shop in copyright licensing whereby they offer multi-territorial licenses to users.[5]

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[1] Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market

[2] Richard Whish and David Bailey, *Competition Law* (9th edn, Oxford University Press 2018) 820

[3] Morten Hviid, Simone Schroff, John Street, 'Regulating Collective Management Organisations by Competition: An Incomplete Answer to the Licensing Problem?', 7 (2016) JIPITEC p 256

[4] Simone Schroff and John Street, 'The politics of the Digital Single Market: culture vs. competition vs. Copyright', (2018) Information, Communication & Society, 21:10, 1305; Hviid, Schroff and Street (n 3) 257

[5] Thomas Riis, 'Collecting societies, competition and the Services Directive' [2011], IPL, 482

Regulators want to achieve that collecting societies no longer predominantly operate on their own national territory, but instead on an EU wide scale. They could apply competition law to force national collecting societies to compete with each other. Nevertheless, the market of collecting societies has certain particularities whereby the rigid application of Treaty provisions would obstruct the functioning of the market. It is therefore challenging to regulate the market in such a way that the object of a single market is obtained without eroding the market itself. The Commission has brought forward the CMR Directive to provide for an appropriate legal framework.

2 Research Question

The CMR Directive recognizes that the market structure of collecting societies in the EU is problematic. Recital 5 of the CMR Directive notes that 'problems with the functioning of collective management organisations lead to inefficiencies in the exploitation of copyright and related rights across the internal market, to the detriment of the members of collective management organisations, rights holders and users.'[6] Recital 38 of the CMR Directive adds to this observation that 'While the Internet knows no borders, the online market for music services in the Union is still fragmented, and a digital single market has not yet been fully achieved.'[7]

The CMR Directive establishes a legal framework for the collective management of rights that are administered by collecting societies on behalf of rights holders, by providing for rules ensuring the better governance and greater transparency of all collecting societies and also by encouraging and facilitating the multi-territorial licensing.[8] This is challenging because, on the one hand, national collecting societies operating on the European market are in competition with each other; on the other hand, the rigid application of competition law can obstruct the functioning of the market. In this thesis, I will research how the CMR Directive tries to balance different interests. My research question is "*Does the CMR Directive provide for an appropriate*

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[6] CMR Directive (n 1) recital 5
[7] Ibid. recital 38
[8] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market /* COM/2012/0372 final - 2012/0180 (COD) para 1.1

legal framework for the collective management of rights that are administered by collecting societies on behalf of rights holders?"

My hypothesis is that the CMR Directive puts in place an appropriate legal framework, since it is implemented with an aim to do so. However, the term 'an appropriate legal framework' is vague and does not specify the policy considerations behind it. I expect therefore that my research will nuance what is meant by 'appropriate' and also bring forward at what cost the objective of a digital single market is obtained.

3 Justification

Article 40 of the CMR Directive says that, 'by 10 April 2021, the Commission shall assess the application of this Directive and submit (...) a report. That report shall include an assessment of the impact of this Directive on the development of cross-border services, on cultural diversity, on the relations between collective management organisations and users and on the operation in the Union of collective management organisations established outside the Union, and, if necessary, on the need for a review.' My research precedes this report, and provides for a theoretical impact assessment of the CMR Directive.

Article 40 opens a discussion about the topic by saying that the Commission will assess the directive and I want to contribute to this upcoming discussion. To do so, I will assess the impact based on economic reasoning. The outcome will be a theoretic assessment, that provides for a benchmark to compare the future report of the Commission with. This way, it will be easy to determine how the practice of the market deviates from economic reasoning.

4 Methodology

This research is performed as a doctrinal literature study. I have selected case law that illustrates how the market in the EU is functioning. I will solely involve the market structure of the collective management of rights in the USA in my research if this provides for useful insights on the market structure in the EU. That is because the market structure in the USA faces different challenges than the EU.[9] Although chapter 2 may provide a useful starting point on how to regulate the market in the USA, a profound analysis of the market in the USA exceeds the scope of this thesis.

5 Structure

Chapter 2 explains the economic principles that are underlying the management of copyrights. The chapter explores what an appropriate legal framework for the collective management of rights would be. The third chapter forms a thorough analysis of the market in the EU before the implementation of the CMR Directive. It provides a benchmark for chapter 4, which analyzes how the CMR Directive regulates the market for collecting societies in the EU. Chapter 5 concludes.

[9] In the USA, there are three competing performance right agencies active on the market. These performance right agencies are governed by consent decrees of more than 80 years old. There is no need for regulation to pursue the objective of a single market.

CHAPTER 2: AN APPROPRIATE LEGAL FRAMEWORK

In order to establish whether the CMR Directive offers an appropriate legal framework for the collective management of rights, we first need to establish what would be 'appropriate'. In this chapter, I determine what an appropriate legal framework for the collective management of rights would be, by scrutinizing the economic rationale. First, I first explain how collecting societies function and what the raison d'être is. Then, I analyze under which circumstances the market forms a natural monopoly. If the market structure does not form a natural monopoly, it is appropriate to introduce competition to the market. I will discuss how competition should be carefully regulated because of the specifics of the market of collecting societies. Furthermore, I discuss how prices should be regulated at an efficient rate, to minimize distortions resulting from market dominance.

1 The functioning of collecting societies

Collecting societies are organizations that manage copyright on behalf of authors and publishers.[10] Their key activities are to grant licenses to commercial users on behalf of the rights holders and to collect royalties and redistribute these to rights holders.[11] The key activities that collecting societies execute can be subdivided in five core functions, namely (i) Obtaining the authority to license and/or collect remuneration from rights holders;[12] (ii) Setting prices;[13] (iii) Licensing users;[14] (iv) Obtaining relevant usage data, if necessary by developing and applying survey or similar statistical methodologies;[15]

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[10] Whish and Bailey (n 2) 820

[11] European Commission MEMO, *Directive on collective management of copyright and related rights and multi-territorial licensing – frequently asked questions*, available at: https://ec.europa.eu/digital-single-market/en/collective-rights-management-directive 2

[12] The terms under which the collecting society exercises this function are set out in a contract between the rights holder, who becomes a member of the collecting society, and the collecting society.

[13] Collecting societies set prices on the use of the works that they represent. The price is established as the result of an agreement between the collecting society and the end-user.

[14] Collecting societies identify who makes use of the repertoire that they represent within their territory of administration. Users need to obtain a license and pay remuneration to the collecting society. The function to license users includes the enforcement of copyrights, by filing lawsuits against users who refuse to pay.

[15] The collection of usage data is necessary in order to license and set a price on the use of the work and to pay remuneration to the rights holder. If an end-user uses the work more often, the remuneration fee should be higher.

(v) Developing and applying a method to distribute funds to represented rights holders and distributing payments with appropriate data reporting.[16]

Putting the core functions together, collecting societies offer the service to manage rights of rights holders collectively. On the one hand, collecting societies offer services to rights holders, by representing and enforcing their rights. On the other hand, collecting societies offer services to users, by selling licenses to make use of the works in their repertoire. In fact, a collecting society can be viewed as a horizontal joint venture of copyright holders who create a common sales agency and then pool revenues and distribute them among members.[17]

2 Raison d'être of collective management

Copyrights are managed collectively by collecting societies, because they enable the market of copyrights to function in situations in which the copyright holder cannot contract directly with the user.[18] Copyright law would be ineffective in markets where the majority of authors and users would not be able to grant or obtain permission to use works that are protected by copyright, without the intervention of collecting societies.[19] The mass use of copyright works creates a need for a huge number of discrete, separate licensing transactions between rights holders and users.[20] Many markets for copyright works are complex, with a great number of creators supplying an even greater number of different products that include an array of rights.[21] Next to that, there are many users with different characteristics, spread all over the world.[22] It is challenging to enforce exclusive property rights, because an individual rights holder most often does not have the capacity to apply legal procedures, remedies and measures to prevent, stop, sanction

[16] Distribution of the remuneration includes making decisions on the uneven allocation of funds for social or cultural purposes: Daniel Gervais, 'The economics of collective management' in Ben Depoorter, Peter Menell and David Schwartz (eds), *Research Handbook on the economics of intellectual property law* (2019) Cheltenham, UK: Edward Elgar Publishing.
[17] Ariel Katz, 'The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights' (2005) Journal of Competition Law and Economics, Vol. 1, No. 3, <https://ssrn.com/abstract=547802 or http://dx.doi.org/10.2139/ssrn.547802> 7
[18] Christian Handke and Ruth Towse, 'Economics of Copyright Collecting Societies' (2007) IIC 937
[19] Ibid.
[20] Thomas Riis (n 5) 484
[21] Handke and Towse (n 18) 938
[22] Ibid.

and/or punish infringements of copyright and related rights on a worldwide scale.[23] The transaction costs that accrue just for the purpose of finding potential trading partners and to negotiate the terms of trade can already be very high.[24] Especially when the copyright works have a relatively small value to many users, transaction costs can be problematic and exceed the market price for a license to use a copyright work.[25] It is impossible or highly impractical to execute the management of copyrights on an individual basis, because no market would develop and rights holders and potential users would lose out.[26] Collecting societies are able to manage copyrights in situations where the exercise of rights is impossible or highly impracticable on an individual basis, because collective management of copyrights reduces transaction costs and permits more transaction to occur.[27] The reducing of transaction costs in licensing multiple users is the raison d'être of collecting societies.[28] The WIPO therefore describes collective management of copyright and related rights as a way of exercising copyright and related rights where the exercise of rights is impossible or highly impracticable on an individual basis.[29]

3 An appropriate market structure

An appropriate market structure of collecting societies is a market structure in which the market operates most efficient. The scholars *Whish* and *Bailey* say that '*where natural monopoly exists, it is inappropriate to attempt to achieve a level of competition'*.[30] An appropriate legal framework would thus not introduce more competition to the market if the market has developed towards a natural monopoly, where this would lead to an increase of average cost. However, monopolies have a tendency to distort the market.[31] If a monopoly is not a natural monopoly, it is appropriate to intervene on the market by introducing more competition. We saw that the raison d'être of collecting

[23] Ibid. ; WIPO. 2003. *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms*, accessed July 7, 2020 at http://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf. 286
[24] Handke and Towse (n 18) 938
[25] Ibid. 939
[26] Thomas Riis (n 5) 484; Handke and Towse (n 18) 939
[27] Riis (n 5) 484
[28] Gervais (n 16) 493
[29] WIPO guide (n 23) 274-275
[30] Whish and Bailey (n 2) 11
[31] Gervais (n 16) 495

societies is that they reduce transaction costs. Collecting societies reduce costs because they form economies of scale.[32] The market develops towards a situation of a natural monopoly when economies of scale are so much more efficient that having two or more competing producers would not be viable.[33] A natural monopoly exists whenever the costs of production are such that it is less expensive for market demand to be met by one firm than by more than one.[34]

There are two reasons why collecting societies could operate as a natural monopoly. First of all, the average cost of monitoring and enforcing copyrights of thousands of works falls rapidly with the number of works represented.[35] It is much cheaper to monitor the use of copyrights in a certain area if this is done collectively, since infringements of copyrights are easy to detect where one collecting society covers the entire repertoire. To establish liability of a user, all that a collecting society has to prove in court is that the user publicly performed music without a license.[36] Meanwhile, an individual copyright holder would have to prove which song was played, when, and that he, the plaintiff, is the copyright holder.[37] Even if the individual plaintiff succeeds to prove an infringement, the remedy only prevents further infringements of this individual copyright.[38] The user can fully abide by the court's order and yet continue to perform, without authorization, any other copyrighted song.[39] Furthermore, collecting societies are much more likely to have the capacity to enforce copyrights than small rights holders, which is, to apply legal procedures, remedies and measures to prevent, stop, sanction and/or punish infringements of copyright.[40] There is an increase in efficiency if collecting societies, as opposed to individual right holders, are able to capture the demand from unauthorized uses.[41]

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[32] An economy of scale is where the average cost per unit of output decreases with the increase in the scale of the output produced; Whish and Bailey (n 2) 10
[33] Whish and Bailey (n 2) 11
[34] Katz (n 17) 11
[35] Handke and Towse (n 18) 939. The monitoring and enforcing copyrights includes; helping users to identify and locate right holders, providing them with legal certainty where a collecting society covers the entire repertoire and the facilitation of international administration of copyrights by means of reciprocal representation agreements between collecting societies
[36] Katz (n 17) 15
[37] Ibid. 16
[38] ibid.
[39] Ibid.
[40] WIPO guide (n 23)
[41] Gervais (n 16) 495

Next to that, the average costs decreases because collecting societies typically reduce transaction costs by issuing repertory licenses.[42] The issuing of repertory licenses decreases the time and effort involved in licensing negotiations. If there are n right holders represented by the collecting society, then $n - 1$ rounds of license negotiation costs can be saved.[43] Furthermore, once a user or infringer has been identified, the cost of licensing or enforcing does not change dramatically whether a license is being issued for a single copyrighted work, all the works of a single copyright holder or all the works of thousands of copyright holders.[44] The costlier the individual transactions in a market for copyright would be without collective management, the quicker average transaction costs fall when an increasing number of works is administered by the same organization.[45]

A monopoly is the most efficient market solution if there are many small users, so that the cost of administration is large relative to the value of the work, and when welfare losses from monopoly pricing are relatively modest.[46] If the average cost of rights management continues to decline as the repertoire of copyrighted works increases indefinitely, a single large collecting society will always have lower unit costs than several smaller suppliers.[47] In this situation, it is not appropriate to introduce more competition to the market.

The scholar Katz explains why collecting societies are not natural monopolies.[48] He points out that the argument that the average cost continues to decrease as the size of the repertoire of the collecting society increases is based on the assumption that the alternative to a single supplier would be that each rights holder would manage each right individually.[49] However, the increase of efficiency necessary to properly manage copyrights is already achieved at a minimum efficient scale for copyright management.[50] The minimum efficiency scale is the scale at which the core tasks of collecting societies can be executed properly. The minimum efficient scale is likely to be achieved at scales

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[42] Ibid.
[43] Ibid.; The 'minus one' derives from the fact that there is always the need of one negotiation round between the collecting society and the user.
[44] Katz (n 17) 13
[45] Handke and Towse (n 18) 940
[46] Ibid. 941
[47] Ibid. 940
[48] Katz (n 17)
[49] Katz (n 17) 13
[50] Ibid.

that fall well short of a monopoly.[51] This is evident, for example, from the market in the USA. In the USA, competition between the three performing rights societies ASCAP, BMI and SESAC has existed for a long time.[52] According to Merges, the existence of three organizations over one organization provides rights holders with an alternative, which increases their bargaining power, and prevents single organizations to fail to adapt to changing circumstances.[53] Competition between these three collecting societies has thus increased efficiency. Katz therefore argues that the natural monopoly argument fails to explain what makes the use of a single collecting society more efficient than the use of several licensing intermediaries.[54] Management of rights should happen at a minimum efficient scale, so that the core functions can be executed properly. However, competition can, to a certain extent, increase efficiency in the market.

Nevertheless, in an analogue market, the cost of enforcing copyrights would increase drastically if there are instead of one collecting societies two or more collecting societies. This follows from the fact that, if there were more entities providing licenses, the plaintiff would not only have to prove that the user performed music publicly without a license, but also that he manages the copyright of that particular repertoire. In an analogue market, the minimum efficient scale is therefore likely to be a monopoly. It is not appropriate to introduce more competition to this market.

The situation is different when collecting societies manage digital copyrights. Since the license allows for online content to be used, user data is easy to collect. Software can track exactly when and which content is used, and even remote monitoring becomes technically feasible.[55] It is therefore no longer problematic to enforce copyrights when there are multiple collecting societies operating on the same territory. The minimum efficient scale on the digital market is smaller than a monopoly. The introduction of competition to the digital market would therefore increase efficiency.

4 Complications of competition

[51] Ibid.
[52] Riis (n 5) 485
[53] Robert Merges, 'The Continuing Vitality of Music Performance Rights Organizations' (June 11, 2008). UC Berkeley Public Law Research Paper No. 1266870 , Available at SSRN: https://ssrn.com/abstract=1266870 or http://dx.doi.org/10.2139/ssrn.1266870
[54] Katz (n 17) 14
[55] Riis (n 5) 485

Organizing competition on the market is complicated because of the specifics of the market of collecting societies. Collecting societies operate at a two-sided market, where they can compete for both users and members, since collecting societies are intermediates between users and rights holders. Users seek licenses with a price as low as possible, and the quality of the service of the collecting society is primarily related to the repertoire.[56] Rights holders on the other hand look for a collecting society that distributes the highest possible royalties and offers the best quality in respect to the core tasks of the collecting society, such as negotiations with users, monitoring the market, enforcing rights, etcetera.[57] When collecting societies compete for users, they lower their prices. Lowering the prices can have negative consequences on the market.

First of all, if members consider the rights revenue allocated to them unreasonably small, they withdraw their rights from the collecting society and seek alternative rights management.[58] This leads to repertoire fragmentation, because the collecting society is no longer authorized to represent the same rights. The repertoire covered by a license of the collecting society shrinks, causing a downward spiral. That is because the license becomes less valuable to the user, whereby the willingness to pay for the licence decreases even further.[59] Since the repertoire varies over the different collecting societies covering the same area, users who are in need of the world repertoire need to obtain licenses from all collecting societies. Therefore, the licenses are complementary, rather than substitutes.[60] Even users who choose to license only one collecting society face legal uncertainty as to which musical works are covered by the licence.[61] In the end, users would have to pay more to license the same repertoire. To avoid repertoire fragmentation, the price should be somewhere between the minimum a potential user is willing to pay and the maximum at which the rights holder is willing to trade.[62]

If every collecting society represents the world repertoire, competition for members is obstructed because members cannot withdraw their rights from the collecting societies. Collecting societies offer a homogenous product on the same

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[56] ibid.
[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] Ibid. 486
[61] Riis (n 5) 486
[62] Richard Watt, Copyright and Economic Theory. Friends or Foes? (2000) Edward Elgar Pub 192

territory and are therefore competing solely on price.[63] When there is perfect price competition, licenses will be priced at marginal cost.[64] The marginal cost of collecting societies is close to zero, whereby this scenario results in a race to the bottom that gradually erodes the value of the copyright itself.[65] Competition in the form whereby every collecting society represents the world repertoire is therefore only possible if there is a correcting mechanism to the erosion of the value of copyright.

In a situation in which there is competition between collecting societies, without repertoire fragmentation and without the erosion of copyrights itself, collecting societies compete on costs. This is desirable if lower costs result from the collecting society operating more efficiently. However, instead of being a sign of efficiency, administration fees significantly lower than those charged by sister societies can also reflect less valuable management to the detriment of the smaller rights holders.[66]

Collecting societies make decisions on the uneven allocation of funds for social or cultural purposes.[67] In a quasi monopoly model, the more successful authors cross subsidise the less successful ones.[68] Smaller rights holders need the collecting society to support cultural diversity, at the cost of operating as efficient as possible.[69] When social spending is reduced it drastically harms cultural diversity, since young musicians or less successful authors are no longer supported to create new work and safeguard the future repertoire.

Collecting societies can also try to cut costs by handling a lower enforcement level. They start cherry picking by only licensing users that are easy to reach and control. The function to license users includes the enforcement of copyrights by filing lawsuits against users who refuse to pay.[70] When competition forces collecting societies to cut costs by handling a lower enforcement level or by no longer supporting small rights holders, the functioning of the market is obstructed.

[63] Riis (n 5) 487
[64] ibid.
[65] Ibid.
[66] Philippe Gilliéron, 'Collecting societies and the Digital Environment (2006) IIC 950
[67] Gervais (n 16) 494
[68] Schroff and Street (n 4) 1315
[69] Josef Drexl, Sylvie Nérisson, Felix Trumpke, Reto M. Hilty, 'COMMENTS OF THE MAX PLANCK INSTITUTE FOR INTELLECTUAL PROPERTY AND COMPETITION LAW ON THE PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS AND MULTI-TERRITORIAL LICENSING OF RIGHTS IN MUSICAL WORKS FOR ONLINE USES IN THE INTERNAL MARKET COM (2012)372' Max Planck Institute for Intellectual Property and Competition Law Research Paper No. 13-04, page 14 para 17
[70] Gervais (n 16) 493

Last but not least, economic reasoning predicts that smaller collecting societies are not able to compete with large collecting societies.[71] The smaller collecting societies will not be able to maintain a minimum efficient scale and disappear. Eventually, the market is likely to develop again towards a situation of a monopoly if the minimum efficient scale of smaller collecting societies is not safeguarded.

When there is competition between collecting societies, it is appropriate to regulate so that prices are not so low that there will be repertoire fragmentation or the erosion of copyrights value itself. In addition, cultural diversity, a high enforcement level and a minimum efficient scale of smaller collecting societies need to be safeguarded.

5 Minimizing distortions

To maximize welfare gain, distortion on the market should be minimized. Inefficient collecting societies cost more, and are likely to offer poorer services to both represented right holders and users.[72] To minimise the distortions on the market, collecting societies need to be motivated to operate efficiently by passing on their lower costs to users who pay for licences and rights holders that finance the services of the collecting society.[73] Collecting societies that do not pass on their lower costs charge excessive prices.

Monopolistic collecting societies have a tendency to distort the market.[74] When there is competition, inefficiencies are less likely, but market dominance of large collecting societies may still distort the market. It is therefore appropriate that law regulates collecting societies by addressing its anti-competitive effects and act against abuse of the market dominance.[75]

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[71] Hviid, Schroff and Street (n 3) 46
[72] Gervais (n 16) 502
[73] Handke and Towse (n 18) 941
[74] Gervais (n 16) 495
[75] Drexl, Nérisson, Trumpke and Hilty (n 69) para 6

5.1 Regulating prices

Regulators can intervene on the market by regulating prices of licenses.[76] Prices of licenses should be at an efficient level: on the one hand, prices should not be so high that it is excessive and allows inefficiencies in the collecting society to exist. On the other hand, prices should not be so low that collecting societies cannot properly function and value of copyrights erodes. Normally, the price of a license is established as the result of an agreement between the collecting society and the end-user. However, in the situation of a monopoly, the collecting society has too much bargaining power because users have no alternative supplier. In the situation of competition for users, the price may sink so low that the quality of the provided services decreases or the remuneration paid to the right holders sinks too far.

It is challenging to formulate an appropriate method on how to measure whether the price of a license is efficient. That is because collecting societies operate at a two-sided market. In a competitive market, undertakings have normally reached their maximum efficiency level if the marginal cost is zero. However, the marginal cost of a license right managed by a collecting society is close to zero, whereby this scenario results in a race to the bottom that gradually erodes the value of the copyright itself.[77]

A different method is needed to measure efficiency. Due to the many variables that can be considered, there is no unanimity on what the best model is to measure efficiency. Which variables to use depends on normative concerns and the context.[78] Variables that can be considered include management ratio, annual variation of collected sums, annual variation of distributable sums, elasticity of distributions compared to collections, annual variation of administration expenses, gross distribution ratio, net distribution ratio, collected sums per employee (COPE), annual variation of COPE, distributed sums per employee, average cost of an employee and collected sums per member.[79] Each variable gives a different efficient ratio.

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[76] The prices can be limited by judicial or administrative mechanisms via compulsory licenses at an equitable rate. The essence of compulsory licensing is that it does not depend on the owner of the particular right whether or not an authorization is granted for making use of the copyright. The license is to be granted in a compulsory way by the collecting society. Next to that, copyright rates can be subject to judicial review in case of disagreement. The judge may set the price at an equitable rate.; Gervais (n 16) 492.; WIPO guide (n 23) 277

[77] Riis (n 5) 487

[78] Gervais (n 16) 502

[79] Gervais (n 16) 502.; Fabrice Rochelandet, 'Are Copyright Collecting Societies Efficient Organizations? An Evaluation of Collective Administration of Copyright in Europe,' in Wendy J. Gordon and Richard Watt,

It may be useful to compare the efficiency of collecting societies in comparable markets. A comparable market is where collecting societies administer the same right.[80] The formula typically used to measure efficiency is to divide total distributions (D) by total collections (C), thus: R=D/C.[81] Nevertheless, this formula has many shortcomings, for example because it does not include the allocation of receipts to social and cultural purposes. Furthermore, the formula does not say anything about which percentage of the unauthorized uses is captured by the collecting society. If the collecting society fails to capture a large portion of the unauthorized market, the efficiency gain for large right holders may be small. Next to that, a comparison of markets does not capture the possibility that all collecting societies operate excessive prices, so that each market is inefficient.

Therefore, the scholar *Rochelandet* proposes to track variations in distribution over collection.[82] The formula would then look like this:

$$R = \frac{\Delta D}{\Delta C}$$

The formula allows measuring variations in the ratio over time, for example of the collections per employee, to measure improvements of efficiency within a collecting society and compare the ratio to those of collecting societies operating in similar markets.[83] This gives an idea of how effective collecting societies are operating in comparison with other collecting societies, but the formula still has its limits. For example, the formula tends to aggregate and compare a number of non-commensurate performance indicators such as collections and membership.[84] After all, the formula to measure variation is very general. *Rochelandet* therefore suggests using a data envelopment analysis to measure efficiency, whereby collections, costs, employees and the number of members are identified as inputs, and distribution as the output.[85] This approach can be used to measure input minimization or output maximization.[86]

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eds., The Economics of Copyright: Developments in Research and Analysis. (2003) Cheltenham, UK and Northampton, MA, USA: Edward Elgar Publishing 187.

[80] Gervais (n 16) 502.

[81] Ibid.

[82] Ibid. 503.; Rochelandet (n 79) 187.

[83] Gervais (n 16) 503

[84] Gervais (n 16) 503

[85] Ibid.; Rochelandet (n 79) 187-188.

[86] Gervais (n 16) 503

Depending on policy considerations, regulators can customize the formulas by putting in variables that they consider most important. The efficient price can be determined on the basis of one of these methods. It is appropriate to intervene on the market by regulating prices at an efficient rate.

6 Conclusion

In this chapter, I scrutinized what an appropriate legal framework for collecting societies is. We have seen that collecting societies enable the market for copyrights to function where the exercise of rights is impossible or highly impracticable on an individual basis.[87] That is because no market would develop and rights holders and potential users would lose out.[88] The reducing of transaction costs in licensing multiple users is the raison d'être of collecting societies.[89]

An appropriate market structure of collecting societies is a market structure in which the market operates most efficient. Management of rights should happen at a minimum efficient scale, so that the core functions of collecting societies can be executed properly. If the average cost of rights management continues to decline as the repertoire of copyrighted works increases indefinitely, a single large collecting society will always have lower unit costs than several smaller suppliers.[90] In an analogue market, the minimum efficient scale is likely to be a monopoly. It is not appropriate to introduce competition to this market. The minimum efficient scale of collecting societies on the digital market is likely to be smaller than a monopoly. The introduction of competition to the digital market would increase efficiency.

When there is competition between collecting societies, it is appropriate to regulate the competition so that prices are not so low that there will be repertoire fragmentation or the erosion of copyrights value itself. In addition, cultural diversity, a high enforcement level and a minimum efficient scale of smaller collecting societies need to be safeguarded.

To increase efficiency, distortions on the market, resulting from market power, should be minimized. It is appropriate that law regulates collecting societies by

[87] WIPO guide (n 23) 274-275
[88] Riis (n 5) 484; Handke and Towse (n 18) 939.
[89] Gervais (n 16) 493
[90] Handke and Towse (n 18) 940; Drexl, Nérisson, Trumpke and Hilty (n 69)

addressing anti-competitive effects and act against abuse of market dominance.[91] Prices of licenses should be at an efficient rate. Depending on policy considerations, the efficient rate of licenses can be determined on the basis of one of the methods discussed in this chapter.

Overall, an appropriate legal framework would only introduce competition on the market if the collecting society does not operate as a natural monopoly. Competition needs to be carefully regulated to safeguard cultural diversity, a high enforcement level and a minimum efficient scale. Prices of licenses need to be at an efficient rate, to minimize distortions resulting from market dominance.

[91] Drexl, Nérisson, Trumpke and Hilty (n 69) para 6

CHAPTER 3: THE EU MARKET BEFORE THE IMPLEMENTATION OF THE CMR DIRECTIVE

The aim of this chapter is to analyze the market structure of collecting societies in the EU, before the implementation of the CMR Directive. This is will prove helpful to understand the specifics of the EU market, whether the market structure is appropriate and also whether there are tensions that the CMR Directive needs to solve.

Typical of the EU market structure is that each Member State has its own collecting society. Via reciprocal representation agreements, collecting societies have agreed how to interact with each other. The practice is thus that each collecting society has a dominant position within its own national territory. However, because of the objective of a single market, collecting societies in the EU should not only operate on their own national territory, but also on a EU-wide scale. Collecting societies are subject to treaty provisions on competition law. Furthermore, the Services Directive prescribes that obstacles to the freedom to provide services on the internal market should be removed.

First, I explain how collecting societies in the EU mainly operate at national level. By analyzing case law of the CJEU, it becomes clear how this practice relates to the internal market. Subsequently, I discuss that the Commission launched various initiatives to pursue the objective of a digital single market, but how all these initiatives failed. Furthermore, I discuss that some Member States obstruct the single market with authorization schemes for the collective management of rights, but that it is not clear whether requirements and restrictions to enter the market are allowed. Thereafter, I discuss how the behaviour of collecting societies towards rights holders and towards users is restricted by EU case law.

1 National markets in the EU

Collecting societies execute their core functions mainly on their own territory of administration. The territory of administration of collecting societies in the EU historically overlaps with the national territory of each Member States.[92] This is a

[92] European Commission MEMO (n 11) 3

consequence of the fact that copyrights are established via national laws. In the absence of EU or international copyrights law, the economic rights of foreign beneficiaries of rights in music can be enjoyed in member states on the basis of the national copyright laws of the member state.[93] The rights of foreign owners of rights are represented within the territory of administration on the basis of reciprocal representation agreements between the collecting societies.[94]

Via these agreements, collecting societies grant each other the right to license their repertoires in each other's territory.[95] It facilitates access by domestic users to a broader repertoire since collecting societies can license their own repertoire and the repertoire of other collective societies within their own territory.[96] Furthermore, rights holders can be sure that their rights are not only enforced on the territory of the collecting society of which they are a member, but also on the territory of collecting societies where their collecting society has concluded a reciprocal representation agreement. Reciprocal representation agreements often provide not only for the exchange of rights, but also for the exchange of payments.[97] Fees collected by collecting society on the basis of a reciprocal representation agreement are transferred to the collecting society of which the original rights holder is a member.

Collecting societies in Europe are members of a worldwide confederation; the International Confederation of Societies of Authors and Composers (CISAC).[98] Members of this organisation abide by the organisation's Professional Rules and Binding Resolutions (Code of Conduct).[99] These rules help to guarantee smooth transactions within and between member societies, with creators and publishers, as well as with commercial content users.[100] Via reciprocal representation agreements, collecting societies in the EU can accordingly represent the world-repertoire.

It follows that, via a network of reciprocal representation agreements, collecting societies have organized themselves in such a way that they do not compete with each

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93 Peter Gyertyánfy, 'Collective Management of Music Rights in Europe after the CISAC Decision (2010) IIC, available at <https://beck-online.beck.de/Dokument?vpath=bibdata%2Fzeits%2Fiic%2F2010%2Fcont%2Fiic.2010.59.1.htm&anchor=Y-300-Z-IIC-B-2010-S-59> 62

94 Ibid. 62

95 European Commission MEMO (n 11) *4*

96 Ibid*. 4*

97 Gervais (n 16) 492

98 CISAC, 'Who we are' <https://www.cisac.org/Who-We-Are> Last accessed 20 July 2020

99 CISAC, 'Governance' <https://www.cisac.org/What-We-Do/Governance> last accessed 20 July 2020

100 Ibid.

other for users. Collecting societies operate as national monopolies, which are mainly regulated by national laws. The advantage of this system is that each collecting society operates above a minimal efficient scale, because of the elimination of competition. The distribution of the burden of administration costs per member state enables the local collecting society to license all the users of the country and enforce the claims, even for less extensive or voluminous use.[101] The collecting societies can therefore properly execute its core functions and the value of copyrights is safeguarded. Furthermore, the agreement to license each other's repertoire enables each collecting society to license the complete world-repertoire on its own territory. The disadvantage of this system is that the single market is obstructed because collecting societies mainly license rights on their own territory. Because collecting societies do not compete at an EU wide scale, they each hold a dominant position on their own territory, allowing inefficiencies to exist.

2 The EU internal market

The practice that collecting societies mainly operate at national level is at tension with the EU internal market. Since collecting societies are undertakings trading on the internal market, they are subject to EU law and principles.[102] EU law prohibits agreements between undertakings as incompatible with the internal market that prevent, restrict or distort competition.[103] The fact that collecting societies organized themselves via a system of reciprocal representation agreements, which eliminates competition, therefore raises competition concerns. We have seen in the previous chapter that competition between collecting societies needs to be applied carefully, to safeguard a minimum efficient scale, cultural diversity and to avoid repertoire fragmentation.

Two cases illustrate the controversies in applying article 101(1) TFEU. In *Tournier*, discothèques could not deal directly with collecting societies in other countries, since the latter were bound by reciprocal representation contracts with Sacem, the French collecting society, and accordingly refused to grant direct access to

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[101] Gyertyánfy (n 93) 63

[102] The concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] 21

[103] Article 101 TFEU

their repertoires.[104] In *Lucazeau*, discothèque operators refused to pay royalties to Sacem for the performance of protected musical works on their premises because they argued Sacem's conduct towards them constituting anti-competitive conduct prohibited by the Treaty.[105] In both cases, the domestic court sent a preliminary question to the CJEU whether reciprocal representation agreements constitute a concerted practice covered by the prohibition in Article 101(1) TFEU.[106] The CJEU said that the reciprocal representation agreements were not in themselves restrictive of competition in such a way as to be caught by article 101(1) TFEU.[107] The CJEU came to this conclusion because of the purpose of the agreement system: the reciprocal representation contracts are intended to make all protected musical works, whatever their origin, subject to the same conditions for all users in the same Member State.[108] Next to that, the agreements enable collecting societies to rely, for the protection of their repertoires in another state, on the organization established by the collecting society operating there, without being obliged to add to that organization their own network of contracts with users and their own local monitoring arrangements.[109] The CJEU deviates with this judgement from the opinion of AG Jacobs, who states that article 101(1) TFEU should be interpreted as prohibiting the conclusion of reciprocal representation agreements if those agreements are capable of preventing, restricting or distorting competition on the market by effect.[110] The CJEU meanwhile allows the reciprocal representation system to exist, because of the purposes that it serves. The CJEU therefore chose a different reasoning than the AG.

The CJEU did find that if concerted action by collecting societies has the effect of systematically refusing to grant direct access to their repertoires to foreign uses, the concerted action is restrictive of competition and caught by article 101(1) TFEU.[111]The legal test that applies to reciprocal representation agreements is therefore that reciprocal representation agreements are not caught by article 101(1) TFEU, unless they constitute a concerted action that has the effect of systematically refusing direct access to repertoire to foreign users.

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104 Case 395/87 *Tournier* [1989] 5
105 Joined cases 110/88, 241/88 and 242/88 *Lucazeau* [1989] 3-4
106 Joined cases 110/88, 241/88 and 242/88 *Lucazeau* [1989] 7; Case 395/87 *Tournier* [1989] 7
107 Case 395/87 *Tournier* [1989] 20; Joined cases 110/88, 241/88 and 242/88 *Lucazeau* [1989] 14
108 Case 395/87 *Tournier* [1989] 19; Joined cases 110/88, 241/88 and 242/88 *Lucazeau* [1989] 13
109 ibid.
110 Opinion of AG Jacobs in case 395/87 *Tournier* [1989] 41
111 Case 395/87 *Tournier* [1989] 23

The burden of proof for concerted action is heavy. The CJEU clarifies that concerted action cannot be presumed where parallel behaviour can be accounted for by other reasons.[112] To prove a concerted action, because of the practical purpose of the reciprocal representation system, it is not sufficient to prove that direct access is systematically refused, but it also needs to be proved that the refusal is not the result of a practical purpose. A reason why collecting societies would systematically refuse to grant access is for example because otherwise, they would be obliged to organize their own management and monitoring system in another country.[113] This reason is not a concerted practice between collecting societies, but a legitimate reason for an individual collecting society to refuse to grant access to foreign users. The behaviour of collecting societies constitutes a concerted action if the systematic refusal of direct access to repertoire to foreign users cannot be accounted for by other reasons than the existence of a concerted action.

Therefore, it can only be proved that the refusal to grant access constitutes a concerted practice after evaluating documents and other evidence.[114] This again is in deviation from the opinion of the AG, who argues that the refusal to grant direct licenses must be seen as the logical consequence of the reciprocal agreements.[115] It follows from *Tournier* and *Lucazeau* that, although reciprocal representation agreements may have the effect to restrict competition for users between national collecting societies, the CJEU does not prohibit these agreements as such, because of the purpose of reciprocal representation agreements. Reciprocal representation agreements are only caught by article 101(1) TFEU if they constitute a concerted action that has the effect of systematically refusing direct access to repertoire to foreign users, as long as the systematic refusal of direct access to repertoire to foreign users cannot be accounted for by other reasons than the existence of a concerted action.

In an analogue market, the practice to refuse direct access to repertoire to foreign users is not a concerted action caught by article 101(1) TFEU, because the practice can be accounted for by reason that it is too costly for collecting societies to manage and enforce rights outside their territory of administration. It is likely that collecting

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[112] Case 395/87 *Tournier* [1989] 23
[113] Ibid. 24
[114] Ibid. 25
[115] Opinion of AG Jacobs in case 395/87 *Tournier* [1989] para 38

societies have legitimate reasons to systematically refuse direct access to their repertoire to foreign users. Collecting societies mainly license users on their own territory, and are therefore not competing for users.

Collecting societies do compete on the market for members. Competition for members may lead to higher royalties and better services for members, which is for example, better enforcement of their rights in their territory of enforcement. However, the fact that competition for users is obstructed limits competition on the market for members as well. That is because reciprocal representation agreements make sure that the rights of members are also enforced by competing collecting societies on the other territories. Next to that, fees collected by collecting society on the basis of a reciprocal representation agreement are transferred to the collecting society of which the original rights holder is a member. Collecting societies thus only compete on the market for members on other aspects, such as regularity of payment, communication or convenience of the member. Competition for members on the analogue market is minor and has in practice no far reaching consequences. Most rights holders will remain member of the collecting society operating in their own country.

Following this case law, reciprocal representation agreements on the analogue market are not prohibited and collecting societies maintain their position of dominance within their own country. Because collecting societies do not compete at an EU wide scale, they each hold a dominant position on their own territory, allowing inefficiencies to exist.

3 The objective of a digital single market

Now lets go back to the test that reciprocal representation agreements are caught by article 101(1) TFEU if they constitute a concerted action that has the effect of systematically refusing direct access to repertoire to foreign users, as long as the systematic refusal of direct access to repertoire to foreign users cannot be accounted for by other reasons than the existence of a concerted action. On the market for online rights, it is more likely that the systematic refusal of direct access to repertoire to foreign users constitutes a concerted action, because this refusal cannot be accounted for by other reasons. That is because software can track exactly when and which content is used, and it is technically feasible to monitor the use online remotely.[116]

We saw that if collecting societies mainly operate on their own territory, the single market is obstructed. Users are geo-blocked and need to obtain licenses on each territory that they want to use repertoire. Because collecting societies do not compete at an EU wide scale, they each hold a dominant position on their own territory, allowing inefficiencies to exist.

Since remote controlling of online rights is technically feasible, the Commission launched various initiatives to end the practice that collecting societies only license users on their own national territory. In a digital single market, collecting societies are in competition with each other for the grant of online multi-territorial licenses. The objective is to establish a one-stop-shop for commercial users to license copyrights for cross-border online use.[117]

In 2005, the Commission issued its Recommendation on collective cross-border management of copyright and related rights for legitimate online music services.[118] A Recommendation is a non-binding instrument. The Recommendation invites Member States to take the steps necessary to facilitate the growth of legitimate online services.[119] It promotes that rights holders should have the freedom to entrust the management of any of the online rights necessary to operate online music services, on a territorial scope of their choice, to a collecting society of their choice, irrespective of the Member State of residence or the nationality of either the collecting society or the rights holder.[120] The Commission thus promotes more competition for rights holders at the online market.

The Recommendation did not lead to the emergence of a digital single market. Therefore, the Commission tried to enforce its policy by investigating reciprocal representation agreements in the CISAC case, which the Commission

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[116] Riis (n 5) 485
[117] Ibid. 482
[118] Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC) [2005] OJ L 276/54
[119] Ibid. Para 2
[120] Ibid. para 3

started after two complaints of broadcasters.[121] This Commission issued a Decision on the conditions of management and licensing of authors' public performance rights of musical works by collecting societies because the practice of collecting societies raised concerns under article 101(1) TFEU.[122] As members of CISAC, collecting societies in the EU make use of the model contract put forward by CISAC to conclude reciprocal representation agreements.[123] The model contract contained membership restrictions and exclusive representation rights.[124] Next to that, the Commission found that the model contract constituted a concerted practice, because it is the only possible explanation for territorial delineation.[125] The Commission found thus that the behaviour of collecting societies leading to territorial delineation did not pass the legal test put forward in *Tournier*. The Commission therefore found that the membership restrictions, the exclusive rights and the coordination of territorial delineations in a way that limits a license to the domestic territory of each collecting society infringed article 101(1) TFEU.[126]

Membership clauses are restrictive of competition and cannot be justified. The exclusive right was found to be restrictive of competition and has a foreclosure effect in the domestic market, which has granted exclusivity insofar as no other collecting society may licence the relevant repertoire for exploitation within the territory of that collecting society.[127] Already in *Tournier* and *Lucazeau* it was said that exclusivity clauses are

[121] COMP/C2/38.698 *CISAC* [2008]
[122] Ibid. para 1
[123] CISAC model contract
[124] The membership clause is contained in article 11(II) of the CISAC model contract and says that *"While this contract is in force neither of the contracting Societies may, without the consent of the other, accept as a member any member of the other society or any natural person, firm or company having the nationality of one of the countries in which the other Society operates*." Based on this clause, collecting societies cannot accept members of other collecting societies or right holders with the nationality of another collecting society as members of its society, without consent of the other collecting society. The territorial clauses are captured in the articles 1(I), 1(II), 6(I) and 6(II) of the CISAC model contract. Article 1, repricocally, confers upon the collecting societies the exclusive right to grant the authorisations for all public performances on its own territory. Article 6(I) refers to the respective territories in which the collecting societies operate and article 6(II) provides that "For the duration of the present contract, each of the contracting Societies shall refrain from any intervention within the territory of the other Society in the latter's exercise of the mandate conferred by the present contract." It follows from these articles that under article 1, a collecting society authorises another collecting society to licence and administer its repertoire, in the territory that is defined in article 6(I). Under article 6(II), the collecting society, which has granted the authorisation, promises to refrain from any intervention within the territory of the other collecting society.
[125] Case T-442/08 *CISAC* [2013] 222
[126] Case T-442/08 *CISAC* [2013]
[127] Case T-442/08 *CISAC* [2013] 140

prohibited.[128] Both the membership clauses and exclusivity clauses were accordingly removed from the reciprocal representation agreements.

In an appeal, the CJEU had to rule on the decision of the Commission that the national territorial delineation was a result of concerted practices, and did not pass the legal test of *Tournier*. The Commission came to this conclusion because it found other explanations of the collecting societies' parallel conduct implausible. For example, for online use, there is no longer a need for a local presence to ensure the effectiveness of the fight against the unauthorised use of musical works.[129] However, to come to this conclusion, the Commission took only authorised uses into consideration, without explaining why it is possible to separate the monitoring of authorised uses and the uncovering and taking action against unauthorised uses.[130] The CJEU annulled the Commission Decision, because the Commission had not proved to a sufficient legal standard the existence of a concerted practice relating to the national territorial limitations.[131] The territorial delineation of national collecting societies is therefore not found to be the result of a concerted practice.

Following the annulment of the CJEU, little changes on the markets for collecting societies. Collecting societies may still refuse direct access to foreign users and the objective of a single market is not obtained.

Another initiative of the Commission to establish a one-stop-shop for online multi-territorial use is the exemption on the IFPI Simulcasting agreement under article 101(3) TFEU. We have seen in chapter 2 that if collecting societies, each representing the world-repertoire, compete with each other for users, competition will lead to the erosion of the value of copyrights. The Simulcasting agreement is intended to facilitate the grant of a multi-territorial licence for the simulcasting activity, by providing for a correcting mechanism.[132]

The agreement, concluded between collecting societies, provides that the tariff of the multi-territorial licence is an aggregate tariff composed of the relevant

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[128] Case 395/87 *Tournier* [1989]; Joined cases 110/88, 241/88 and 242/88 *Lucazeau* [1989]
[129] COMP/C2/38.698 *CISAC* [2008] 140 - 161
[130] Ibid. Para 144
[131] Ibid. Para 161 and 182
[132] Commission Decision of 8 October 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement 2003/300/EC (Case No COMP/C2/38.014 — IFPI "Simulcasting", notified under document number C(2002) 3639)
OJ L 107 para 14

individual tariffs charged by each participating collecting society for simulcasting on its own territory.[133] However, a simple aggregation of the respective tariffs will not lead to price competition, since the global tariff for a multi-territorial license will be the same no matter which of the participating societies grants the license.[134] Collecting societies are therefore expected to determine the administration fee that is added to the copyright royalty.[135] Only the royalty fees are aggregated, so that competition can occur with respect to the administration fee.

The advantage of this agreement would be that the royalties paid to the members of collecting societies are not affected, because they are separated from the administration fees and included in the aggregated tariff. Because the revenue rights are not affected, right holders will not withdraw their rights from the collecting society.[136] At first sight, separating the administration fee from the royalty rate thus prevents repertoire fragmentation.

However, competition on the administration fees influences the quality of the administration services provided.[137] Gilliéron explains that, instead of being a sign of efficiency, administration fees significantly lower than those charged by sister societies are likely to reflect less valuable management to the detriment of the right holders.[138] For example, collecting societies may engage in the practice to only license large users that are easy to reach, and fail to enforce copyrights to smaller users. Another example is that collecting societies may distribute remunerations only over a longer period of time. Small or medium sized collecting societies cannot compete with major collecting societies, so they are forced to reduce costs to survive.[139] Smaller collecting societies must therefore combine resources and merge into a larger collecting society.

Another difficulty of the simulcasting agreement is that, to be able to separate the administration fee from the royalty fee, it should be possible to

[133] Commission Decision of 8 October 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement 2003/300/EC (Case No COMP/C2/38.014 — IFPI "Simulcasting") (notified under document number C(2002) 3639) para 24
[134] Ibid. Para 69
[135] Ibid. Para 120
[136] Riis (n 5) 485
[137] Ibid. 488
[138] Gilliéron (n 66) 950
[139] Gilliéron (n 66) 950

construct an accounting standard to allocate the relevant cost components.[140] However, the application of economic models to the valuation of repertoires of licensed content is still an area in need of further research.[141] If it were possible to determine the exact administration fee, collecting societies in a competitive market would have no bargaining power in relation to users.[142] Collecting societies refused to renew their simulcasting agreements. The consequences are noticeable in the Dutch case *The Performing Rights Society Limited v Vereniging BUMA*.[143] The Court of Haarlem ruled that the Dutch collecting society BUMA was not allowed to offer a pan-European license including the online sale of the music repertoire administered by the Performing Rights Society, a collecting society based in the UK.[144] This is because the simulcasting agreement between the two collecting societies expired in 2003. Without the simulcasting agreement, BUMA had not obtained any rights to the repertoire of works administered by PRS beyond Dutch territory.[145] Exempting the simulcasting agreements under article 101(3) TFEU did not lead to the establishment of a digital single market.

4 National obstructions to the internal market

The refusal of collecting societies to directly license foreign users is not the only obstacle to a single market. A number of EU Member States require collecting societies to be authorized by a public authority.[146] However, restrictions to the freedom of establishment or to provide services within the Union are prohibited by article 49 and 56 TFEU. The Services Directive should clarify whether authorization schemes for collecting societies are exempted from the prohibition of restrictions to the freedom of establishment or the freedom to provide services.

The Services Directive establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of

[140] Riis (n 5) 488
[141] Gervais (n 16) 498
[142] Riis (n 5) 488
[143] Rechtbank Haarlem 148418/KG ZA 08-410, LJN: BE8765, *The Performing Rights Society Limited v Vereniging BUMA* [2008]
[144] Kristof Neefs, 'Collecting societies collide over pan-European online music licensing' (2008) Journal of Intellectual Property Law & Practice, 2008, Vol. 3, No. 12, 758
[145] Ibid.
[146] Riis (n 5) 490

services.[147] It simplifies procedures and formalities applicable to access to a service activity and to the exercise thereof.[148] An authorisation scheme, which is any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof, is only allowed if the conditions listed in article 9 Services Directive are satisfied.[149] According to this article, Member States that have in place an authorisation scheme for collecting societies need to make sure that this scheme does not discriminate against the collecting society in question and is justified by an overriding reason relating to the public interest.[150] Recital 40 clarifies that 'overriding reasons relating to the public interest' includes the protection of intellectual property and cultural policy objectives.[151] Since collecting societies manage the protection of rights covered by their repertoire, they have an influence on the level of protection of intellectual property and the offer of licenses to perform cultural works. The third condition listed in article 9 is that the objective of the scheme cannot be attained by means of a less restrictive measure, which refers to the proportionality principle.[152] It is questionable if an authorisation scheme is the least restrictive measure available to a Member State to protect intellectual property and its cultural policy. Intellectual property is after all protected by means of the law. Refusal to authorise a collecting society has the effect that the collecting society cannot establish itself on the territory. This limits competition for the existing collecting society, which maintains a monopoly or dominant position on the territory. It has to be justified why the maintaining of this position on the territory is necessary to obtain cultural policy objectives.

Next to that, Member States have to respect the right of providers to provide services in a Member State other than that in which they are established.[153] The freedom to provide services in another member state has the following consequences for the markets of collecting societies: collecting societies must be able to offer services to users established in another member state and collecting societies must be able to

[147] Directive 2006/123/EC on services in the internal market art 1(1)
[148] Services Directive (n 147) 5(1)
[149] Services Directive (n 147) 4(6) and 9(1)
[150] Services Directive (n 147) 9(1)
[151] Services Directive (n 147) Recital 40
[152] Services Directive (n 147) 9(1)(c)
[153] Services Directive (n 147) 16(1)

offer services to members established in another member state. Collecting societies thus must be able to monitor, license and enforce copyrights in another member state.[154] Article 16(1) of the Services Directive provides that Member States shall not make the access to or exercise of a service activity in their territory subject to compliance with any requirements that do not respect the principle of non-discriminatory, necessity and proportionality.[155] The principle of necessity means that the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment.[156] Requirements for allowing collecting societies to provide services to users and members in another member state can maybe be justified for reasons of the protection of the functioning of the market for copyrights, but this is not a valuable reason to comply with the necessity principle.[157] Article 16 of the Services Directive prohibits therefore that Member States put requirements on the freedom to provide services on their territory.

However, if Member States are not allowed to put any requirements or restrictions on collecting societies wanting to enter the domestic market, it creates a need for regulation at EU level. After all, collecting societies established in the member state with the least control may offer services over the whole EU territory, which leads to forum shopping. The national collecting society may not be able to compete with collecting societies entering national the market, and is forced to lower its costs. Unregulated competition on the national market endangers therefore the protection of copyrights.

Member States that put restrictions on the freedom to provide services can argue that article 17(11) of the Services Directive provides for an exception on the restriction to put in place an authorization scheme for the collective management of copyrights and neighbouring rights.[158] The article namely says that article 16, which prohibits Member States putting requirements on the freedom to provide services on their territory, does not apply to copyrights, neighbouring rights (…), as well as industrial property rights.[159] However, DG MARKT published in its 'Handbook on implementation of the Services

[154] The services that collecting societies offer are described as the core functions of collecting societies in the second chapter.
[155] Services Directive (n 147) 16(1)
[156] Ibid.
[157] Riis (n 5) 490
[158] Services Directive (n 147) 17(11)
[159] Ibid.

Directive' that 'the derogation in Article 17(11) for intellectual property rights covers the rights as such (existence of the right, scope and exceptions, duration, etc.). It does not concern, by contrast, services linked to the management of such rights, such as those provided by collecting societies or patent agents.'[160] According to DG MARKT, requirements on the freedom to provide services of collecting societies are thus not exempted from article 16 Services Directive.

On the other hand, as Riis points out, copyrights as such are by nature not a service.[161] An exemption to the freedom to the services directive must therefore necessarily refer to the management of copyrights.[162] It follows that the statement made in the Handbook may be incorrect. A disclaimer precedes the Handbook, stating that the Handbook is not binding on the European Commission as an Institution.[163] Nevertheless, the Handbook is an indication of the Commission's policy, and causes legal uncertainty on whether Member States can make use of an exemption to put restrictions on the freedom to provide services of collecting societies. The CMR Directive should provide clarity to whether requirements and restrictions to provide management services are allowed.

5 Behaviour of collecting societies towards rights holders and users

Before the implementation of the CMR Directive, there is at EU level no legislation specifically regulating the behaviour of collecting societies. However, we saw that since collecting societies are undertakings trading on the internal market, they are subject to EU law and principles. The next cases show how the behaviour of collecting societies towards rights holders and towards users is restricted by EU case law.

5.1 The market for rights holders

Collecting societies need to honour the principle of non-discrimination towards members of a foreign nationality. In the case GEMA I, the Commission found that the

[160] DG MARKT Handbook on implementation of the Services Directive, available at https://op.europa.eu/en/publication-detail/-/publication/a4987fe6-d74b-4f4f-8539-b80297d29715. > page 42
[161] Riis (n 5) 490
[162] Ibid.
[163] Handbook (n 160)

German collecting society GEMA infringed article 102 TFEU because it denied to give members from other member states the same status as German members.[164] In Phil Collins v. IMTRAT Handels GmbH, the CJEU said that the principle of non-discrimination may be directly relied upon before a national court by an author or performer from another Member State, or by those claiming under them, in order to claim the benefits of protection reserved to national authors and performers[165] Preferential treatment for groups of members and distribution variations according to genre and cultural value have been tolerated.[166] In BRT v. SABAM, the CJEU limited the power of the Belgian collecting society by stating that it could not impose on its members obligations which are not indispensable for the attainment of its corporate object and which thus unfairly infringe the freedom of a member in the exercise of his copyright may constitute abuse.[167] SABAM required its members to assign all their present and future copyrights to SABAM and allow them to exercise these rights for given years after their withdrawal from the collecting society.[168] In GEMA II, the Commission said that the maximum noticing period to withdraw rights from the collecting society and assign the rights elsewhere is three years.[169]

It follows from these cases that in principle, rights holders are free to assign their rights to the collecting society of their choice, and they should not be treated differently based on their nationality. Collecting societies may thus not obstruct competition for members.

5.2 Refusal to license

In principle, a collecting society cannot refuse to license a user in its own territory without a legitimate reason. This follows already from the judgements of *Tournier* and *Lucazeau* discussed above, whereby it was said that it constitutes a concerted practice when the refusal to license a foreign user cannot be accounted for by

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[164] Case OJ L134/15 *GEMA I* [1971]
[165] Joined cases C-92/92 and C-326/92 Phil Collins v. IMTRAT Handels GmbH [1993]
[166] Case OJ L166/22 *GEMA II* [1972]; Martin Kretschmer, 'The Aims of European Competition Policy towards Copyright Collecting Societies' (2005) Society for Economic Research on Copyright Issues, available at <http://www.serci.org/congress_documents/2005/kretchmer.pdf> 14
[167] Case C-127/73 BRT vs SABAM [1974]
[168] P. Sean Morris, 'The reform of Article 82 and the operation of competition principles upon the normal trading functions of copyright collecting societies' (2009) Journal of Intellectual Property Law & Practice, Vol. 4, No. 8 page 570
[169] GEMA II (n 166)

other reasons than the existence of a concerted action.[170] The CJEU accepted that collecting societies refuse to grant access to users outside the territory of administration if otherwise, they would be obliged to organize their own management and monitoring system in another country.[171]

In *Tournier*, it was also at question whether the refusal to grant a license covering solely the foreign repertoire represented by the collecting society Sacem was a concerted practice.[172] Unless access to a part of the copyright repertoire could entirely safeguard the interests of the copyright holders, without increasing the total costs, the CJEU did not find the refusal to grant a partial license a concerted practice.[173] The legal test is thus that the refusal to grant a license covering only part of the repertoire constitutes a concerted practice, if a partial license does not lead to an increase of the total costs and if the interests of rights holders are entirely safeguarded. Granting a partial license instead of a blanket license almost always increases the total costs, because collecting societies would have to administer and monitor whether the rights used fall within the license. Granting a license for only one copyright would probably not increase the total cost, because it is easy to administer if the user performs another or different work.

5.3 Excessive pricing

Excessive pricing is captured by article 102 TFEU as an abuse of dominance. We saw in chapter 2 that collecting societies need to be motivated to operate efficiently, by passing on their lower costs to users who pay for licences and rights holders that finance the services of the collecting society.[174] Collecting societies that do not pass on their lower costs charge excessive prices.

AG Jacobs notes in his opinion on *Tournier* and *Lucazeau* that there is no specific provision at EU level for any external control over the fixing by collecting societies of the rates of remuneration for copyright.[175] The Court thus has to indicate if and when fixed prices are excessive.

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[170] Case 395/87 *Tournier* [1989]; Joined cases 110/88, 241/88 and 242/88 *Lucazeau* [1989]
[171] Ibid. 24
[172] Ibid. 7
[173] Ibid. 33
[174] Handke and Towse (n 18) 941
[175] Opinion of AG Jacobs in case 395/87 *Tournier* [1989] 6

In *Tournier*, it was said that a comparison with the situation in other Member States may provide useful indications regarding the possible abuse of a dominant position.[176] The legal test is that, if the royalties charged are appreciable higher than those charged in other Member States and this is not justified, the higher charges impose an unfair trading condition and must be regarded as indicative of an abuse of a dominant position.[177] A large disadvantage of this approach is that it does not take account of a situation in which all collecting societies charge unreasonably high rates. It only measures the relative price differences, without saying anything about the absolute efficiency of the collecting society. The CJEU could therefore have considered to narrow the legal test, by adding another economic model to the test. If the value of the economic model indicates that the efficiency rate exceeds a certain level, the CJEU could have found this also an indication of excessive pricing. However, the CJEU did not choose to do so.

In Kanal 5 Ltd, TV 4 AB v STIM, the Swedish collecting society STIM imposed on broadcasters Kanal 5 and TV 4 the payment of remuneration corresponding to a percentage of their revenue deriving from television broadcasts directed at the general public and/or subscription sales.[178] Another broadcaster, SVT, pays STIM a lump sum instead of a percentage of its revenue.[179] The CJEU did not find that it constitutes an abuse of dominance to use a remuneration model based on the revenue of the channels, provided that this remuneration model is proportionate.[180] After all, it is necessary to find an appropriate balance between the interests of composers of music who sought to receive remuneration for the television broadcast of their works and those of the television broadcasting companies to be able to broadcast under reasonable conditions.[181] However, if there exists another method which enables the use of those works and the audience to be identified and quantified more precisely, and that method protects the interests of rights holders, without leading to disproportionate increase in costs, it is an abuse if this method is not used.[182] It is also considered an abuse when dissimilar conditions to equivalent transactions with other trading parties are applied,

[176] Ibid. 43
[177] Case 395/87 para 46 and 38
[178] Case C-52/07 *Kanal 5 Ltd, TV 4 AB v STIM* [2008] 10
[179] Ibid. 12
[180] Ibid. 41
[181] Ibid. 26 – 31; Sean Morris (n 168) 571
[182] Ibid. 40

thereby placing them at a competitive disadvantage.[183] If the various broadcasters are competitors and it is not justified why SVT pays a lump sum instead of a percentage of its revenue, it constitutes an abuse of dominance.[184] The legal test developed in this judgement is thus that it does not constitute an abuse of dominant position to charge prices based on the revenue of the user, provided that the remuneration model used to determine prices is proportionate, unless 1) there exists another method that quantifies the income resulting from on the use more precisely, which protects the interests of rights holders, without leading to disproportionate increase in costs, or 2) dissimilar conditions to equivalent transactions with other trading parties are applied, thereby placing them at a competitive disadvantage, without justification. It does not become clear from this judgement what a proportionate balance is, or how dissimilarities can be justified. Morris argues therefore that Article 102 TFEU needs some realignment that can reflect properly how it should be applied to cases like *Kanal 5*.[185]

It follows from these cases that prices are excessive and caught by article 102 TFEU if they are appreciable higher than those charged in other Member States or disproportionate to the revenue of the user originating from the use of the work, when these prices are not justified. Since the prices are no subject to further regulation at EU level, and competition for users is obstructed, it is likely that prices are so high that they allow inefficiencies to exist.

6 Conclusion

Collecting societies organize themselves via reciprocal representation agreements so that they can license each other's repertoires, and thereby maintain a dominant position within their own territory. The legal test that applies to reciprocal representation agreements is that reciprocal representation agreements are not caught by article 101(1) TFEU, unless they constitute a concerted action that has the effect of systematically refusing direct access to repertoire to foreign users. The behaviour of collecting societies constitutes a concerted action if the systematic refusal of direct access to repertoire to foreign users cannot be accounted for by other reasons than the existence of a concerted action.

[183] ibid. 43
[184] Ibid. 48
[185] Sean Morris (n 168) 572

On the analogue market, it is likely that collecting societies have legitimate reasons to systematically refuse direct access to their repertoire to foreign users. Collecting societies mainly license users on their own territory and are therefore not competing for users. On the market for online rights, it is more likely that the systematic refusal of direct access to repertoire to foreign users constitutes a concerted action because this refusal cannot be accounted for by other reasons.

Since remote controlling of online rights is technically feasible, the Commission launched various initiatives to end the practice that collecting societies only license users on their own national territory. In a digital single market, collecting societies are in competition with each other for the grant of online multi-territorial licenses. The objective is to establish a one-stop-shop for commercial users to license copyrights for cross-border online use.[186] However, the Commission has not been able to enforce its policy. Collecting societies can still refuse direct access to foreign users and the objective of a single market is not obtained. Collecting societies refused to renew their Simulcasting agreements.

Furthermore, the single market is obstructed because a number of EU Member States require collecting societies to be authorized by a public authority.[187] There is uncertainty whether article 17(11) Services Directive provides for an exemption on the prohibition to put restrictions on the freedom to provide services, which has far-going consequences.

The behaviour of collecting societies towards rights holders and towards users is restricted by EU case law. Rights holders are free to assign their rights to the collecting society of their choice, and they should not be treated different based on their nationality. Collecting societies cannot refuse to license users in their own territory without a legitimate reason. The refusal to grant a license covering only part of the repertoire does constitute a concerted practice, if a partial license does not lead to an increase of the total costs and if the interests of rights holders are entirely safeguarded. Prices are excessive and caught by article 102 TFEU if they are appreciable higher than those charged in other Member States or disproportionate to the revenue of the user originating from the use of the work, when these prices are not justified. Since the prices

[186] Riis (n 5) 482
[187] Ibid. 490

are no subject to further regulation at EU level, and competition for users is obstructed, it is likely that prices are so high that they allow inefficiencies to exist.

CHAPTER 4: THE EU MARKET AFTER THE IMPLEMENTATION OF THE CMR DIRECTIVE

The purpose of this chapter is to analyze how the CMR Directive has regulated the market of collecting societies in the EU, by discussing its influence and effects.[188] This analysis will prove helpful to understand whether the CMR Directive provides for an appropriate legal framework for collecting societies in the EU. The CMR Directive, implemented in 2014, is the latest initiative of the Commission to introduce more competition on the online market and enable the digital single market. In this chapter, it becomes clear if the Commission obtained the objective of a digital single market, but also whether the minimum efficient scale and cultural diversity are safeguarded.

The CMR Directive regulates two distinguish aspects in the internal market. First of all, the CMR Directive regulates governance and transparency of collective management of copyrights and related rights. This concerns all collecting societies established in the EU. Next to that, the CMR Directive regulates multi-territorial licensing of rights in musical works for online use. Only some collecting societies in the EU manage authors' rights in musical works for online use on a multi-territorial basis. I first discuss the rules on governance and transparency, which concern all collecting societies. Then, I discuss the specific rules on multi-territorial licensing. Following this, I discuss which national authority is competent to put sanctions and take measures on collecting societies. Furthermore, I discuss an alternative legal aspect, namely copyrights law itself, which the Commission should have harmonized in order to pursue the internal market.

1 Regulation applicable to all collecting societies in the EU

The directive provides for regulation on how collecting societies should behave towards rights holders and towards users. Rights holders need to be free to become a member of the collecting society of their choice. Members are involved in the

[188] The proposal says in para 1.1 that the CMR Directive is implemented to establish a legal framework for the collective management of rights that are administered by collecting societies on behalf of rights holders, by providing for rules ensuring the better governance and greater transparency of all collecting societies and also by encouraging and facilitating the multi-territorial licensing.

governance of the collecting society. The costs that collecting societies charge are regulated by providing that, on one hand, the management fee may not exceed justified and documented costs, and on the other hand, prices charged to the user must be reasonable. I discuss the consequences of each of these regulations.

1.1 Competition for members

The Directive establishes competition on the market for members. It puts forward rules to ensure that rights holders are free to authorize the collecting society of their choice for the rights of their choice on the territory of their choice.[189] Rights holders may withdraw their rights from a collecting society to authorize a different society, upon serving reasonable notice not exceeding six months.[190] Collecting societies should not impose on rights holders any obligations, which are not objectively necessary for the protection of their rights and interests or for the effective management of their rights.[191] Furthermore, collecting societies must accept rights holders and entities representing rights holders if they fulfil the membership requirements, which shall be based on objective transparent and non-discriminatory criteria.[192] Collecting societies should not discriminate against any rights holder whose rights it manages under a representation agreement.[193] It follows from these rules that rights holders need to be able to assign the different rights that they hold in a way that maximises the benefit for them, whatever form this may take.[194]

We saw in the previous chapter that competition on the market for members is nothing new. Already, collecting societies were not allowed to discriminate between members of a different nationality or state of establishment. The Directive is thus only a confirmation of the existing prohibition to limit competition for members. However, it is a new limitation that the withdrawal period for rights may not extend six months. Earlier, the CJEU said that a withdrawal period extending three years was an abuse of dominance.[195] A shorter withdrawal period increases flexibility of rights holders, which

[189] Art 5(2) and 5(7) CMR Directive (n1)
[190] art 5(4) CMR Directive 5(4)
[191] art 4 CMR Directive
[192] art 6(2) CMR Directive
[193] Art 14 CMR Directive
[194] Schroff and Street (n 4) 1311
[195] Case OJ L166/22 *GEMA II* [1972]Schroff and Street (n 4) 1312: SACEM and GEMA had assignment intervals of 10 and 3 years, respectively.

could increase competition for members. However, a shorter withdrawal period destabilises the repertoire hold by the collecting society. Stability of the repertoire is one of the key elements of the legal certainty given to users getting blanket licenses.[196] We saw in chapter 2 that licensing users with repertoire/blanket licenses is one of the reasons why collecting societies can operate more efficiently. Increasing flexibility for rights holders by destabilising repertoire can obstruct the functioning of the market.

The Max Planck Institute for Intellectual Property and Competition Law brings forward another weakness of the rules on competition for members, namely that the obligation to accept rights holders if they fulfil the membership requirements does not go far enough.[197] They state that, if there is no general obligation to license rights holders, the directive only restates the faculty of rights holders under general private law to negotiate their contracts freely. It may be difficult for the smallest and less popular repertoires to access the market, which harms cultural diversity.[198] The directive should therefore put forward a strong obligation to license rights holders, but fails to do so.[199]

Competition for members is meanwhile tempered by the fact that collecting societies may not discriminate against rights of rights holders managed via representation agreements. If there is only one collecting society operating on a certain territory, it does not matter to which collecting society the rights holder is a member, since all collecting societies have concluded reciprocal representation agreements. Either way, the rights are managed and enforced by the collecting society operating on the territory.

1.2 Governance: involvement of members

The Directive ensures that members are involved in the organisation's decision-making process.[200] There is a general assembly of members, which shall decide on multiple issues, including any amendments to the statute and to the membership terms and the appointment or dismissal of directors.[201] Next to that, collecting societies have

[196] Drexl, Nérisson, Trumpke and Hilty (n 69) page 23 para 37
[197] Drexl, Nérisson, Trumpke and Hilty (n 69) page 7 para 10
[198] Proposal CMR Directive (n 8)
[199] Drexl, Nérisson, Trumpke and Hilty (n 69) page 7 para 10
[200] Art 6(3) CMR Directive
[201] Art 8(3)(4) (5) CMR Directive

to have a supervisory function for continuously monitoring the activities and the performance of the duties of the persons who manage the business of the collecting society.[202] There shall be fair and balanced representation of the different categories of members in the body exercising the supervisory function.[203] Furthermore, the directive provides for regulation on transparency, reporting and disclosure, which gives stakeholders the opportunity to make informed decisions. [204]

By allowing members to choose their collecting society and to participate in the decision-making, it is expected that the collecting society becomes more efficient and act less abusive on the market for members.[205] That is because members are more involved in the governance of the collecting society. Members are not likely to vote against their own interests. It may be that professional or major rights holders will pick better management, and/or that major right holders will provide useful inputs into the operations of the collecting society as an efficient business.[206] Furthermore, collecting societies need to keep major rights holders happy, because if they are not satisfied with the governance of a collecting society, they can leave for a collecting society with more effective governance.[207]

There is a significant downside to giving major rights holders such a degree of control to the detriment of non-major rights holders.[208] The directive gives no indication as to how representation is to be realised and what 'fair and balanced' actually means.[209] The directive treats rights holders as a single category, assuming that all rights holders have a common interest.[210] In practice the interests of rights holders can vary greatly.[211] On one hand, corporate right owners and established authors prefer management organisations that administer rights efficiently, which is, cost-effectively and accurately.[212] On the other hand, less commercially successful authors need the collecting society to strengthen their collective bargaining position because of their

[202] Art 9(1) CMR Directive
[203] Art 9(2) CMR Direcitve
[204] Title II Chapter 5 CMR Directive
[205] Schroff and Street (n 4) 1313-1314
[206] Gervais (n 16) 503
[207] Schroff and Street (n 4) 1313-1314; Gervais (n 16) 503
[208] Gervais (n 16) 503
[209] Schroff and Street (n 4) 1313
[210] Drexl, Nérisson, Trumpke and Hilty (n 69) page 13 - 16
[211] See also Drexl, Nérisson, Trumpke and Hilty (n 69) page 13 - 16
[212] Schroff and Street (n 4) 1315

individual weakness relative to the large corporations.[213] Smaller rights holders need the collecting society to support cultural diversity, at the cost of operating as efficient as possible.[214] In a quasi monopoly model, the more successful authors cross subsidise the less successful ones, lowering the cost of administration for the latter while increasing their own.[215] However, in a competitive model, where corporate right owners and established authors are more involved in the governance of the collecting society, it is less likely that collecting societies increase their administration rate to support less successful authors. Namely, the rights holders that have sufficient market power to withdraw their rights from the existing system have the strongest bargaining position, and they do not depend on collective bargaining power or social spending.[216] When social spending is reduced, this may drastically harm cultural diversity. Young musicians are no longer supported to create new work and safeguard the future repertoire.[217] The Max Planck institute considers this is most unfortunate in an area where the protection of the party with the weaker bargaining position has been considered as the justification of a limitation of party autonomy.[218] We saw in chapter 2 that if regulators have the policy to protect cultural diversity, competition should be applied carefully to safeguard a minimum efficiency scale for smaller collecting societies. To protect cultural diversity, competition may not be so fierce that it effects the functioning of the collecting society itself. Even smaller collecting societies must have room to invest in social cost and a high enforcement level, at the expense of efficiency, which is more in the interest of major rights holders. If regulators in the EU want to pursue this policy, the directive lacks a mechanism to protect cultural diversity by supporting smaller and less successful authors.

Next to that, the scholars Schroff and Street argue that the required standard of transparency of collecting societies is too low to satisfy the needs of right holders, since the directive allows that information about the distribution of royalties be available to members, but not to the public.[219] Furthermore, collecting societies often publish information in their national language only.[220] The lack of publicly available translated

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[213] Ibid.
[214] Drexl, Nérisson, Trumpke and Hilty (n 69) page 14 para 17
[215] Schroff and Street (n 4) 1315
[216] Drexl, Nérisson, Trumpke and Hilty (n 69) page 14 – 15 para 17
[217] Schroff and Street (n 4)1317
[218] Drexl, Nérisson, Trumpke and Hilty (n 69) page 15 para 17
[219] Schroff and Street (n 4) 1313
[220] Ibid.

material limits rights holders in their choice of collecting societies outside of their national borders.[221] Although the CMR Directive is an improvement to a situation of no regulation, the requirements on transparency should be more far-reaching.

Collecting societies were not yet regulated at EU level to ensure fair and balanced involvement of members in the governance of the collecting society. The regulation on transparency and disclosure is also new. Although one could argue that the absence of transparency and representation of members in the governance is an abuse of dominance, it can be difficult to prove. The directive therefore leads to improved governance of collecting societies, but has significant downsides because it does not protect cultural diversity and should require more transparency.

1.3 Justified and documented costs

The CMR Directive regulates the collection and use of rights revenue.[222] Collecting societies have to separate a) rights revenue and the income arising from the investment of rights revenue and b) any own assets it may have and income arising from such assets, from management fees or from other activities.[223] Collecting societies should not use income from category A for purposes other than distribution to rights holders, unless otherwise agreed with the general assembly.[224]

We have seen before in the Simulcasting agreement that collecting societies were required to separate collected royalties from costs of the provided services. This prevented competition on royalties and therefore prevented the erosion of copyright itself. However, collecting societies did not want to renew the Simulcasting agreement, because it turned out to be very difficult to construct an accounting standard to allocate the relevant cost components of the total income.[225] If it were possible to construct an accounting standard, collecting societies in a competitive market would have no bargaining power in relation to users.[226] On top of that, instead of being a sign of efficiency, administration fees significantly lower than those charged by sister societies are likely to reflect less valuable management to the detriment of the (smaller) rights

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221 Ibid.
222 Title II chapter 2 CMR Directive
223 Art 11(3) CMR Directive
224 Art 11(4) CMR Directive
225 Riis (n 5) 488
226 Ibid.

holders.[227] Lower administration fees may indicate that there is less social support to increase cultural diversity.

The arguments brought forward against the separation of income following the Simulcasting agreement are also relevant for the CMR Directive, since the CMR Directive does not provide for an accounting standard to allocate the relevant cost components of the total income. We saw in chapter 2 that without an accounting standard, competition will lead to a situation in which collecting societies also compete on royalties. When there is competition for users, the value of copyrights itself is not safeguarded because the marginal cost of managing copyrights is close to zero. Next to that, without an accounting standard, indirect costs are difficult to justify. Smaller collecting societies will have to compete with larger collecting societies that have the means to operate more efficiently. To remain in the market, collecting societies have to lower their cost at the detriment of indirect costs, whereby the enforcement level is lower and there is less social support of smaller rights holders. The directive should therefore safeguard that a minimum percentage of the income of collecting societies is allocated to royalties and indirect costs such as enforcement and social support.

The directive does provide some regulation on how to distribute income. Collecting societies are only allowed to deduct management fees from the rights revenue, if those deductions are reasonable and established on the basis of objective criteria.[228] Management fees should not exceed the justified and documented costs incurred by the collecting society, and the collecting societies must provide the rights holder with information on management fees and other deductions.[229] The remaining revenue must be distributed regularly, diligently and accurately to rights holders, as soon as possible but no later than nine months from the end of the fiscal year in which the rights revenue was collected.[230] The same goes for revenue derived from the rights managed on the basis of a representation agreement.[231] These provisions ensure that the percentage of rights revenue is not lowered by inefficiencies such as excessive pricing, since management fees should not exceed justified and documented costs.

[227] Gilliéron (n 66) 950
[228] Art 12(2) CMR Directive
[229] Art 12(1) and (3) CMR Directive
[230] Art 13(1) CMR Directive
[231] Art 15 CMR Directive

In case the rights holder is not known, the collecting society has to take all necessary measures to identify and locate the rights holders.[232] If the rights holder is still not identified and located, the collecting societies must make relevant information available to its members and to all collecting societies with which it has concluded representation agreements.[233] If the rights holder still cannot be identified, the amounts collected shall be deemed non-distributable, and the general assembly shall decide on the use of the non-distributable amounts collected.[234] This indicates that income of collecting societies that is not distributed to rights holders may only cover costs. The collecting society cannot pursue profit, since management fees should not exceed the justified and documented costs and the general assembly decides over non-distributable revenue.

In the analogue market, competition based on costs is counteracted by the reciprocal representation system. Either way, rights are managed and enforced by the collecting society that operates on a certain territory, and not per se by the collecting society that the rights holder is a direct member of. The collecting society operating on the territory reduces the management fee, and not the collecting society that the rights holder is a member of. The applicable tariffs, management fees and the conditions for the collection of the rights revenue and distribution of amounts due to rights holders are the same whether the rights holder is a direct member, or represented via a reciprocal representation agreement. [235] This limits competition on royalties, management fees, conditions for the collection of the rights revenue and distribution of amounts due. Because competition is limited in the analogue market, it does not lead to more efficiency. However, since management fees should not exceed justified and documented costs, the directive does regulate inefficiencies arising from monopoly power.

1.4 Reasonable prices

Collecting societies do not have a duty to license users.[236] Collecting societies may, based on the information offered by the user, either offer a license or provide the user with a reasoned statement explaining why it does not intend to license a particular

[232] Art 13(3) CMR Directive
[233] Art 13(3) CMR Direcitve
[234] Art 13(4)(5) CMR Directive
[235] Art 14 CMR Directive
[236] See also, Drexl, Nérisson, Trumpke and Hilty (n 69) page 8 para 11

service.[237] It follows that the legal test formulated in *Tournier* still applies, which allows for a refusal to directly license foreign users and limited competition for users between collecting societies. Collecting societies on the analogue market therefore may still hold a dominant position within their territory.

The directive tries to regulate the power of dominant collecting societies by requiring that licensing terms shall be based on objective and non-discriminatory criteria.[238] Rights holders shall receive appropriate remuneration for the use of their rights.[239] The tariff for exclusive rights and rights to remuneration needs to be reasonable in relation to the economic value of the use of rights in trade, as well as in relation to the economic value of the service provided by the collecting society.[240]

We have seen in chapter 2 however that it is almost impossible to value rights, since there are so many variables. The directive does not provide how to measure the economic value of the rights and services. Since, in an analogue market, there is almost no competition between collecting societies on the market for users, these provisions still leave room for excessive pricing of licenses. The directive confirms the existing case law that prices should be reasonable, but does not supplement it with precise regulation. That is why in the case *Autortiesību un komunicēšanās konsultāciju aģentūra/Latvijas Autoru apvienība v Konkurences padome (AKKA/LAA)*, dating from 2017, the CJEU had to determine how to measure reasonable prices.[241] In this case, it was at question whether the Latvian collecting society charged unfair prices.[242] The Latvian collecting society held a dominant position within the member state, and the CJEU needed to answer which method is appropriate to define the concept of unfair prices under 102 TFEU.[243] The method could be to compare its rates with those applicable in the neighbouring States, as well as with those applicable in other Member States, adjusted in accordance with the PPP index.[244] In the earlier case *Tournier*, it was already said that when an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in other Member States, and where a

[237] Art 16(3) CMR Directive
[238] Art 16(2) CMR Directive
[239] Ibid.
[240] Ibid.
[241] Case C-177/16 *Autortiesību un komunicēšanās konsultāciju aģentūra/Latvijas Autoru apvienība v Konkurences padome (AKKA/LAA)* [2017]
[242] Ibid.
[243] Ibid. para 24
[244] Ibid. Para 31

comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position.[245] The CJEU said therefore said in AKKA/LAA that this is an appropriate method to examine whether the collecting society applies unfair prices, provided that the reference Member States have been selected in accordance with objective, appropriate and verifiable criteria and that the comparisons are made on a consistent basis.[246]

Following this case law, an excessive price is thus determined on the basis of a comparison with neighbouring States. Disadvantageous of this approach is that collecting societies in neighbouring states could also be charging excessive prices. The regulation, provided for by the directive, that the tariff needs to be reasonable in relation to the economic value of the use of rights in trade, as well as in relation to the economic value of the service provided by the collecting society, may therefore be not enough of a safeguard to efficient prices.[247]

2 Multi-territorial licensing of rights in musical works for online use

Next to the discussed regulation on transparency and governance, the CMR Directive regulates the multi-territorial licensing of rights in musical works for online use.[248] The online market responds differently than the analogue market.[249] It is less attainable to exclude the use of copyright works. The role of collecting societies on the online marketplace is therefore not to exclude the use of copyright on their territory, but to monetize the online use.[250] The directive therefore provides that all representation agreements between collecting societies providing for multi-territorial licensing are concluded on a non-exclusive basis.[251] Rights holders have less incentive to withdraw their rights from a collecting society, since they monetize the use of their work and represent their rights on a non-exclusive basis. The Directive puts forward some requirements that collecting societies which grant multi-territorial licenses for online rights in musical works need to fulfil, on top of the regulation that is applicable to all collecting societies.

[245] Case 395/87 *Tournier* [1989] 38; Case AKKA/LAA (n 241) 38
[246] Case 395/87 *Tournier* [1989] Para 51
[247] Case AKKA/LAA (n 241)
[248] Title III CMR Directive
[249] Gervais (n 16) 504
[250] Gervais (n 16) 504
[251] Recital 44 and article 29(1) CMR Directive

2.1 Requirements

First of all, collecting societies offering multi-territorial licenses must have sufficient capacity to process data electronically, in an efficient and transparent manner, which is needed for the administration of such licenses.[252] This includes data needed for the purposes of identifying the repertoire and monitoring its use, invoicing users, collecting rights revenue and distributing amounts due to rights holders.[253] Rights holders, other collective management organisations and online service provider must be able to request a correction of the data information when the information is inaccurate in respect of their online rights.[254] Collecting societies must use this data to monitor the use of online rights it presents by online providers to which it has granted a multi-territorial license.[255] These online providers must have the possibility to report the actual use of the online rights and receive an accurate invoice of the collecting society managing these online rights.[256] The collecting society must, based on the user data, accurately and without delay distribute the amounts due to rights holders.[257]

Next to that, collecting societies must provide this up-to-date information to online service providers, the rights holders whose rights it represents and to other collective management organisations, allowing the identification of the online music repertoire they represent.[258] They must provide rights holders with information on the use of their works and the amounts collected.[259] Rights holders can use this information because they may, wholly or in part, specify the musical work, the online rights and the territories in respect of which they authorise the collecting society.[260] Rights holders who have authorised a collecting society to represent their online rights that does not grant or offer to grant multi-territorial licences for online rights can withdraw these rights from that collecting society for the purposes of multi-territorial licensing, without having to withdraw the online rights for the purposes of mono-territorial licensing,[261]

[252] Art 24 CMR Directive
[253] Ibid.
[254] Art 26(1) CMR Directive
[255] Art 27(1) CMR Directive
[256] Art 27(3)(4) CMR Directive
[257] Art 28 CMR Directive
[258] Article 25 CMR Directive
[259] Article 28(2) CMR Directive
[260] Article 26(2) CMR Directive
[261] Article 31 CMR Directive

Collecting societies can, on a non-exclusive nature, mandate another collecting society to grant multi-territorial licences for the online rights in its own music repertoire.[262] If a collecting society does not offer multi-territorial licenses in online rights in its own repertoire, it is even mandatory for the collecting society to request another collecting society to represent its rights.[263] The other collecting society is required to agree to the request if it is already offering to grant multi-territorial licenses for the same category of online rights in the repertoire of other collecting societies.[264] Management must happen on a non-discriminatory basis, on the same conditions as those, which it applies to the management of its own repertoire.[265] The management fee should not exceed the costs reasonably incurred.[266]

2.2 Consequences

It follows from these requirements that only collecting societies that accurately process and use data to correctly monitor the use of the online rights are able to offer multi-territorial licenses for online use. According to the *Tournier* test, because these collecting societies are able to accurately monitor the use of online rights, they should not refuse direct access to foreign users. If collecting societies are offering multi-territorial licenses on the same territory, they are in competition with each other on the market for users. Also, competition on the market for members is no longer tempered by reciprocal representation agreements, because collecting societies directly manage the online rights they represent on multiple territories. Thus, collecting societies that offer online licenses on the same territory are in competition with each other both on the market for users and the market for members.

By requiring collecting societies that do not have the capacity to offer multi-territorial licenses to mandate another collecting society to manage its rights, the Directive ensures that online licenses are offered over the whole territory. The advantage of multi-territorial licenses is that users with multi-territorial licenses are no longer geo-blocked. The directive thus ensures that, via multi-territorial licenses, the objective of a digital single market is obtained.

[262] Article 29(1) CMR Directive
[263] Article 30(1) CMR Directive
[264] Article 30(1) CMR Directive
[265] Article 29(1) and 30(3) CMR Directive
[266] Article 30(5) CMR Directive

2.3 Effects of the policy

Increased competition may have the effect that collecting societies operate more efficient on the market for online rights. This is because collecting societies in competition on the market for users need to keep their prices low, since they have less bargaining power towards users. On top of that, increased transparency gives more insight in whether collecting societies are operating efficiently. It also provides more insight in the amount of royalties collected. By allowing rights holders to choose their collecting society and to participate in the decision-making, collecting societies become more efficient and act less abusive on the market for members.[267]

We saw before that the directive is missing mechanisms to protect the value of copyrights. However, since collecting societies are also in competition for members, rights revenue will not sink too low. If the royalties distributed to rights holders are too low, rights holders withdraw their rights and seek alternative representation. If the collecting society, via reciprocal representation agreements, is no longer able to represent the world-repertoire, this practice leads to repertoire fragmentation. Users need to obtain multiple licenses to use the same repertoire, since they lost the advantage of the one-stop shop for multi-repertoire licences and now have to acquire parallel licenses for separate repertoires.[268] It increases costs and uncertainty, because users not only have to obtain multiple licenses, but they also have to identify and contact multiple rights holders to find out whether the licenses cover the works they want to use.[269] Given the complexity of the task, users can never be sure if they have actually covered everything and potentially expensive infringement claims remain a possibility.[270] Since neither users, nor rights holders, nor collecting societies benefit from a situation in which the price of a license is so low that rights holders withdraw their rights, competition on the market for users does probably not lead to a situation in which the prices are below this level. In the best scenario, licenses are priced at an efficient level, whereby collecting societies try to reduce their costs to compete for users, while keeping rights holders happy.

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[267] Schroff and Street (n 4) 1313-1314
[268] Drexl, Nérisson, Trumpke and Hilty (n 69) page 6 para 9
[269] Hviid, Schroff and Street (n 3) 25
[270] Ibid. Para 27

However, we saw that the Directive does not distinguish between rights holders with different interests. Collecting societies want to keep their costs as low as possible to prevent large rights holders from withdrawing their rights, while licensing as much as possible users. In a competitive model, where corporate right owners and established authors are more involved in the governance of the collecting society, it is less likely that collecting societies increase their administration rate to support less successful authors. Small rights holders do not benefit from this situation, since they depend on social allocations of revenue. Because of the specifics of the online market, their repertoire is still available to the users. However, with the lack of a social support system, smaller rights holders are no longer able to sufficiently monetize the use of their work. This may drastically harm cultural diversity, because young musicians are no longer supported to create new work and safeguard the future repertoire.[271] The Directive therefore lacks a mechanism to protect cultural diversity by supporting smaller and less successful authors.

Another risk of introducing more competition is that the minimum efficient scale of small collecting societies is not safeguarded. Economic reasoning predicts that, over time, smaller collecting societies are not able to compete with large collecting societies on the online market and disappear.[272] After all, economies of scale can manage rights of rights holders more efficient than smaller collecting societies. The consequence of a policy introducing more competition may well be that only a very few will be able to grant multi-territorial licenses.[273] This may well lead to a single collecting society administering all online music rights within the EU.[274] In this case, competition does not lead to more efficiency on the market.

This effect is to a certain extend counteracted if smaller collecting societies still hold a dominant position on their territory for analogue rights. Although they may not be able to compete with large collecting societies on the market for online rights, their dominant position on the market for analogue rights on their own territory makes it unlikely that they disappear completely.

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[271] Schroff and Street (n 4) 1317
[272] Hviid, Schroff and Street (n 3) 46
[273] Drexl, Nérisson, Trumpke and Hilty (n 69) page 5 para 8
[274] Ibid.

2.4 Impact on the management of online rights

Thus, the advantage of multi-territorial licenses is that users with multi-territorial licenses are no longer geo-blocked. The directive ensures that, via multi-territorial licenses, the objective of a digital single market is obtained. Collecting societies that offer online licenses on the same territory are in competition with each other both on the market for users and the market for members. Competition usually leads to more efficiency on the market, because collecting societies no longer hold a dominant position. However, the directive leaves room for repertoire fragmentation and does not safeguard a minimum efficient scale for smaller collecting societies to properly function and protect cultural diversity.

3 Competent authority

We saw in the previous chapter that it is unclear whether member states may put requirements or restrictions on collecting societies wanting to enter the domestic market. The proposal for the CMR Directive states that collecting societies are subject to the Services Directive.[275] Article 16 of the Services Directive prohibits that member states put requirements on the freedom to provide services on their territory, while article 17(11) of the Services Directive provides for an exception to article 16 on copyrights and neighbouring rights.[276] There is uncertainty on whether this exception also applies to the management of copyrights.

Collecting societies are in need of control because of the monopoly position of national collecting societies vis-à-vis rights holders and users and the public interests involved.[277] The proposal for the CMR Directive states that there should be competent authorities that handle complaints with regard to the activities of collecting societies and may take appropriate administrative sanctions and measures.[278] The Directive states that Member States shall ensure that the competent authorities designated for that purpose have the power to impose appropriate sanctions or to take appropriate

[275] Commission Proposal, Explanatory Memorandum (n 8) at 1.4
[276] Services Directive (n 147) 17(11)
[277] Drexl, Nérisson, Trumpke and Hilty (n 69) page 16 para 19
[278] article 37-40 proposal CMR Directive (n 8)

measures where the provisions of national law adopted in implementation of this Directive have not been complied with.[279]

However, it is not clear which national authority should have the power to impose appropriate administrative sanctions and measures, where the provisions of national law have not been complied with.[280] Should the national authority in which the collecting society is established be able to impose sanctions the collecting society, or should the authorities of the states in which the collecting society offers licenses take measures? If the first answer applies, the national authority in which the collecting society is established can impose sanctions, and not the authority of the member state where the collecting society offers services. Authorization schemes are prohibited and there is thus no restriction on the freedom to provide services.

If the second answer applies, national authorities would be allowed to put requirements on services provided by foreign collecting societies, which is an obstacle to the freedom to provide services on the internal market. In this case, article 17(11) Services Directive must be interpreted as including the management of copyrights, providing an exception from the prohibition to put obstacles on the freedom to provide services.

There are a few indications that the first answer applies, whereby authorities only impose sanctions on collecting societies established on their territory and authorization schemes are prohibited. First of all, recital 4 of the directive provides that collecting societies should be able to enjoy the freedoms provided by the Treaties when representing rights holders who are resident or established in other Member States or granting licences to users who are resident or established in other Member States.[281] Sanctions or measures put forward by a foreign authority would obstruct this freedom. Next to that, article 36(1) of the Directive says that Member States shall ensure that compliance by collective management organisations *established in their territory* with the provisions of national law adopted pursuant to the requirements laid down in this Directive is monitored by competent authorities designated for that purpose.[282] If competent authorities only monitor the compliance of collecting societies established in

[279] article 36(3) CMR Directive
[280] article 36(3) CMR Directive; Drexl, Nérisson, Trumpke and Hilty (n 69) page 16 para 19
[281] Recital 4 CMR Directive
[282] Article 36(1) CMR Directive

their territory, it makes sense that this authority has the competence to impose sanctions and take measures.

The Max Planck Institute argues that the second answer should apply, whereby national authorities are able to put sanctions and take measures on collecting societies offering services on their territory.[283] That is because copyrights and related rights as form of intellectual property rights are of a territorial nature.[284] Authorization schemes, sanctions and measures, based on national copyright law, put forward by a national authority, are limited to the territorial outreach of the management of rights under domestic law.[285] Licenses granted under foreign law would not be subject to control by the domestic authority, which creates a risk of a regulatory vacuum.[286]

Next to that, if only the authority of the member state where the collecting society is established may take measures and put forward sanctions on the collecting society, there is a risk that the collecting society offering multi-territorial licenses establishes itself in the country with the weakest control standard.[287] Article 16 would allow for forum shopping and run the risk of triggering a race to the bottom for control on collecting societies.[288] Article 17(11) Services Directive should therefore apply to the management of copyrights, so that authorities can take measures and put forward sanctions when foreign services are offered on their territory.

Overall, the CMR Directive is not clear on which national authority may take measures and put forward sanctions on collecting societies. There are indications that article 16 of the Services Directive applies, whereby authorities only control collecting societies established in their own territory. However, because copyright law is not harmonized, there is a risk of a regulatory vacuum and forum shopping. Therefore, article 17(11) Services Directive should provide for an exception for the management of rights.

[283] Drexl, Nérisson, Trumpke and Hilty (n 69) page 17 para 20
[284] Ibid.
[285] Ibid.
[286] Ibid.
[287] Ibid. Page 18 para 24
[288] Ibid.

4 Harmonization of copyrights law

Some argue that, in order to pursue the Digital Single Market for online rights, the Commission should have harmonized another legal aspect, namely copyrights law itself. The Max Planck Institute for Intellectual Property and Competition Law puts forward an important weakness of the CMR Directive. The institute argues that the directive has no regard for the co-existence of different traditions of collective rights management in continental countries and the Anglo-American world.[289] They explain for example that '*continental collecting societies typically require rights holders to sign contracts that cover both their reproduction rights (so-called 'mechanical right') and their public performance rights. In contrast, Anglo-American collecting societies are established as 'performing rights organisations' (PROs) that only require the transfer of the public performance rights*.'[290] This situation leads to legal uncertainty as to who holds rights and is able to authorize or withdraw rights from a collecting society.[291] It also causes questions on whether it is allowed to separately assign mechanical rights and public performance rights in continental countries.[292] To promote multi-territorial licensing, the Commission therefore should have harmonized copyright law itself as well.

The scholars Schroff and Street also criticize the use of competition as a mechanism to minimize abuse of the dominant position of collecting societies. They argue that, since copyright protection varies significantly between member states, collecting societies are not competing on a level playing field.[293] This results in unintended pressure on a fine tuned system of copyrights protection, with little regard given to the potential consequences given the national differences.[294] Instead of using competition law to regulate collecting societies, the Commission could have chosen to rely on harmonized copyright law and its principles to implement an effective system of cross-border collective management of copyrights.[295]

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[289] Drexl, Nérisson, Trumpke and Hilty (n 69) 8 para 12
[290] Ibid.
[291] Ibid.
[292] Drexl, Nérisson, Trumpke and Hilty (n 69) page 11-12, para 13.; Case 7 O 4139/08 Landgericht München I (Munich District Court I) [2009], published in Zeitschrift für Urheber- und Medienrecht 788; Case 29 U 3698/09 Oberlandesgericht München (Munich Court of Appeal) [2010]Published in Zeitschrift für Urheber- und Medienrecht 709
[293] Schroff and Street (n 4) 1310- 1311
[294] Ibid. 1311
[295] Ibid. 1309

5 Conclusion

On an analogue market, the objective of a single market is not obtained since the *Tournier* test still applies, whereby collecting societies have no duty to directly license foreign rights holders. Collecting societies therefore still hold a dominant position on the national market. Inefficiencies are limited by increased transparency, involvement of members in governance, justified and documented costs and reasonable prices.

The directive contains some weaknesses, because a further limitation on the withdrawal period of rights increases flexibility for rights holders by destabilising repertoire, which can obstruct the functioning of the market. Next to that, the directive treats rights holders as a single category, and lacks a mechanism to protect cultural diversity by supporting smaller and less successful authors.

The directive can be improved because collecting societies should be more transparent towards non-members and because it does not indicate a method for establishing reasonable prices or an accounting standard to allocate the relevant cost components of the total income. The directive should therefore safeguard that a minimum percentage of the income of collecting societies is allocated to royalties and indirect costs such as enforcement and social support.

Collecting societies that have sufficient capacity to process data electronically can offer multi-territorial licenses of rights in musical works for online use. By requiring collecting societies that do not have the capacity to offer multi-territorial licenses to mandate another collecting society to manage its rights, the Directive ensures that online licenses are offered over the whole territory. The advantage of multi-territorial licenses is that users with multi-territorial licenses are no longer geo-blocked. The directive thus ensures that, via multi-territorial licenses, the objective of a digital single market is obtained.

Collecting societies offering multi-territorial licenses on the same territory are in competition with each other on the market for member and users. Increased competition may have the effect that collecting societies operate more efficient on the market for online rights, because collecting societies no longer hold a dominant position. However, the directive leaves room for repertoire fragmentation. The functioning of the market can also be obstructed because the value of copyrights itself is not properly safeguarded. In a competitive model, it is even less likely that collecting societies will raise their costs by supporting smaller rights holders. Economic reasoning predicts that, over time, smaller collecting societies are not able to compete with large collecting societies on the online market and disappear. The minimum efficient scale and cultural diversity are thus not safeguarded on the market for online rights.

Furthermore, the CMR Directive is not clear on which national authority may take measures and put forward sanctions on collecting societies. There are indications that article 16 of the Services Directive applies, whereby authorities only control collecting societies established in their own territory. However, because copyright law is not harmonized, this creates a risk of a regulatory vacuum and forum shopping. Therefore, article 17(11) Services Directive should provide for an exception also for the management of rights, or copyrights law should be further harmonized.

The implementation of the CMR Directive can be problematic because of the weaknesses it contains and because of the different copyright law systems that exist in domestic law. For the internal market to work, instead of using competition law to regulate collecting societies, the Commission should also have harmonized copyrights law. The CMR Directive thus has the effect that it enables the objective of a digital single market. However, the Directive contains weaknesses. It lacks a mechanism to protect cultural diversity and to safeguard a minimum efficient scale for small collecting societies. Furthermore, it has no regard of the co-existence of different national copyrights laws.

CHAPTER 5: CONCLUSION

In this thesis, I asked the question "*Does the CMR Directive provide for an appropriate legal framework for the collective management of rights that are administered by collecting societies on behalf of rights holders?*" My hypothesis was that the CMR Directive puts in place an appropriate legal framework, since it is implemented with an aim to do so, but that my research would nuance the meaning of 'appropriate' and also bring forward at what cost the objective of a digital single market is obtained.

We have seen that the market for collective management of rights is complex and contains several components, such as a market a for members and users, an analogue market and digital market, small rights holders and large rights holders, small users and users who want to license the world repertoire, and, typically in the EU, national markets and the EU market. The answer to whether the CMR Directive is an appropriate legal framework therefore needs to be qualified, but generally saying, we can conclude that the CMR Directive does not provide for an appropriate legal framework, since the directive needs improvement.

An appropriate market structure for collecting societies is a market structure in which the market operates most efficient. On the analogue market, before the implementation of the CMR Directive, collecting societies had legitimate reasons to systematically refuse direct access to their repertoire to foreign users. Collecting societies mainly licensed users on their own territory. After the implementation of the CMR Directive, the *Tournier* test still applies, so that the market structure of collecting societies on the analogue market remains the same. Collecting societies are not competing for users and therefore maintain a dominant position on the national market. This is an appropriate market structure for collecting societies on the national market, because collecting societies on the analogue market operate most efficient in the form of a natural monopoly. However, there is no single market for analogue rights in the EU, and users wanting to perform copyrighted work in multiple members states have to license multiple collecting societies.

On the digital market, it is more likely that the systematic refusal of direct access to repertoire to foreign users constitutes a concerted action, because this refusal cannot be accounted for by other reasons since remote controlling of online rights is technically feasible. Before the implementation of the CMR Directive, the Commission launched various initiatives to end the practice that collecting societies only license users on their own national territory. The Commission wanted to establish a one-stop-shop for commercial users to license copyrights for cross-border online use.[296] Collecting societies would compete with each other for the grant of online multi-territorial licenses.

It is appropriate to introduce competition, since the digital market is operating most efficient if there is some competition between collecting societies. However, competition needs to be organized in such a way that prices are not so low that there is repertoire fragmentation or the erosion of copyrights value itself. In addition, cultural diversity, a high enforcement level and a minimum efficient scale of smaller collecting societies need to be safeguarded. Before the implementation of the CMR Directive, there were no mechanisms in place to ensure that competition between collecting societies met these conditions. Exempting the Simulcasting agreement under article 101(3) TFEU was not enough to protect the value of copyrights, since collecting societies had reasons not to renew the Simulcasting agreement. The Commission tried to enforce its policy in the CISAC decision, but its attempts to enable the digital single market failed. Collecting societies were thus not competing for users, and the objective of a digital single market was not obtained.

The CMR Directive requires collecting societies that do not have the capacity to offer multi-territorial licenses to mandate another collecting society to manage its rights. Collecting societies offering multi-territorial licenses on the same territory are in competition with each other on the market for member and users. Users with multi-territorial licenses are no longer geo-blocked and the directive ensures that, via multi-territorial licenses, the objective of a digital single market is obtained.

A competitive market structure is appropriate on the digital market since it increases efficiency, as long as some conditions are met. However, the directive does not provide an appropriate legal framework for the digital market because those conditions are not met. The directive treats rights holders as a single category and lacks a mechanism to protect cultural diversity by supporting smaller and less successful authors. In a competitive model, it is not likely that collecting societies will raise their

[296] Riis (n 5) 482

costs by supporting smaller rights holders. The Directive does an attempt to separate the costs of collecting societies with the rights revenue, but does not indicate a method for establishing reasonable prices or an accounting standard to allocate the relevant cost components of the total income. Therefore, the value of copyrights itself is not properly safeguarded. (Large) rights holders who consider the rights revenue too low will withdraw their repertoire, which leads to repertoire fragmentation. Economic reasoning predicts that, over time, smaller collecting societies are not able to compete with large collecting societies on the online market and disappear. Eventually, this could lead to the rise of a monopolistic market structure at EU level.

The benefit of the CMR Directive is that it enables the digital single market, but to be an appropriate legal framework, the directive should be improved by safeguarding that a minimum percentage of the income of collecting societies is allocated to royalties and indirect costs such as enforcement and social support. The legal framework provided for by the CMR Directive is thus not appropriate with regard to introducing competition to the digital market.

Regardless of the market structure, it is appropriate that law regulates collecting societies by addressing anti-competitive effects and act against abuse of market dominance.[297] Before the implementation of the CMR Directive, there is at EU level no legislation specifically regulating the behaviour of collecting societies. The behaviour of collecting societies towards rights holders and towards users is restricted by EU case law.

Rights holders are free to assign their rights to the collecting society of their choice, and they should not be treated different based on their nationality. The CMR Directive establishes competition on the market for members. Since collecting societies were already not allowed to discriminate between members of a different nationality or state of establishment, the only new element that the directive introduces to the market for members is the shorter withdrawal period for rights. However, increasing flexibility for rights holders by destabilising repertoire can obstruct the functioning of the market. Thus, although competition for members is appropriate because it addresses anti-competitive effects of market dominance on the market for members, the directive is not a valuable addition to the existing legal framework in this aspect.

[297] Drexl, Nérisson, Trumpke and Hilty (n 69) para 6

Market power of collecting societies is limited because collecting societies cannot refuse to license users in their own territory without a legitimate reason. The refusal to grant a license covering only part of the repertoire does constitute a concerted practice if a partial license does not lead to an increase of the total costs and if the interests of rights holders are entirely safeguarded. However, on an analogue market, granting a partial license instead of a blanket license almost always increases the total costs because collecting societies would have to administer and monitor whether the rights used fall within the license. The CMR Directive tries to regulate the power of collecting societies by requiring that licensing terms shall be based on objective and non-discriminatory criteria.[298] After the implementation of the directive, collecting societies do not have a duty to license users. The directive thus does not significantly alter the market power of collecting society towards users with regard to refusal to license. Regulators could thus consider to limit the market power further by introducing a duty to license users, but it is appropriate that collecting societies need a legitimate reason to refuse to license, and that licensing terms are be based on objective and non-discriminatory criteria.

To limit inefficiencies arising from market power, prices of licenses should be at an efficient level: on the one hand, prices should not be so high that they are excessive and allow inefficiencies to exist. On the other hand, prices should not be so low that collecting societies cannot properly function and value of copyrights erodes.

Prices are excessive and caught by article 102 TFEU when they are appreciable higher than those charged in other Member States or disproportionate to the revenue of the user originating from the use of the work if these prices are not justified. The CMR Directive establishes that the tariff for exclusive rights and rights to remuneration needs to be reasonable in relation to the economic value of the use of rights in trade, as well as in relation to the economic value of the service provided by the collecting society.[299] The directive does not indicate which method to use to measure whether tariffs are reasonable. It is thus up to case law which method to use to examine whether collecting societies apply unfair prices. The CJEU found it an appropriate method to compare rates with those applicable in neighbouring States as well as with those applicable in other Member States, adjusted in accordance with the PPP index, provided that the reference

[298] Article 16(2) CMR Directive
[299] Ibid.

Member States have been selected in accordance with objective, appropriate and verifiable criteria and that the comparisons are made on a consistent basis.[300] However, we saw in chapter 2 that it is inaccurate to measure inefficiency by comparing rates with other member states, because this method has many shortcomings and does not capture the possibility that all collecting societies charge excessive prices. It is therefore appropriate if the CMR directive indicates one of the methods brought forward in chapter 2 to measure efficiency.

The CMR Directive regulates collecting societies by increasing transparency and ensuring involvement of members in governance. The directive can be improved because collecting societies should be more transparent towards non-members, but in general, increased transparency and involvement of members in governance is appropriate because it limits anti-competitive effects.

Next to that, the CMR Directive indicates that management fees should not exceed justified and documented costs. Therefore, collecting societies cannot pursue profit. If management fees do not exceed justified and documented costs, collecting societies are operating efficient on the market for members. The provisions of the CMR Directive regarding justified and documented costs are thus appropriate.

Overall, the CMR Directive is an improvement to no specific regulation at EU level, but it contains too many weaknesses to be an appropriate legal framework to regulate anti-competitive effects of collecting society.

Some EU Member States require collecting societies to be authorized by a public authority, which is an obstruction to the internal market since it obstructs the freedom of establishment and the freedom to provide services.[301] An authorisation scheme is only allowed if the conditions listed in article 9 Services Directive are satisfied.[302] This is likely not the case for most authorization schemes, because it is questionable if an authorisation scheme is the least restrictive measure available to a Member State to protect intellectual property and its cultural policy.

Article 16 of the Services Directive prohibits that Member States put requirements on the freedom to provide services on their territory. However, if Member

[300] Case AKKA/LAA (n 241) para 31 and para 51
[301] Riis, (n 5) 490
[302] Services Directive (n 147) 4(6) and 9(1)

States are not allowed to put any requirements or restrictions on collecting societies wanting to enter the domestic market, it creates a need for regulation at EU level.

The CMR Directive states that Member States shall ensure that the competent authorities designated for that purpose have the power to impose appropriate sanctions or to take appropriate measures where the provisions of national law adopted in implementation of this Directive have not been complied with.[303] It is not clear which national authority should have the power to impose appropriate administrative sanctions and measures, where the provisions of national law have not been complied with.[304] Following article 16 Services Directive, the national authority in which the collecting society is established can impose sanctions and not the authority of the member state where the collecting society offers services, since member states are not allowed to put requirement or restrictions on the freedom to provide services on their territory.

However, article 17(11) of the Services Directive provides for an exception to article 16 for the collective management of copyrights and neighbouring rights.[305] Since the article establishes derogation for copyrights as such, it is uncertain whether this derogation also covers the management of such rights. If yes, national authorities would be allowed to put requirements on services provided by foreign collecting societies. The CMR Directive is inconclusive whether the article 17(11) Services Directive applies to the management of rights.

National authorities should be allowed to put requirements on services provided by foreign collecting societies, because otherwise, licenses granted under foreign law would not be subject to control by the domestic authority, which creates a risk of a regulatory vacuum.[306] Next to that, collecting societies established in the member state with the least control may offer services over the whole EU territory, which leads to forum shopping. Therefore, it is appropriate for the CMR Directive to indicate that article 17(11) Services Directive applies to collective management of rights.

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303 article 36(3) CMR Directive
304 article 36(3) CMR Directive; Drexl, Nérisson, Trumpke and Hilty (n 69) page 16 para 19
305 Services Directive (n 147) 17(11)
306 Ibid.

Furthermore, for the internal market of collective management of copyrights to properly function, the Commission should also harmonize copyrights law itself. Since copyright protection varies significantly between member states, collecting societies are not competing on a level playing field.[307] The directive has no regard for the co-existence of different traditions of collective rights management in continental countries and the Anglo-American world, which causes legal uncertainty.[308] Enforcing the policy to establish a one-stop-shop for commercial users to license copyrights for cross-border online use, without harmonizing copyrights itself, results in unintended pressure on the system of copyrights protection.[309]

Therefore, we can say that the CMR Directive elaborates a legal framework for collecting societies at EU level, but it needs further improvement to provide for an appropriate legal framework.

[307] Schroff and Street (n 4) 1310- 1311
[308] Drexl, Nérisson, Trumpke and Hilty (n 69) page 8 para 12
[309] Ibid. 1311

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