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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 16.07.2008
C(2008) 3435 final

COMMISSION DECISION

Of

16.07.2008

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

(Case COMP/C2/38.698 – CISAC)

(Only the Spanish, Czech, Danish, German, Estonian, Greek, English, French, Italian,
Latvian, Dutch, Polish, Slovak and Slovenian texts are authentic)

(Text with EEA relevance)

1.	<i>INTRODUCTION</i>	5
2.	<i>THE PARTIES</i>	5
2.1.	The complainants	5
2.2.	The parties against whom the complaint is made	6
	CISAC	6
3.	<i>REGULATORY CONTEXT</i>	7
4.	<i>THE SUBJECT MATTER OF THE PRESENT DECISION</i>	8
4.1.	The CISAC model contract	8
4.2.	The reciprocal representation agreements between the EEA CISAC members	9
4.3.	The relevant clauses of the CISAC model contract	9
4.3.1.	The membership clauses	9
4.3.2.	The territorial clauses	10
4.4.	Application of the relevant clauses of the CISAC Model Contract	11
4.4.1.	Changes to the CISAC model contract	11
4.4.2.	Implementation of the CISAC model contract in reciprocal representation agreements between EEA CISAC members	12
5.	<i>THE RELEVANT MARKETS</i>	16
5.1.	Structure of the market	16
5.1.1.	The copyright held by right holders	16
5.1.2.	How do collecting societies obtain the rights they licence to commercial users? 17	
5.1.3.	The licensing of copyright.....	17
5.1.4.	Monitoring of the use of the licence, auditing of commercial users' accounts and enforcement vis-à-vis the licensee.....	17
5.2.	Relevant product markets.....	18
5.2.1.	The copyright administration services for public performance rights	18
5.2.2.	The licensing of public performance rights for satellite, cable and internet transmissions (the licensing market)	19
5.3.	Relevant geographic market.....	20
5.3.1.	The geographic scope of the market for the provision of copyright administration services to right holders	20
5.3.2.	The geographic scope of the market for the provision of copyright administration services to other collecting societies regarding public performance rights 21	
5.3.3.	The market for the licensing of public performance rights for satellite, cable and internet broadcasting to commercial users	21
6.	<i>PROCEDURE</i>	22
6.1.	The Statement of Objections	22
6.2.	The Oral Hearing.....	22
6.3.	Further requests for information	22
6.4.	Notice published pursuant to Article 27(4) of Regulation (EC) No 1/2003	23
7.	<i>ARTICLE 81(1) OF THE TREATY AND 53(1) OF THE EEA AGREEMENT</i>	23
7.1.	Relationship between the Treaty and the EEA Agreement – Jurisdiction	27
7.2.	Agreements between undertakings and a decision of an association of undertakings 27	
7.2.1.	Collecting societies are undertakings.....	27
7.2.2.	CISAC is an association of undertakings.....	28
7.2.3.	Reciprocal representation agreements are agreements between undertakings.....	28
7.2.4.	The CISAC Model Contract is a decision of an association of undertakings	28
7.3.	Legal and policy context	29
7.3.1.	Article 151(4) of the Treaty	29

7.3.2.	The effect of local regulations.....	31
7.3.3.	The extended licensing system.....	32
7.3.4.	The Commission Recommendation on rights management in the online environment.....	32
7.3.5.	The affected forms of competition.....	34
7.3.6.	The comfort letter sent to PRS in 1999.....	35
7.4.	Membership restrictions.....	36
7.5.	The exclusive representation.....	40
7.5.1.	General observations.....	40
7.5.2.	Article 1 of the CISAC model contract: the exclusivity clause.....	41
7.5.3.	Article 6(II) of the CISAC model contract.....	42
7.6.	The territorial delineation of the authority to licence.....	44
7.6.1.	The parallel territorial delineation constitutes a concerted practice.....	45
7.6.1.1.	Territorial restrictions are not explained by the territorial nature of copyright	46
7.6.1.2.	In the context of satellite transmission, the behaviour of the 24 EEA CISAC members cannot be justified by legislative provisions and the Sydney Agreement is not an appropriate answer to the objections.....	47
7.6.1.3.	The practice cannot be said to be the outcome of individual market reaction	49
7.6.1.4.	The need for local presence does not explain the systematic delineation of the territory as the territory of the country where the collecting society is established...	50
7.6.2.	The concerted practice is restrictive of competition.....	57
7.6.2.1.	Territorial delineation and exclusivity.....	57
7.6.2.2.	Is the concerted practice objectively necessary for ensuring that EEA CISAC members grant each other reciprocal mandates?.....	59
7.6.3.	Conclusion.....	62
7.7.	Effect on trade between Member States and between Contracting Parties to the EEA Agreement.....	63
8.	<i>ARTICLE 81(3) OF THE TREATY AND ARTICLE 53(3) OF THE EEA AGREEMENT</i>	64
8.1.	Overview.....	64
8.2.	Contribution to improving the production or distribution of goods or the promotion of technical or economic progress.....	65
8.3.	The indispensability of restrictions.....	66
8.4.	Allowing consumers a fair share of the resulting benefit.....	67
8.5.	No elimination of competition.....	69
8.6.	Conclusion on Article 81(3) of the Treaty and on Article 53(3) of the EEA Agreement.....	69
9.	<i>ARTICLE 86(2) OF THE TREATY</i>	70
10.	<i>REMEDIES</i>	71
10.1.	Practices infringing Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.....	71
10.2.	Article 7(1) of Regulation (EC) No 1/2003.....	72

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(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty¹, and in particular Articles 7(1) thereof,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Articles 11 and 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty².

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions³

Having regard to the final report of the Hearing Officer in this case⁴,

¹ OJ L 1, 4.1.2003, p. 1. Regulation as last amended by Regulation (EC) No 1419/2006 (OJ L 269, 28.9.2006, p. 1).

² OJ L 123, 27.4.2004, p. 18. Regulation as amended by Regulation (EC) No 1792/2006 (OJ L 362, 20.12.2006, p. 1).

³ OJ ...

⁴ OJ...

WHEREAS:

1. INTRODUCTION

1. This Decision concerns the conditions of management and licensing of authors' public performance rights of musical works by collecting societies. It is addressed to authors' collecting societies established in the EEA which are members of the International Confederation of Societies of Authors and Composers ("CISAC") and which are collectively referred to as the "EEA CISAC members".
2. CISAC advocates the use of a model contract for reciprocal representation agreements between its members for the management of public performance rights. This model contract covers all exploitation of musical works which require a public performance right licence. It is reflected to a very large extent in the bilateral reciprocal representation agreements between the EEA CISAC members. The following restrictions are at issue: clauses which restrict the right holders' ability to contract freely with the collecting societies of their choice (the "membership restrictions") and clauses and concerted practices which ensure that each collecting society will, in the territory in which it is established, enjoy absolute territorial protection from other collecting societies in granting licences to commercial users (the "territorial restrictions"). On the basis of the CISAC model contract, the EEA CISAC members conclude reciprocal representation agreements with each other.
3. The investigation concerning the CISAC model contract and the reciprocal representation agreements between the EEA CISAC members managing public performance rights has its origin in two complaints: a complaint lodged on 30 November 2000 by the RTL Group ("RTL") against GEMA which refused to grant RTL a Community-wide licence over the rights it administers for its own members as well as for the members of other collecting societies on the basis of reciprocal representation agreements for its music broadcasting activities, and a complaint lodged on 4 April 2003 by Music Choice Europe plc ("Music Choice") against CISAC concerning the CISAC model contract described in Section 4.1.

2. THE PARTIES

2.1. The complainants

Music Choice

4. Music Choice is a digital and interactive audio broadcaster that offers music channels on a multi-platform basis throughout the Community. Music Choice operates on a buyer-to-buyer-to-customer model, that is to say, it sells its programming – bundled into basic or premium subscription packages – to distributors who then retail it to end users. Music Choice provides a web-
-

based radio and a television service where users can watch a stream of music videos or listen to music channels. The content which Music Choice offers to distributors is already copyright-cleared by Music Choice.

RTL

5. RTL, based in Luxembourg, is a leading broadcasting group and one of the largest audiovisual content production organisations in the EEA.

2.2. The parties against whom the complaint is made

CISAC

6. CISAC represents 219 member societies in 115 countries⁵. CISAC is a non-governmental, non-profit making organisation registered under French law and has legal personality. Its statutes were amended at the general assembly which took place in Seoul, South Korea, in October 2004⁶. One of the major objectives of CISAC is to promote reciprocal representation among collecting societies by means of model contracts.

The EEA CISAC members

7. The EEA CISAC members manage authors' (lyricists' and composers') rights, especially their public performance rights. On behalf of their members (authors and publishers) they grant exploitation licences to commercial users.
8. The EEA CISAC members are : Ελληνική Εταιρεία Προστασίας της Πνευματικής Ιδιοκτησίας (AEPI- Greece), Autortiesību un komunikācijas konsultāciju agentūra/Latvijas Autoru apvienība (AKKA/LAA - Latvia), Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, reg.Gen.m.b.H (AKM - Austria), Magyar Szerzői Jogvédő Iroda Egyesület (ARTISJUS - Hungary), Vereniging Buma (BUMA - Netherlands), Eesti Autorite Ühing (EAÜ - Estonia), Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA - Germany), the Irish Music Rights Organisation Limited – Eagrais um Chearta Cheolta Teoranta (IMRO - Ireland), Komponistrettigheder i Danmark (KODA - Denmark), Lietuvos autorių teisių gynimo asociacijos agentūra (LATGA-A - Lithuania), Performing Right Society Limited (PRS - United Kingdom), Ochranný svaz autorský pro práva k dílům hudebním, o.s. (OSA - Czech Republic), Société Belge des Auteurs, Compositeurs et Editeurs Scrl / Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM - Belgium), Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM - France), Združenje skladateljev, avtorjev in založnikov za zaščito avtorskih pravic Slovenije (SAZAS - Slovenia), Sociedad General de Autores y Editores (SGAE - Spain), Societa Italiana degli Autori ed Editori (SIAE - Italy), Slovenský ochranný Zväz Autorský pre práva k

⁵ See CISAC website: www.cisac.org. The total amount of royalties collected by CISAC's member collecting societies, on their own national collection territories, amounted in 2005 to more than EUR 6,7 billion.

⁶ Under Article 9(4) of the current version of the statutes of CISAC, the general assembly takes place every year.

hudobným dielam (SOZA - Slovakia), Sociedade Portuguesa de Autores (SPA - Portugal), Samband Tónskalda og Eigenda Flutningsréttar (STEF - Iceland), Svenska Tonsättares Internationella Musikbyrå (STIM - Sweden), Säveltäjain Tekijänoikeustoimisto teosto r.y. (TEOSTO - Finland), the Norwegian Performing Right Society (TONO - Norway), and Stowarzyszenie Autorów ZAiKS (ZAIKS - Poland).⁷

3. REGULATORY CONTEXT

9. The legal framework in which the CISAC model contract and the bilateral reciprocal representation agreements operate is composed of national laws regulating collective rights management and Community legislation. At Community level, the protection of copyright for the exploitation of music rights through the internet, cable and satellite is laid down in a number of Directives. Of particular relevance for the exploitation of copyright through the internet is Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society⁸, the so called “EU Copyright Directive”. That Directive contains a number of provisions aimed at implementing the 1996 World Intellectual Property Organisation (WIPO) Copyright Treaty within Member States⁹, relating to reproduction rights, rights of communication to the public and rights of making available to the public, and distributions rights.¹⁰
10. Council Directive 93/83/EEC of 27 September 1993 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission¹¹ establishes a legal framework for the legitimate trans-border exploitation of broadcast services. Article 1 of that Directive harmonises the definition of communication to the public by satellite. Article 1(2)(b) provides: “(b) The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth”. As a consequence of that definition, the applicable law is the law of the Member State where transmission of the signal is initiated. Authors have an exclusive right to authorise this communication of their copyrighted works by satellite (Article 2 of Directive 93/83/EEC). Concerning cable retransmission, Directive 93/83/EEC provides: "rights to grant or refuse authorization to a cable

⁷ The collecting societies of Bulgaria and Romania are not parties to the procedure in so far as their respective countries were not part of the EEA/Community when the procedure started.

⁸ OJ L 167, 22.6.2001, p. 10.

⁹ See Recital 15 of Directive 2001/29/EC.

¹⁰ See Articles 2, 3 and 4 of Directive 2001/29/EC.

¹¹ OJ L 248, 6.10.1993, p. 15.

operator for a cable retransmission may be exercised only through a collecting society." (Article 9 of the Directive).

11. Lastly, Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights¹² is also an important piece of Community legislation and demonstrates that the fight against piracy is of major concern to Community institutions. In that respect, it must be emphasised that this case deals only with the legal exploitation of copyrighted material, that is to say, practices which restrict the ability of collecting societies to grant licences to certain users or with a wider scope. As explained in Recitals 173 to 181 this case does not prevent collecting societies from monitoring the market in order to spot unauthorised use of copyright works, or from taking enforcement measures against such behaviour.

4. THE SUBJECT MATTER OF THE PRESENT DECISION

4.1. The CISAC model contract

12. In order to grant licences and collect royalties from commercial users abroad, the collecting societies co-operate worldwide on the basis of so-called "reciprocal representation agreements". A reciprocal representation agreement is a contract between two collecting societies whereby the societies give each other the right to grant licences for any public performance of musical works of their respective members¹³.
13. The CISAC model contract is a model for reciprocal representation agreements. It was approved for the first time at the CISAC general assembly in 1936¹⁴. The CISAC model contract serves as a non-mandatory model¹⁵ for reciprocal representation agreements between CISAC's members, especially for the licensing of public performance rights¹⁶. The CISAC model contract

¹² OJ L 157, 30.4.2004, p. 45; corrected version (OJ L 195, 2.6.2004, p. 16).

¹³ Case 395/87 *Ministère Public v. Jean-Louis Tournier* [1989] ECR 2521, paragraph 17.

¹⁴ The CISAC model contract is drafted and proposed by the executive board of CISAC and is adopted by its general assembly. Over the years, the model contract has been subject to a number of revisions and amendments. The most significant modifications relate to the removal of the exclusivity clause in May 1996 and the removal of the membership clause in June 2004. When not otherwise specified, the CISAC model contract refers to the 30.8.2005 version.

¹⁵ Under Article 8 of the statutes of CISAC, the decisions taken by the different bodies of CISAC (executive board, general assembly, director-general, internal committees) are not binding on the members of CISAC but constitute recommendations.

¹⁶ "Public" performances are defined in Article 1(III) of the CISAC model contract as consisting of "all sounds and performances rendered audible to the public in any place whatever within the territories in which each of the contracting Societies operates, by any means and in any way whatever, whether the said means be already known and put to use or whether hereafter discovered and put to use during the period when this contract is in force. "Public performance" includes in particular performances provided by live means, instrumental or vocal; by mechanical means such as projection (sound film), of diffusion and transmission, etc...) as well as by any process of wireless reception (radio and television receiving apparatus, telephonic reception, etc... and similar means and devices, etc...)"

applies to all categories of exploitations of musical works requiring a public performance right licence.

4.2. The reciprocal representation agreements between the EEA CISAC members

14. In the EEA, each collecting society has signed a reciprocal representation agreement based on the CISAC model contract with all other EEA CISAC members. The CISAC model contract and the bilateral reciprocal representation agreements contained, or contain, clauses concerning the membership of right holders. As regards the entitlement to grant licences to users, the result of the 'web' of bilateral reciprocal representation agreements is that each collecting society is entitled to license not only the repertoire of their own members but also the repertoire of all associated collecting societies (this complete repertoire is hereinafter referred to as the "world repertoire" even though some collecting societies would occasionally not participate in the system).
15. Under that system, each collecting society collects, at the same time, royalties due as a result of exploitation of the rights in its own country, not only for its own members, but also for the authors and publishers abroad who are members of other collecting societies with which it has concluded bilateral representation agreements.
16. Each collecting society has, in principle, the right to license the repertoire of its own members for exploitation outside its domestic territory, and even on a worldwide basis. However, on the basis of the reciprocal representation agreements, each collecting society's ability to define the scope of such mono-repertoire licence may be restricted, and in fact such licences are rarely granted.
17. This also applies to exploitation using new technologies, such as for internet and cable exploitation. For satellite retransmission, collecting societies may grant a licence covering the footprint of the satellite, but only the collecting society based in the country of up link is mandated to grant the licence¹⁷.

4.3. The relevant clauses of the CISAC model contract

4.3.1. The membership clauses

18. Article 11(II) of the CISAC model contract provided until June 2004¹⁸ 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.”

¹⁷ See Section 7.6.1.2. of this Decision.

¹⁸ See Section 4.4.1 of this Decision.

19. In April 1990, the CISAC executive board decided to add a second sentence to Article 11(II) which reads as follows:

"Any refusal to consent to such acceptance by the other Society must be duly motivated. In the absence of reply within three months, following a request sent by recorded delivery letter, it shall be presumed that agreement has been given."

20. According to the information provided by CISAC, this new sentence was "annexed to the CISAC Model Contract"¹⁹. CISAC has not clarified whether this amendment was endorsed by the general assembly²⁰.
21. Collecting societies which implement Article 11(II) in their bilateral reciprocal representation agreements cannot, therefore, accept members of other collecting societies or right holders having the nationality of another collecting society as a member of its society, without the consent of the latter.

4.3.2. *The territorial clauses*

22. Article 1(I) of the CISAC model contract stated until May 1996²¹ that:

"By virtue of the present contract, the SODIX confers on the SODAY the exclusive right, in the territories in which the latter Society operates (as they are defined and delimited in Article 6(1) hereafter), to grant the necessary authorisations for all public performances (as defined in paragraph III of this Article) of musical works, with or without lyrics, which are protected under the terms of national laws, bilateral treaties and multilateral international conventions relating to the author's right (copyright, intellectual property, etc...) now in existence or which may come into existence and enter into effect while the present contract is in force. The exclusive right referred to in the preceding paragraph is conferred insofar as the public performance right in the works concerned has been, or shall be, during the period when the present contract is in force, assigned, transferred or granted by whatever means, for the purpose of its administration, to the SODIX by its members, in accordance with its Articles of Association and Rules the said works collectively constituting "the repertoire of the SODIX".²²

23. Article 1(II) of the CISAC model contract stated until May 1996²³ that:

¹⁹ See paragraph 95 of CISAC's Reply to the Statement of Objections.

²⁰ In the CISAC Model Contract which was provided to the Commission by CISAC on 29.11. 2004, the new sentence was not integrated in the text of the agreement or referred to in a footnote in the agreement, but was only contained in the last page of the annexes to the agreement. In its notification of 3 February 1994, PRS attached a CISAC model contract, which, however, does not contain this new sentence, see annex 2 of CISAC's non-confidential Reply to the Statement of Objections.

²¹ See Section 4.4.1 of this Decision.

²² "SODIX" and "SODAY" refer to the parties to the reciprocal representation agreement in the CISAC model contract and are defined as *the* "society collecting public performance royalties, or public performance rights department of a unitary society".

²³ See Section 4.4 1of this Decision.

“Reciprocally, by virtue of the present contract, the SODAY confers on the SODIX the exclusive right, in the territories in which this latter Society operates (as these territories are defined and delimited in Article 6(I) hereafter) to grant the necessary authorisations for all public performances (as defined in paragraph III of this Article) of musical works, with or without lyrics, which are protected under the terms of national laws, bilateral treaties and multilateral international conventions relating to the author’s right (copyright, intellectual property etc...) now in existence or which may come into existence and enter into effect while the present contract is in force. The exclusive right referred to in the preceding paragraph is conferred insofar as the public performance right in the works concerned has been, or shall be, during the period when the present contract is in force, assigned, transferred or granted by whatever means, for the purpose of its administration, to the SODAY by its members, in accordance with its Articles of Association and Rules, the said works collectively constituting “the repertoire of the SODAY”.

24. Article 6(I) of the CISAC model contract refers to the territories in which the respective collecting societies operate:

"The territories in which the SODIX operates are as follows:

The territories in which the SODAY operates are as follows:"

25. Article 6(II) of the CISAC model contract 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.”

26. The interaction between Articles 1(I), 1(II), 6(I) and 6(II) of the CISAC model contract may be described as follows: under Article 1(I), a collecting society authorises another collecting society to licence and administer its repertoire in the territory as defined in Article 6(I). The CISAC model contract leaves the definition of the territories blank. Each collecting society has to specify in its reciprocal representation agreement the scope of its territory. Under Article 6(II), the collecting society which has granted the authorisation refrains from “any intervention within the territory of the other collecting society”, as defined by Article 6(I). In each reciprocal representation agreement signed by two collecting societies, this reciprocal system is implemented.

4.4. Application of the relevant clauses of the CISAC Model Contract

4.4.1. Changes to the CISAC model contract

Article 11(II) of the CISAC model contract (the membership clause)

27. In response to a Commission request for information of 30 September 2004, CISAC explained in a letter of 6 October 2004 that CISAC’s Legal Committee proposed the deletion of Article 11(II) at its meeting of 3 June 2004. However, in response to another Commission request of 11 November

2004, CISAC sent as an annex to its answer (dated of 29 November 2004), the latest version of the CISAC model contract. That version still contains Article 11(II) but CISAC indicated that it was in the process of incorporating the latest amendments into its model contract. On 10 April 2006, CISAC replied to the Statement of Objections. CISAC attached to its Reply the 30 August 2005 version of its model contract. Footnote 42 of this model contract indicates that Article 11(II) was deleted in June 2004. Accordingly, it must be concluded that Article 11(II) remained part of the CISAC model contract until 3 June 2004.

Articles 1(I) and 1(II) of the CISAC model contract

28. Since 1996, the CISAC model contract applicable to EEA CISAC members no longer contains the exclusivity clauses in Articles 1(I) and 1(II)²⁴. Indeed, CISAC demonstrated in its Reply to the Statement of Objections that its Legal Committee recommended in May 1996 not to propose the exclusivity to EEA CISAC members. This recommendation was adopted by the general assembly of CISAC on 18 and 19 September 1996²⁵.

Article 6 (I) and 6(II) of the CISAC model contract

29. To date, the territorial clauses laid down in Article 6(I) and 6(II) continue to be part of the CISAC model contract.

4.4.2. *Implementation of the CISAC model contract in reciprocal representation agreements between EEA CISAC members*

Implementation of Article 11(II) of the CISAC model contract (the membership clause)

30. The membership clause remains present in a significant number of bilateral reciprocal representation agreements and it has structured the relationship and the behaviour of EEA CISAC members for decades. The Commission's investigation shows that 23 of the Addressees of the Statement of Objections (all but PRS) have indicated that this model clause is present in a significant number of their bilateral reciprocal representation agreements²⁶. Some of these EEA CISAC members have expressly indicated that they effectively apply this clause: BUMA, OSA, SIAE, SPA and ZAIKS. IMRO has indicated in its reply to a request for information sent in March 2005 that it "seeks the consent of an affiliate (i.e. the other society) if an applicant is already a member of that society". Some of the other EEA CISAC members claimed in their Replies to the Statement of Objections that they do not apply such a

²⁴ See footnote 1 of the current CISAC model contract which states that any exclusivity in reciprocal representation agreements between its EEA members "is not possible".

²⁵ See page 25 and annex 5 of CISAC's Reply to the Statement of Objections.

²⁶ See the answers of the EEA collecting societies to the request for information sent on 11.3.2005.

clause despite the fact that it is present in the agreements, but no evidence has been put forward in order to demonstrate that assertion²⁷.

31. Most of the bilateral reciprocal representation agreements submitted to the Commission contain only the first sentence of Article 11(II), but not the second sentence which was "annexed" to the CISAC model contract.
32. Most of the EEA CISAC members have indicated that they have modified or wanted to modify their reciprocal representation agreements in order to remove the membership clause and have accordingly sent copies to the Commission of their correspondence with the other EEA CISAC members. This is the case for AKM²⁸, ARTISJUS, BUMA, GEMA, KODA, OSA, SACEM, SAZAS, SIAE, SGAE, SOZA, STIM and TONO. However, some of the documents sent by these collecting societies to the Commission were only offers to modify the agreements, which were not countersigned by the other collecting societies. KODA only sent the Commission a copy of an amended version of its reciprocal representation agreement which was, according to KODA, proposed to the other parties.²⁹
33. PRS replied that only one of its reciprocal representation agreements provided for that clause and that it has been recently modified in order to eliminate the membership restriction³⁰. However, it appears from the

²⁷ These collecting societies are: AEPI, AKKA-LAA, ARTISJUS, EAU, GEMA, PRS, SAZAS, SGAE, SOZA, STIM and TONO.

²⁸ In addition, AKM alleges that its bilateral reciprocal representation agreements no longer contain the membership clause because they are permanently adapted to the decisions of CISAC, see pages 8 f. and 27 of AKM's non-confidential Reply to the Statement of Objections. AKM refers to Article 12 of the CISAC model contract which is allegedly contained in all of its reciprocal representation agreements and which reads as follows: "*The present contract is subject to the provisions of the Statutes and decisions of the International Confederation of Societies of Authors and Composers.*" However, the wording of this clause does not give rise to the automatic amending of the bilateral reciprocal representation agreement to conform with the CISAC model contract. The CISAC model contract contains in Article 12 a clause with the same wording. When discussing the membership clause and its use by collecting societies in the non-confidential version of its Reply to the Statement of Objections (paragraph 99 ff.), CISAC does not mention Article 12 of the CISAC model contract. On the contrary, it may be concluded from CISAC's description of the function of the CISAC model contract (paragraph 80 ff. of the non-confidential version of its Reply to the Statement of Objections) that Article 12 is not meant by CISAC to bring about the automatic amendment of bilateral reciprocal representation agreements so as to conform to the CISAC model contract. AKM itself does not seem to be of this opinion, because after 3 June 2004 – when CISAC had decided to delete the membership clause in the CISAC model contract – AKM agreed with some collecting societies to remove the membership clause from the bilateral reciprocal representation agreements without ever making the point that, in view of Article 12, the bilateral reciprocal representation agreement would no longer contain the membership clause.

²⁹ STIM has provided evidence in their Reply to the Statement of Objections that the membership clause was deleted from its reciprocal representation agreements with most of the collecting societies in March/April 2006. In February 2008, STIM wrote to the Commission to explain that it had unilaterally 'repudiated' the restrictive membership restrictions with the remaining of the collecting societies.

³⁰ On 18 April 2005, PRS replied to a request for information sent on 11 March 2005 concerning the implementation of the CISAC model contract by collecting societies. In its Reply, PRS indicated that it does not apply the membership restrictions: "*The bilateral agreements that PRS has entered into with other EEA collecting societies do not contain this Article. There is one exception and that is the agreement PRS has concluded with the Austrian collecting society AKM. The continued presence of the*

Commission's file that PRS has undoubtedly applied the membership restrictions: in an exchange of emails of 28 September 2004 with a Hungarian right holder, wishing to join PRS, an official of PRS wrote: "Dear Mr [...], Thank you for your recent application for membership of PRS. As you are a Hungarian national, we are required to seek permission from ARTISJUS before admitting you to membership of PRS. This is normally a formality. However, as you will see from the emails below, ARTISJUS claim that you are actually a member of ARTISJUS. This is not reflected in the internationally recognised SUISA/IPI file. If this is the case, you will have to resign from ARTISJUS before we can admit you to membership of PRS. ARTISJUS have confirmed that they do not have a problem with this, but you will need to contact them directly"³¹.

34. In addition, in a letter sent to ARTISJUS on 14 September 2004, PRS wrote concerning the application of this Hungarian right holder that: "PRS have received an application for writer membership from [...]. He is a Hungarian national who was born in Budapest on... and is now a resident in the UK. Could you please confirm whether ARTISJUS have any objection to this application...?". These exchanges of correspondence are a clear application of the membership restrictions. PRS was requested to comment on these documents. It argued that it had sent the letter of 14 September 2004 to ARTISJUS because it did not know whether this right holder was a member of ARTISJUS³². This explanation does not appear to be consistent with either the content of the letter sent to ARTISJUS or with the exchange of e-mails between PRS and the right holder involved³³.
35. Although at least one EEA CISAC member (STIM) claims to have unilaterally brought to an end the membership clause in all its reciprocal representation agreements where it remained, taking into account that this has been done belatedly (well after the Statement of Objections) and the legal scope of such a purely unilateral removal of the membership clause is unclear, it cannot be safely concluded that any of the 24 EEA CISAC members have actually and completely removed their membership clause from its reciprocal representation agreements.

above clause in that agreement is an oversight and PRS will take the steps to remove it. In any event it is not applied in practice". See pages 1 and 2 of PRS' non-confidential Reply to the Statement of Objections dated 12 of January 2006. On 7 November 2005, PRS wrote to the Commission to inform it that the membership restrictions contained in the reciprocal representation agreement with AKM had been removed on 1 of August 2005 and provided the Commission with a copy of the amendment signed by PRS and AKM.

³¹ E-mail of 28 September 2004 sent by an official of PRS to a Hungarian right holder member of the Hungarian collecting society, ARTISJUS.

³² Reply dated of 2 June 2006 by PRS to the Commission's request for information dated 19 May 2006. See notably page 4 of the non-confidential version of PRS' Reply.

³³ As the Court of First Instance of the European Communities stated in a recent judgment, "...the duration of an infringement must be appraised not by reference to the period during which an agreement is in force, but by reference to the period during which the undertakings concerned adopted conduct prohibited by Article 81 EC..." (Joined cases T-101/05 and T-111/05, BASF AG and UCB SA v Commission of the European Communities, judgment of 12 December 2007, paragraph 187).

Implementation of the exclusivity clauses of Articles 1(I) and 1(II) of the CISAC model contract.

36. The exclusivity referred to in Article 1 of the CISAC model contract is itself reflected in the bilateral reciprocal representation agreements concluded between 17 EEA CISAC members: AKKA/LAA, ARTISJUS, BUMA, EAU, IMRO, KODA LATGA-A, OSA, SAZAS, SGAE, SOZA, SPA, STIM, STEF, TONO, TEOSTO, ZAIKS³⁴. Certain of these 17 collecting societies claim that all of their reciprocal representation agreements contain such exclusivity (AKKA/LAA, EAÜ, LATGA, OSA, SAZAS, SPA, TONO, and ZAIKS). The others claim that the exclusivity is not present in all their reciprocal representation agreements (ARTISJUS, BUMA, KODA, IMRO, SOZA, SGAE, STIM, STEF and TEOSTO). Finally, SGAE claims that, even though the exclusivity clause is present in some of their bilateral reciprocal representation agreements, it is not applied. However, no evidence has been brought to the Commission's attention to confirm that claim.
37. Certain EEA CISAC members have indicated that they have modified or wanted to modify their reciprocal representation agreements in order to remove the exclusivity clause at issue and accordingly forwarded copies to the Commission of their correspondence with the other EEA CISAC members. This is the case for ARTISJUS, BUMA, KODA, OSA, SAZAS, SOZA, SGAE, STIM and TONO. However, some of the documents sent by these collecting societies to the Commission were only offers to modify the agreements, which were not counter signed by the other collecting societies. KODA merely provided a copy to the Commission of an amended model agreement which was, according to KODA, proposed to the other parties.³⁵ Although at least one collecting society (STIM) claims to have unilaterally repudiated the exclusivity clause in all its agreements where it remained, taking into account that this has been done belatedly (well after the Statement of Objections) and the legal scope of such a repudiation is unclear, it cannot be safely concluded that any of the 17 EEA CISAC members mentioned above have actually and completely removed the exclusivity clause from their reciprocal representation agreements.

Implementation of Articles 6(I) and 6(II) of the CISAC model contract

38. All the EEA CISAC members have implemented Article 6(I) of the CISAC model contract in their bilateral reciprocal representation agreements in a way which confines each collecting society's licences to its own domestic territory³⁶. In practice this means that a collecting society always grants

³⁴ See the Replies to the request for information sent on 11 March 2005 to the EEA collecting societies.

³⁵ STIM has provided evidence in their Reply to the Statement of Objections that the exclusivity clause had been deleted from their reciprocal representation agreements with most of the collecting societies in March/April 2006. In February 2008, STIM wrote to the Commission to explain that it had unilaterally repudiated the exclusivity clause with the remaining of the collecting societies.

³⁶ The French collecting society SACEM also covers the territory of Luxembourg which has no "domestic" collecting society. The Alliance MSCP-PRS operates also in Malta where there is no "domestic" collecting society.

licences to both its own repertoire, and to the repertoires of other collecting societies, on a mono-territorial basis.

39. Reciprocal representation agreements concluded by all EEA CISAC members also contain provisions which replicate Article 6(II) of the CISAC model contract.
40. By a letter of 7 November 2005, PRS informed the Commission that it had written to the other EEA CISAC members on 12 October 2005 in order to remove Article 6(II) from the reciprocal representation agreements where this Article was present (contracts between PRS and KODA, TEOSTO, SACEM, GEMA, AEPI, STEF, SIAE, BUMA, TONO, ZAIKS, SPA, SAZAS, STIM and SGAE). PRS submitted amended reciprocal representation agreements in respect of ZAIKS, STEF, TONO and BUMA, to the Commission, wherein those parties agreed to modify their reciprocal representation agreements accordingly. Certain other EEA CISAC members have indicated that they have modified or wanted to modify their reciprocal representation agreements in order to remove the exclusivity clause at issue and accordingly forwarded copies to the Commission of their correspondence with the other EEA CISAC members. This is the case, for example, for AKM, ARTISJUS, BUMA, GEMA, KODA, OSA, SAZAS, SIAE, SGAE, STIM and TONO. However, some of the documents sent by those collecting societies to the Commission were only offers to modify the agreements and were not countersigned by the other collecting societies. KODA merely sent a copy to the Commission of an amended model contract which was, according to KODA, proposed to the other parties. At present, the Commission has no evidence in its possession that any of the EEA CISAC members have actually and completely removed this clause from their reciprocal representation agreements.

5. THE RELEVANT MARKETS

5.1. Structure of the market

5.1.1. The copyright held by right holders

41. Authors hold the copyright on the musical works they have created. A copyright usually entails an exclusive right to authorise or prohibit the exploitation of the protected works. This is notably the case for public performance rights, at issue in this Decision.
42. The licensing of copyright can be ensured by individual or collective management. However, individual management is in many instances not feasible; as either the applicable national law provides for compulsory collective management, sometimes even pursuant to Community law,³⁷ or the market features render any individual management inefficient or impossible. Indeed, for many small or medium-sized right holders, it seems that

³⁷ Certain national laws provide for compulsory collective management for certain rights. At Community level, Article 9 of Directive 93/83/EEC states that: "Member States shall ensure that the right of copyright owners ...to grant or refuse authorisation to a cable operator for a cable retransmission may be exercised only through a collecting society".

individual management does not represent a viable option for the management of public performance rights. It is, therefore, often necessary to have recourse to collective management, and direct management of the rights by the author is wholly exceptional.

5.1.2. How do collecting societies obtain the rights they licence to commercial users?

43. Collecting societies manage copyright on behalf of their members. Collecting societies obtain rights from two sources: either by direct transfer³⁸ from the original right holders or via a reciprocal representation agreement with another collecting society managing the same categories of rights in another EEA country. If a right holder transfers the rights to a collecting society he or she becomes a member of that collecting society. In some cases the transfer of rights to collecting societies is made mandatory. For example, this is the situation for the cable retransmission right whereby Directive 93/83/EEC provides that such a right may be exercised only through a collecting society³⁹. In certain cases, national laws provide that the collecting society may also grant licences of works of right holders who are not members of a collecting society (extended collective management system).
44. As a consequence of the transfer of rights from various right holders, a collecting society has a portfolio of works. This portfolio constitutes the national repertoire of the collecting society. However, the overall repertoire of a collecting society is much broader; it encompasses also the repertoires of other collecting societies which have signed a reciprocal representation agreement with it.

5.1.3. The licensing of copyright

45. A collecting society licences the rights to commercial users. In return, the collecting societies collect and distribute royalties to the right holders. Although the markets for the licensing and administration of public performance rights for satellite, cable and internet use display distinct characteristics⁴⁰, the practices of the collecting societies in terms of licensing, administration and reciprocal representation remain almost identical to the traditional ways of operating in the commercial premises licensing market (such as discos, bars) where local monitoring is necessary.

5.1.4. Monitoring of the use of the licence, auditing of commercial users' accounts and enforcement vis-à-vis the licensee

46. Like other entities licensing intellectual property rights, collecting societies ensure the monitoring of the use of the licensed intellectual property rights, the auditing of the commercial users' accounts and the enforcement of copyright in the case of infringement of the rights.

³⁸ Under certain jurisdictions, right holders have to either transfer their rights to the collecting society or entrust them to the latter. For the purpose of this Decision, the term "transfer" covers both mechanisms.

³⁹ Article 9 of Directive 93/83/EEC.

⁴⁰ See Section 7.6.1.4 as regards the description of the distinguishing features of these markets, notably issues relating to the monitoring, auditing and enforcement of granted licences.

47. It is important to emphasise that this Decision only deals with lawful uses of works. Acts of piracy or use in the absence of an exploitation licence are therefore outside the scope of this Decision. Accordingly, the considerations and assessments in this Decision are valid only within the limits of the usual and normal relationship between collecting societies and commercial users and for specific exploitations described in Section 5.2 concerning the relevant product markets.

5.2. Relevant product markets

48. In its two Sony/BMG Decisions⁴¹ as in the Seagram/Polygram Decision⁴² the Commission found that exploitation on the basis of the different types of rights may lead to the defining of separate product markets for each category of rights, although the precise market definition was left open in that regard. Both demand-side (different characteristics of rights relating to different customer needs) and supply-side considerations (existence of different exploitation systems, application of dissimilar licensing rates) supported that finding.
49. Collective management of copyright covers different activities corresponding to many different relevant product markets which are all affected by the CISAC model contract:
- (a) The provision of copyright administration services to right holders,
 - (b) The provision of copyright administration services to other collecting societies,
 - (c) The licensing of public performance rights for satellite, cable and internet transmissions to commercial users.
50. Due to the fact that the CISAC model contract deals with public performance rights, the product market at issue in this Decision is restricted to such rights.

5.2.1. *The copyright administration services for public performance rights*

- (a) Copyright administration services to authors (the right holders' market)
51. The first relevant product market is the market for the provision of copyright administration services to right holders regarding public performance rights. On the supply side, this market is characterised by collecting societies offering the administration of public performance rights to right holders of copyright protected musical works, who on the demand side wish to engage in a collective copyright management scheme. If a right holder transfers the

⁴¹ Commission Decision of 19.07. 2004 (Case No COMP/M.3333 — SONY/BMG) recitals 25 and 26 (OJ L 62, 9.3.2005, p 30). and Commission Decision of 3.10.2007 (case No COMP/M.3333-SONY/BMG, recital 22 (OJ C 94, 16.4.2008, p.19). A public version in English of the two decisions can found at http://ec.europa.eu/comm/competition/mergers/cases/index/m66.html#m_3333.

⁴² Commission Decision of 21.09.1998 (Case No IV/M.1219 Seagram/Polygram) recital 17, OJ C 309, 9.10.1998. A public version in English of the decision can found at: http://ec.europa.eu/comm/competition/mergers/cases/decisions/m1219_en.pdf.

administration of his or her rights to a collecting society, he or she becomes a member of that collecting society.

(b) Copyright administration services to other collecting societies

52. The second relevant product market is the market for the provision of copyright administration services by one collecting society to another regarding public performance rights. On the supply side, this market is characterised by collecting societies that are willing and capable of administering the public performance rights of other collecting societies.
53. The demand side is characterised by collecting societies seeking to obtain the administration of their repertoire outside the EEA country where they are established. The demand side, therefore, features collecting societies which have been mandated by their members to administer the performance rights associated with their repertoires in territories other than that in which the collecting society is established. The services which the collecting societies provide to each other cover, in particular, the granting of licences for the use of the copyright work, the monitoring and auditing of such use by the licensee, the billing of users, the checking of the actual use of the music by licensees in order to allocate the royalties to different authors, and the subsequent collection of royalties and transferring of collected royalties to the recipient collecting societies. These services also include general monitoring of the market to spot those companies or individuals using music, and therefore needing a licence, and taking enforcement measures, if need be, to ensure that those companies or individuals obtain the necessary licence or otherwise cease unlawful exploitation of the work.

5.2.2. *The licensing of public performance rights for satellite, cable and internet transmissions (the licensing market)*⁴³

54. The third relevant product market is the market for licensing of public performance rights to commercial users for satellite, cable and internet use. This market has specific features which are not present in the other markets covered by the CISAC model contract for public performance rights and the bilateral reciprocal representation agreements (essentially the offline environment). The main differences concern the technical possibility of remote monitoring and of copyright exploitation of public performance rights through the internet, satellite and cable environment beyond national territories. As a consequence, a distinction may be drawn between the markets covered by the preliminary rulings in *Tournier* and *Lucazeau*⁴⁴ (offline environment) and the market at issue in this Decision. The specificities of that market and their consequences are further discussed in Section 5.3.3.
55. With respect to the licensing of public performance rights to commercial users for satellite, cable and internet use, SABAM has argued that a

⁴³ It is understood that for the purposes of this Decision, a “cable retransmission” means a retransmission of a satellite transmission and within the satellite footprint. This Decision does not deal with the question of the liability of the different market players for acquisition of the cable retransmission right.

⁴⁴ Case 395/87 - *Ministère Public v. Jean-Louis Tournier* [1989] ECR 2531 and Joined cases 110/88, 241/88 and 242/88 - *François Lucazeau and others v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others*, [1989] ECR 2811.

distinction should be drawn between multi-territorial licences of the world music repertoire, and mono-territorial (national licences) of the same world music repertoire, which would constitute a different product market. The lack of substitutability between the two products on the demand and supply side would stem from the different territorial scope of the licences that reflect different users and user needs.⁴⁵

56. The existence of two different products is essentially the result of the practices introduced by collecting societies. In a world where territorial restrictions were removed, users would have little incentive to opt for mono-territorial licences and would accordingly request multi-territorial licences. On the demand-side, it can reasonably be argued that a certain degree of substitutability exists between the two products since users of mono-territorial and multi-territorial licences often compete on the same markets for final consumers. A content provider operating in four EEA countries could in theory sign either mono-territorial licences with the four collecting societies located in the countries where it operates, or sign one multi-territorial licence with one collecting society covering part or all of the EEA.
57. Technical and legal distinctions could militate in favour of separate product markets for each of the satellite, cable and internet transmission modes. Cable and satellite television is subject to specific regulatory frameworks and a variety of internet based transmissions display particular features. A number of users will not need a licence which covers all three modes of transmissions. However, in view of the increasing convergence between television and internet services, this might change.

5.3. Relevant geographic market

5.3.1. The geographic scope of the market for the provision of copyright administration services to right holders

58. The geographic scope of the market for the provision of copyright administration services to authors regarding public performance rights is national. Quite apart from factors, such as cultural or linguistic, which may influence this situation, the fact remains that membership restrictions and other measures which restrict the ability of right holders to entrust their rights on a non-exclusive basis, have contributed to this effect for decades, even in cases where such clauses have been disappearing.
59. However in the absence of the membership restrictions, the geographic market could potentially be broader, since authors could switch between collecting societies and transfer their rights to those collecting societies which would provide the best service to them.

⁴⁵ See pages 8 to 10 of SABAM's non-confidential Reply to the Statement of Objections.

5.3.2. *The geographic scope of the market for the provision of copyright administration services to other collecting societies regarding public performance rights*

60. The geographic scope of the market for the provision of copyright administration services to other public performance rights collecting societies has both a national aspect and wider cross-border elements.
61. The collecting societies administer the repertoires of other collecting societies. Under the present bilateral reciprocal representation agreements they are confined to doing so within their own national territory. Every collecting society, therefore, holds under the current network of reciprocal representation agreements, a monopoly over services to be provided within their respective national territories for other collecting societies abroad.
62. Internet and satellite transmission activities are, however, not confined to a single EEA country. Undertakings engaged in such activities therefore demand multi-territorial licences. As a consequence, a collecting society licensing a commercial user to upload audiovisual content on the internet would, in the absence of the restrictions contained in the bilateral representation agreements, be able to grant a multi-territorial licence. Similarly, in the case of satellite transmission and cable retransmission, any collecting society located within the satellite footprint would be able to grant licences covering the footprint of the satellite.

5.3.3. *The market for the licensing of public performance rights for satellite, cable and internet broadcasting to commercial users*

63. When defining the geographic market, the Commission identifies possible obstacles and barriers isolating undertakings in a given area from the competitive pressure of undertakings located outside the area in question⁴⁶. Historically, the Commission has defined relevant markets in the framework of traditional copyright licensing as being national⁴⁷. The need for local monitoring and the economies of scale involved in engaging in such an activity imply that it has not been considered viable, until now, for collecting societies to operate in the territory of another collecting society. In view of the organisation of collecting societies and their current licensing practices, the relevant geographic market can be defined as being national in scope.
64. Those reasons do not, however, necessarily apply outside the traditional off-line world where remote monitoring is possible. Technical and economic barriers preventing collecting societies from entering the markets of other collecting societies have clearly diminished. The potential market is therefore much broader – the geographic market for satellite broadcasting and cable retransmission could be considered to be the entire satellite footprint; for

⁴⁶ Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5) at paragraph 30.

⁴⁷ Commission Decision 71/224/EEC of 2 June 1971 relating to proceedings under Article 86 of the Treaty (IV/26 760-GEMA) (OJ L 134, 20.6.1971, p. 15) at Section II.B. Decision as amended by Decision 72/268/EEC (OJ L 166, 24.7.1972, p. 22); Commission Decision 81/1030/EEC of 29 October 1981 relating to a proceeding under Article 86 of the EEC Treaty (IV/29.839 - GVL) (OJ L 370, 28.12.1981, p. 49) at Recital 45.

internet use, the geographic scope of the market is potentially worldwide, or at least regional in scope.

6. PROCEDURE

65. This case started in November 2000 with the lodging of a complaint by RTL against GEMA. In April 2003, another commercial user, Music Choice – a digital audio broadcaster – also complained against CISAC.

6.1. The Statement of Objections

66. On 31 January 2006, the Commission issued a Statement of Objections to CISAC and to the EEA CISAC members. On the same date, a CD ROM containing the Commission's file was sent to CISAC and to the EEA CISAC members as an attachment to the Statement of Objections. The addressees were granted a two month deadline to reply. LATGA-A, SPA and STEF did not lodge a Reply to the Statement of Objections.

6.2. The Oral Hearing

67. All addressees of the Statement of Objections, with the exception of EAÜ and those who did not reply to the Statement of Objections (namely LATGA-A, SPA and STEF), requested an oral hearing pursuant to Article 12 of Regulation (EC) No 773/2004. SOZA, ARTISJUS and OSA were represented by CISAC legal representatives.

68. The Oral Hearing took place on 14, 15 and 16 June 2006. Twenty-seven undertakings requested to be granted, and obtained, the status of interested third parties in the proceedings. Some of them did not request to be heard in a formal oral hearing.⁴⁸ All other third parties were admitted to the oral hearing.⁴⁹ They were informed about the substance of the case by means of a non-confidential version of the Statement of Objections and were requested to submit comments.

6.3. Further requests for information

69. Requests for information were sent after the issuing of the Statements of Objections. Access to these requests and replies thereto, as well as to comments by third parties in the Statement of Objections, were given to the addressees of the Statement of Objections on 5 July 2006. In addition, between mid-September 2006 and 20 November 2006, the Commission sent a new request for information in order to gather more financial and economic data related to the markets involved. On 18 December 2006, access was given to these requests and the replies thereto.

⁴⁸ British Telecom, Deutsche Telekom, Ericsson, Infospace and the BBC.

⁴⁹ They were: (i) EDIMA, (ii) IFPI, (iii) RTL Group, (iv) Music Choice, (v) Footprint, (vi) IMPALA, (vii) Universal Music International, (viii) Music users, (ix) ICMP, (x) NextRadioTv, (xi) EBU, (xii) ZDF, (xiii) ARD, (xiv) VPRT, (xv) SKAP, (xvi) EICTA, (xvii) ECCA, (xviii) ROAIM, (xix) FFACE, (xx) Vodafone, (xxi) ACT and (xxii) UTECA.

6.4. Notice published pursuant to Article 27(4) of Regulation (EC) No 1/2003

70. CISAC and 18 EEA CISAC members namely AEPI (Greece), AKM (Austria), ARTISJUS (Hungary), BUMA (Netherlands), GEMA (Germany), IMRO (Ireland), LATGA-A (Lithuania), PRS (United Kingdom), SABAM (Belgium), SACEM (France), SGAE (Spain), SIAE (Italy), SPA (Portugal), STEF (Iceland), STIM (Sweden), TEOSTO (Finland), TONO (Norway), SOZA (Slovakia)) offered commitments in March 2007.
71. In short, the commitments were the following: CISAC offered not to recommend the 'membership clause' for insertion into the reciprocal representation agreements between EEA CISAC members and the 18 EEA CISAC members offered to remove it from representation agreements concluded with other EEA CISAC members. In relation to the 'territoriality clauses', CISAC offered not to recommend the granting of exclusive rights between EEA CISAC members, and the 18 EEA CISAC members offered to remove such clauses from the reciprocal representation agreements concluded with other EEA CISAC members. In addition, with regard to 'territorial delineation', the signatory societies undertook to grant multi-repertoire, multi-territorial performing right licences for internet services, satellite services and cable retransmission services to each signatory society that fulfilled certain qualitative criteria.⁵⁰
72. The commitments have been market tested by the publication of a Notice pursuant to Article 27(4) of Regulation 1/2003 on 9 June 2007⁵¹. More than 80 observations were submitted. Market players, that is to say, broadcasters, content providers and certain collecting societies, generally considered that the proposed commitments would not be effective and almost none of the potential licensees would be eligible under the definitions and exceptions listed in the proposed commitments, to obtain a multi-territorial multi-repertoire licence. Additionally, certain EEA CISAC members who had offered the proposed commitments took the opportunity of the market test to criticise them. It must therefore be concluded that the proposed commitments would not give an appropriate answer to the competition concerns raised in the Statement of Objections.
73. A non-confidential version of the comments made by the market players during the market test period was sent to all the addressees of the Statement of Objections.

7. ARTICLE 81(1) OF THE TREATY AND 53(1) OF THE EEA AGREEMENT

74. This Decision concerns:

⁵⁰ See paragraphs 9, 10 and 11 of the Notice published pursuant to Article 27(4) of Council Regulation No 1/2003 in Case COMP/38698- CISAC (OJ C 128, 9.6.2007, p. 12).

⁵¹ OJ C 128, 09.06.2007, p. 12.

- (a) membership restrictions contained in the reciprocal representation agreements which prevent competition between EEA CISAC members for the provision of their services to authors; and
 - (b) territorial restrictions which prevent competition between EEA CISAC members for the licensing of performing rights to commercial users; the territorial restrictions take the form of express exclusivities in the reciprocal representation agreements and a concerted practice on the territorial delineation of the scope of the licence.
75. As regards the membership restrictions of collecting societies, the Commission tackled certain anti-competitive practices vis-à-vis right holders in the 1971 GEMA Decision⁵² and gave clear indications concerning the limitations which competition law imposes on the relationship between authors' collective societies and their members. First, the GEMA Decision precludes collecting societies from engaging in discrimination based on the nationality of right holders (notably as regards the terms of membership or the methods for distributing collected royalties). Second, the GEMA Decision gave some guidance concerning the length and the scope of the contract between collecting societies and right holders: it was made clear in that Decision that collecting societies could not impose contracts that were too long term nor oblige right holders to assign their rights on an exclusive basis and for a compulsory worldwide exploitation. In its judgement of 27 March 1974 in *Belgische Radio en Televisie v SV SABAM and NV Fonior*, the Court of Justice ruled that the conditions imposed by a collecting society on its members could infringe Article 82 of the Treaty if they encroached upon a member's freedom to exercise his copyright beyond that which is necessary 'for the attainment of its object'.⁵³
76. In its judgment in *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v Commission of the European Communities*⁵⁴, the Court of Justice upheld a Commission Decision⁵⁵ which found that GVL, a German collecting society managing certain related rights for performing artists in Germany, had breached Article 82 of the Treaty by refusing to conclude management contracts with right holders who were neither German nationals nor resident in Germany and also by refusing to protect the rights of such artists in Germany. The Court found in particular that the refusal by GVL – which had a de facto dominant position on the market in services relating to the management of secondary exploitation rights vested in performing artists – to conclude management agreements with foreign artists, having no residence in Germany, constituted discrimination on grounds of nationality and had the effect of partitioning the common market, and thereby restricting the freedom to provide services. The Court specified that the restriction on

⁵² Decision 71/224/EEC.

⁵³ Case 127/73 - *Belgische Radio en Televisie v SV SABAM and NV Fonior* [1974] ECR 313, at paragraph 15.

⁵⁴ Case 7/82 - *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v Commission of the European Communities* [1983] ECR 483, paragraphs 38 and 47.

⁵⁵ Decision 81/1030/EEC.

movement was appreciable "since a multitude of foreign holders of rights were prevented from exploiting their rights in Germany".⁵⁶

77. Territorial restrictions between collecting societies were directly addressed by the Court of Justice in the cases *Ministère Public v. Jean-Louis Tournier*⁵⁷ and in *Lucazeau v. Société des Auteurs, Compositeurs et Editeurs de Musique (Sacem) and others*⁵⁸. However, already in *Greenwich Film v. Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and Société des éditions Labrador*, the Court of Justice made clear that "the activities of such associations [the collecting societies] may be conducted in such a way that their effect is to partition the Common Market and thereby restrict the freedom to provide services which constitutes one of the objectives of the Treaty"⁵⁹.
78. In the *Tournier* and *Lucazeau* preliminary rulings, the Court of Justice held that "...the reciprocal representation contracts in question are contracts for services which are not in themselves restrictive of competition...The position might be different if the contracts established exclusive rights whereby copyright-management societies undertook not to allow direct access to their repertoires by users of recorded music established abroad"⁶⁰. In addition, the Court of Justice made clear that "any concerted practice by national copyright management societies of the Member States having as its object or effect the refusal by each society to grant direct access to its repertoire to users established in another Member States"⁶¹ is anti-competitive.
79. The Court of Justice dealt with the reciprocal representation contracts between authors' collecting societies in the specific context of copyright licensing of performance rights for physical premises such as discos, hotels, bars and restaurants. The Court considered that "the mere parallel behaviour may amount to strong evidence of a concerted practice if it leads to conditions of competition which do not correspond to the normal conditions of competition. However, concerted action of this kind cannot be presumed where the parallel behaviour can be accounted for by reasons other than the

⁵⁶ See paragraph 35 of the judgement.

⁵⁷ Case 395/87- *Ministère Public v. Jean-Louis Tournier* [1989] ECR 2521, at paragraph 17.

⁵⁸ Joined cases 110/88, 241/88 and 242/88 - *François Lucazeau and others v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others* [1989] ECR 2811.

⁵⁹ Case 22/79 - *Greenwich Film v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and Société des éditions Labrador* [1979] ECR 3275.

⁶⁰ Judgement of the Court of Justice in Case 395/87 - *Ministère Public v. Jean-Louis Tournier*, at paragraph 20; see also judgement of the Court of Justice in joined cases 110/88, 241/88 and 242/88 - *François Lucazeau and others v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others*, [1989] ECR 2811, at paragraph 14.

⁶¹ Case 395/87 - *Ministère Public v. Jean-Louis Tournier*, paragraph 26, Joined cases 110/88, 241/88 and 242/88 - *François Lucazeau and others v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others* at paragraph 20.

existence of concerted action."⁶² For copyright licensing for physical premises, the Court found that such a reason might be that collecting societies of other Member States would be obliged, in order to license their repertoire outside their own territory, to organise their own management and monitoring system in another country.

80. The present Decision assesses the systematic territorial delineation for copyright licensing of music rights for certain types of exploitation (satellite, cable broadcasting and the internet), in light of the test established in the Tournier and Lucazeau cases and the characteristics of these new forms of exploitation.
81. The Commission has adopted two Decisions concerning the relationship between collecting societies and commercial users, either in a multi-territorial and/or electronic environment; the Simulcasting Decision⁶³ and the Cannes Extension Agreement Decision.⁶⁴
82. In the Cannes Extension Agreement Decision, one of the issues at stake was the price of the multi-territorial licence granted to users (record companies) for mechanical rights. Under the system put in place by authors' collecting societies (with the consent of the publishers), a record company could conclude a single licensing agreement with only one collecting society for the whole of the EEA territory or for part thereof. The record company had to pay all royalties due for the EEA exploitation of the works to the single collecting society in question. This collecting society applied the uniform rate agreed between all collecting societies and any rebate to users was practically impossible. However, the Cannes Extension Agreement Decision imposed binding commitments whereby collecting societies could introduce a mechanism to grant a certain and maximum rebate to record companies which contracted for a multi-territorial mechanical rights licence. The Cannes Extension Agreement allowed therefore for the delivery of multi-territorial licences with the guarantee that right holders revenues will not be jeopardised (due to the fixed and uniform rate), along with a certain degree of price competition (namely, the introduction of the possibility for collecting societies to offer a maximum rebate to record companies which is limited to administrative costs).
83. In the same vein, the Simulcasting Agreement enabled collecting societies managing the rights of record companies to issue multi-territorial licences for

⁶² Case 395/87 - Ministère Public v. Jean-Louis Tournier, paragraph 24, Joined cases 11/0/88, 241/88, 242/88 –François Lucazeau and others v Sociétés des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others, paragraph 18.

⁶³ Commission Decision 2003/300/EC of 8 October 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/C2/38.014- IFPI 'Simulcasting') (OJ L107, 30.4.2003, p. 58).

⁶⁴ Commission Decision 2007/735/EC of 4 October 2006 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/C2/38.681-The Cannes Extension Agreement) (OJ L 296, 15.11.2007, p. 27).

simulcasting⁶⁵. The original notification provided that commercial users could be granted the licence only from the collecting society located in their national territory. The Commission granted an exemption only after collecting societies agreed that commercial users could seek a licence from any collecting society in the EEA. Collecting societies had to split the price of the licence between the administration fees and the price of the protected subject matter. Competition took place on the administration fees and not on the remuneration of the authors themselves, thus ensuring that in this respect right holders' revenues cannot be jeopardised.

7.1. Relationship between the Treaty and the EEA Agreement – Jurisdiction

84. As set out in Section 2.2., CISAC is an association of collecting societies which incorporates a number of members based in the Community and two based in EFTA States which are parties to the EEA Agreement, namely TONO of Norway and STEF of Iceland.
85. Insofar as the decisions adopted by CISAC, bilateral reciprocal representation agreements between collecting societies and concerted practices restrict competition in the common market and affect trade between Member States, Article 81 of the EC Treaty is applicable. Similarly insofar as the decisions adopted by CISAC, bilateral reciprocal representation agreements between collecting societies and concerted practices restrict competition within the territory covered by the EEA Agreement and have an effect on trade between the Community and EFTA States, Article 53 of the EEA Agreement is applicable.
86. In this case, the Commission is the competent authority to apply both Article 81 of the Treaty and Article 53 of the EEA Agreement on the basis of Article 56 of the EEA Agreement as both trade between Member States and between Member States and EFTA States is affected⁶⁶.

7.2. Agreements between undertakings and a decision of an association of undertakings

7.2.1. Collecting societies are undertakings

87. Collecting societies are undertakings within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement. They participate in the commercial provision of services⁶⁷ and are therefore engaged in the exercise of economic activities. On various occasions, the Court of Justice has

⁶⁵ Simulcasting is the simultaneous transmission by radio and television stations via the internet of sound recordings included in their broadcast of radio and television signals. The reciprocal representation agreement is intended to facilitate the grant of internet licences to radio and television broadcasters engaged in simulcasting.

⁶⁶ See Section 7.7.

⁶⁷ See for example, Case 127/73 *Belgische Radio en Televisie v. SV SABAM and NV Fonior*.

considered that EC competition rules apply to the activities of collecting societies⁶⁸.

7.2.2. *CISAC is an association of undertakings*

88. CISAC is an association of collecting societies and therefore an association of undertakings within the meaning of both Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

7.2.3. *Reciprocal representation agreements are agreements between undertakings*

89. The bilateral reciprocal representation agreements concluded between the EEA CISAC members constitute agreements between undertakings within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement⁶⁹.

7.2.4. *The CISAC Model Contract is a decision of an association of undertakings*

90. Both Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement are applicable to associations of undertakings insofar as:

(a) the activities of the association, or of the undertakings belonging to the association, are intended to produce the results which Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement aim to suppress;⁷⁰ and / or

(b) the association intended, and/or did, co-ordinate the conduct of its members on the market⁷¹.

91. CISAC argues that the model contract for reciprocal representation agreements between the collecting societies is non-binding for the EEA CISAC members⁷². CISAC indicates also that "Any CISAC member is free to make use of the model contract...The CISAC model contract has to be so adapted because it is a document which has been designed for the potential use not just in the EEA but for more than 140 societies representing musical works all over the world"⁷³. In order to demonstrate its assertions, CISAC notes that "virtually none of the authors' societies has systematically used an exact reproduction of the CISAC model contract for its bilateral representation"⁷⁴.

⁶⁸ See also the GVL and Lucazeau judgements referred to in footnotes 56 and 59.

⁶⁹ TONO and STEF have concluded bilateral agreements with all collecting societies in the Community.

⁷⁰ See Joined cases 209 to 215 and 218/78 - Heintz van Landewyck SARL and others v Commission of the European Communities [1980] ECR 3125, paragraph 88.

⁷¹ Case 45/85 Verband der Sachversicherer e.V. v Commission of the European Communities [1987] ECR 405, at paragraph 32; Joined cases 96-102, 104, 105, 108 and 110/82 NV IAZ International Belgium and others v Commission of the European Communities, [1983] ECR 3369, at paragraphs 20 and 21.

⁷² Response of 15 July 2003 to the complaint submitted by Music Choice.

⁷³ See point 76 of CISAC's Reply to the Statement of Objections.

⁷⁴ See point 80 of CISAC's reply to the Statement of Objections.

92. However, even if it takes the form of a non-binding recommendation to the members, the CISAC model contract constitutes a decision taken by an association of undertakings within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement, on the basis of which the individual members of the association conclude bilateral reciprocal representation agreements. A recommendation made by an association has been held to amount to a decision even in circumstances where the recommendation was not binding upon its members but where members were actually complying with the recommendation⁷⁵. As shown in Section 4.4.2, EEA CISAC members have used the relevant provisions of the CISAC model contract in their bilateral reciprocal representation agreements. The CISAC model contract therefore determined their conduct and consequently had an appreciable influence on competition. CISAC itself strongly invites its members to follow the model contract; this is indeed explained at the beginning of the model contract in a "Note of the use of the model contract", wherein it states that its purpose is the protection of right holders' interests "through harmonising the conditions in which the authors' societies represent each other..." (emphasis added). In addition,, CISAC recommends that the model contract be used "whenever that is possible" and if collecting societies cannot use the exact wording of the model contract, CISAC specifies that collecting societies are "called upon to conclude *the essential general principles contained in the model contract*" (emphasis added)⁷⁶. The intention to coordinate, and the actual coordination of CISAC members, appears quite clearly from these statements.

7.3. Legal and policy context

7.3.1. Article 151(4) of the Treaty

93. According to Article 151(4) of the Treaty: "The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures". In this regard reference can also be made to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions which was approved by the Council on behalf of the Community⁷⁷. The content of this Convention is therefore part of the Community acquis.
94. Some parties have argued that these proceedings would hurt cultural diversity in Europe and would not therefore be in line with the objectives of Article 151(4) of the Treaty. That assertion appears to refer only to the objection regarding the territorial delineation of the authority to licence, and not to the other elements of this case. It is based on the assumption that this Decision would prohibit territorial delineation as such and would therefore jeopardise

⁷⁵ Joined cases 96-102, 104, 105, 108 and 110/82, at paragraphs 20 and 21 and 89.

⁷⁶ See page 2 of the CISAC model contract, updated on 30 August 2005.

⁷⁷ Decision 2006/515/EC of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (JO L 201, 25.7.2006, p. 15).

the proper licensing of musical works. It is alleged that the intervention of the Commission would destroy the system of bilateral reciprocal representation agreements, with the effect that the world repertoire would no longer be available from one collecting society. This would lead some users to focus on the popular repertoires and to leave aside repertoires of smaller EEA countries⁷⁸. In the same context, it has been argued that the prohibition of territorial delineation would lead to a concentration of the management and multi-territorial licensing of repertoires which have an international appeal to a limited number of collecting societies. Without this revenue 'stream', which according to this argument might become very significant, the management of the local repertoire would prove very costly for more traditional or other local uses thus jeopardising adequate promotion and remuneration of local talent and threatening cultural diversity.

95. Cultural diversity in the music sector is not called into question by this Decision, which neither prohibits the reciprocal representation system as such, nor the possibility for collecting societies to introduce a certain territorial delineation together with certain commercial conditions in their representation contracts. It prohibits the coordination amounting to a systematic territorial delineation by national territory⁷⁹. As explained in Section 7.6.2.2, this Decision therefore does not constitute an incentive for collecting societies to leave the system of reciprocal representation. On the contrary, it offers collecting societies the possibility to adapt the system of reciprocal representation to the needs of the online environment and to thereby make it more attractive for both right holders and users.
96. In addition, it has also been claimed that a prohibition decision in this case would introduce competition among EEA CISAC members as to the prices of licences granted to commercial users (a so-called "race to the bottom"), to the detriment of right holders. As shown in Section 7.6.2.2, having regard to previous Commission Decisions, it cannot be expected that this Decision will lead to a race to the bottom for royalties being paid to authors.
97. It has also been argued that the cross-subsidisation for distributing royalties which is currently made by certain EEA CISAC members between 'massive-used' music and local music, or between the biggest right holders and small authors would be jeopardised⁸⁰. However, this Decision does not interfere with the internal policy of EEA CISAC members concerning the distribution of royalties between their members, as to whether they apply some level of cross-subsidisation among members - including offering social or cultural services - or distribute royalties on the basis of the actual use of musical works only.

⁷⁸ See, for example, paragraphs 23, 102 ff., and 155 of GEMA's non-confidential Reply to the Statement of Objections and page 26 of AKM's non-confidential Reply to the Statement of Objections.

⁷⁹ See Section 7.6.

⁸⁰ For example, TONO asserted in its Reply to the Statement of Objections (at page 15 of the non-confidential version) that the end of territorial delineation "would have a negative effect on the cultural diversity within the EEA. Especially for the more national repertoire such as the Norwegian, it will lead to further marginalisation of Norwegian music ... within the EEA, to the advantage of anglo-american music."

98. The tendency of certain right holders observed over the last few years to withdraw part of their rights from the reciprocal representation system of collecting societies and to appoint new rights managers for pan-European licensing is a consequence of market evolution and the emergence of new business models which developed long before these proceedings and cannot be interpreted as arising from them. It cannot be accepted that this Decision would jeopardise the viability of local repertoires as a consequence of the withdrawal of reciprocal representation agreements because this Decision does not call into question the reciprocal agreements as such, and does not constitute an incentive for collecting societies to terminate them.
99. Finally, the marketing efforts for music distribution are essentially carried out by record companies, broadcasters and radio stations, not by collecting societies. The promotion and the success of musical works are to a large extent beyond the control of authors' collecting societies.

7.3.2. *The effect of local regulations*

100. Some EEA CISAC members claim that they are assigned a monopoly position by national law. This would, allegedly, be the case in Italy, Austria, Hungary and Slovakia. In other cases (for example, SAZAS) it is claimed that local regulations require registration, or some form of authorisation, which other EEA CISAC members do not have and which would prevent those EEA CISAC members from issuing licences in a specific territory. It is not always clear whether this refers to the issuing of a licence to a user who is located in that territory or who intends to exploit the licence in that territory.
101. Without reaching a definitive conclusion, it must be observed that these alleged national monopolies or other restrictive measures do not prevent collecting societies from concluding reciprocal representation agreements with other collecting societies which would allow the counterpart to grant multi-territorial licences, or which would abolish the counterpart's protection against competition from other collecting societies. For example, Austrian law could not prevent AKM from concluding an agreement with SABAM whereby the mandate of the latter would be non-exclusive, or would also include the territory of the Netherlands. Insofar as the practices described in this Decision affect markets other than those where exclusivity is granted by law, these are the result of autonomous decisions of collecting societies, and not the result of national legislation.⁸¹ In any event, the arguments relating to the effect of local regulations contradict the previous behaviour of certain parties, notably SIAE and AKM⁸². Both have signed the Santiago Agreement⁸³, which means that they do not see any difficulty with any other

⁸¹ To that extent, it is observed that in a letter sent by SIAE to BUMA dated 5 April 2006, SIAE explained to BUMA that there was no exclusivity in their reciprocal representation agreements. SIAE emphasised the fact that: "*In other words, BUMA has the right to appoint another mandatee or itself to license its repertoire in Italy*".

⁸² See pages 12 and 21 of AKM's non-confidential Reply to the Statement of Objections.

⁸³ The Commission issued a Statement of Objections in 2004 concerning internet licensing made by authors' collecting societies under the so-called *Santiago Agreement*. This Agreement contained a customer allocation clause by which collecting societies undertook to issue worldwide licences only to users located in their domestic (that is to say, national) territory. The Commission considered that the

signatory of the Santiago Agreement issuing licences covering the whole EEA territory, including Italy and Austria.

102. In addition, some EEA CISAC members claim that the clauses at issue in these proceedings are in any case unenforceable, since they are contrary to certain provisions of national law⁸⁴. However, the fact that a clause in an agreement may also be contrary to national law cannot prevent the application of Article 81 of the Treaty.

7.3.3. *The extended licensing system*

103. Certain EEA CISAC members indicated to the Commission that their national law provides for a collective licensing system. Under this system, a collecting society is entitled to issue a licence covering not only the works of the right holders it represents, but also the works of right holders who are not members of a collecting society. Notably this is a possibility for the licensing of broadcasting and cable retransmission rights⁸⁵.
104. However, such a system is aimed at ensuring that certain users can get a single licence for all rights and is not relevant for assessing the compatibility of the practices at issue in this procedure with Article 81 of the Treaty. The extended licensing system does not impede, as such, a collecting society located in another EEA country from issuing a licence covering the territory of the EEA country where such a system is in place. The usual condition for a collecting society to validly issue an extended licence is for it to be in line with local laws on the functioning of collecting societies (in terms of accountability, efficiency). Any collecting society fulfilling this condition could potentially start to issue extended licences.
105. Accordingly, it should be concluded that this Decision does not undermine the existence and the functioning of the extended licensing system.

7.3.4. *The Commission Recommendation on rights management in the online environment*

106. In 2005, Commission Recommendation 2005/737/EC of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services was published.⁸⁶

loss of territoriality brought about by the internet, as well as the digital format of music files, opened the way for multi-territorial licensing with an increasing competition between collecting societies for the delivery of this new licence. The Santiago Agreement expired at the end of 2004 and the parties did not renew it (See Commission press release IP/04/586 of 3 May 2004). BUMA and SABAM offered commitments not to sign any agreement on licensing of public performance rights for online use with other copyright management societies containing the customer allocation clause (see Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Cases COMP/ C2/39152 — BUMA and COMP/C2/39151 SABAM (Santiago Agreement — COMP/C2/38126), OJ C 200, 17.8. 2005, p. 11).

⁸⁴ See AEPI's Reply to the Statement of Objections, and points 34 and 35 of GEMA's Reply to the Statement of Objections.

⁸⁵ See Articles 3(2) and 9(2) of Directive 93/83/EEC.

⁸⁶ OJ L 276 of 21.10.2005, p. 54.

107. Many EEA CISAC members have argued that the Statement of Objections substantially contradicts that Recommendation. Those arguments may be summarised by quoting CISAC observations: "This study strongly criticises and clearly rejects "option" 2 which enhances cross-border management of copyright by introducing multi territorial licences with a free choice for access point. It introduces competition at the level of the commercial user and thus enhances the user's bargaining power further". CISAC considered therefore that: "The position taken by the Statement of Objections regarding competition in relation to music services over the internet is unjustified and clearly at odds with the 2005 study in which the Commission concludes that the competition promoted in the Statement of Objections would be detrimental to authors and commercial users in the cultural sector"⁸⁷.
108. From the outset, the Commission observes that the EEA CISAC members confused Recommendation 2005/737/EC (which does not propose any "option") with the impact assessment contained in a Staff working paper drafted prior to that Recommendation. The Staff working paper was merely a preparatory work and was not adopted by the Commission.⁸⁸
109. In substance, Recommendation 2005/737/EC strongly advocates that right holders should be free to choose their rights managers and to choose the scope of the rights managed, irrespective of the residence or the nationality of the right holder⁸⁹. In addition, that Recommendation clearly states that collective rights managers should grant licences to commercial users on the basis of objective criteria and "without any discrimination among users"⁹⁰ and advocates the emergence of multi-territorial licences. Recommendation 2005/737/EC and this Decision are therefore consistent in that they both encourage the removal of anti-competitive barriers impeding right holders from freely choosing their collecting societies and rights managers from delivering multi-territorial licences.
110. Finally, a Recommendation, which is a non-binding act, must be read and interpreted in light of the provisions of the Treaty, notably Articles 81 and 82 thereof.

⁸⁷ See pages 11 and 12 of CISAC's Reply to the Statement of Objections.

⁸⁸ See Commission Staff Working Document –Impact Assessment reforming cross border collective management of copyright and related rights for legitimate online music services SEC(2005) 1254 dated 11.10.2005, available at http://ec.europa.eu/internal_market/copyright/docs/management/sec_2005_1254_en.pdf. In this respect, it is noted that CISAC has made references to language that is not part of the study as regards the assessment made by the staff of option 2 (see in particular citations made in paragraph 175 of CISAC's Reply to the Statement of Objections).

⁸⁹ See points 3 and 5 of Recommendation 2005/737/EC.

⁹⁰ See point 9 of Recommendation 2005/737/EC.

7.3.5. *The affected forms of competition*

111. Paragraph 18 of the Guidelines on the application of Article 81(3) of the Treaty⁹¹ provides a framework for analysing which sources of competition may be affected by agreements that have as their object or effect the restriction of competition within the meaning of Article 81(1). In the context of this case, two forms of competition are affected. First, competition between collecting societies relating to their own services or repertoires. Such (actual or potential) competition could take place on the three markets described in Section 5.2, namely, the market for the provision of copyright administration services to right holders, the market for the provision of administration services to other collecting societies and the market for the licensing of public performance rights for satellite, cable and internet to commercial users.
112. Some EEA CISAC members have argued that competition between collecting societies for the licensing of their own repertoire to commercial users via direct licensing could not occur, since the collecting societies' repertoires are complementary. It is true that some users, such as radio and television channels, have only a limited opportunity to select individual national repertoires. Other users, such as ringtone providers might be more flexible in the repertoires they need for their own offers to the market. In addition, the high degree of complementarity of the repertoires of the collecting societies is significantly increased by restrictions which are imposed, or have been imposed, on a member's ability to join a different collecting society or to split his/her own repertoire amongst several collecting societies. These restrictions have divided the worldwide repertoire into strictly national ones.
113. The second form of competition is competition between collecting societies offering similar repertoires. It would occur, in the absence of the territorial restrictions contained in the reciprocal representation agreements, between collecting societies on the basis of rights that they have obtained from other collecting societies as a result of reciprocal representation agreements. This form of (actual or potential) competition which affects the offer of music repertoires to commercial users comes into play only on the market for the licensing of public performance rights.
114. Agreements that restrict a licence to a particular territory and which prevent other collecting societies from licensing into that territory affect competition on the repertoire concerned. In short, if an agreement restricts actual or potential competition, that would have existed but for the contractual restraints, then such an agreement may be 'caught' by Article 81(1) of the Treaty.
115. Before it may be concluded whether such a restriction of competition is caught by Article 81(1) of the Treaty due to its restrictive object or effect, it is necessary, according to paragraph 18(2) of the Commission Guidelines on the application of Article 81(3) of the Treaty, to consider whether licensing between collecting societies would be likely to occur in the absence of the

⁹¹ Communication from the Commission – Notice - Guidelines on the application of Article 81(3) of the Treaty of 24.4.2004 (2004/OJ C 101, p. 97).

contractual restraints in question. If the restraint is objectively necessary for the existence of such licensing, the restraint is not 'caught' by Article 81(1) of the Treaty⁹². Article 81(1) therefore does not apply if, in the absence of the restraint, the type of agreement in question would not have been concluded. In that case, there is no competition to restrict. As indicated by the reference to "objective necessity" this assessment is not based on the subjective views of the parties. As stated in paragraph 18(2) of those Guidelines, the question is not whether the parties in their particular situation would not have accepted the conclusion of a less restrictive agreement, but rather, given the nature of the agreement and the characteristics of the market, whether a less restrictive agreement would have been concluded by undertakings in a similar setting. In this regard, it is necessary to assess the actual economic context in which the CISAC model contract and the EEA CISAC members function, as well as the characteristics of the relevant markets.

116. That framework is applied in the Sections dealing both with the various restrictions contained in the bilateral reciprocal representation agreements (Sections 7.4 and 7.5) and with the concerted practices between EEA CISAC members, and the compatibility of such restrictions with Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement (Section 7.6).

7.3.6. *The comfort letter sent to PRS in 1999*

117. Prior to the Statement of Objections, and within the framework of another procedure (Case IV/34.991), the Commission sent a comfort letter to PRS concerning its internal membership rules and its reciprocal representation contract with SACEM⁹³.
118. PRS notified its membership rules to the Commission on 3 February 1994. According to the Annex to Form A/B, the members' assignment of rights to PRS was exclusive for the whole body of performance rights (Point 5.2.2. of Annex to Form A/B). In an update made to the notification on 12 January 1999 PRS notified its amended membership terms to allow for the withdrawal of live performance rights. PRS likewise notified its reciprocal representation agreements with other EEA CISAC members, which, according to the text of the Annex to Form A/B, "...are not exclusive..." According to the text of the Annex to Form A/B, PRS provided its agreement with SACEM in Appendix 8 to the notification. However, the document which is in Annex 8 is actually the CISAC model contract. A comfort letter was issued to PRS on 16 February 1999.
119. PRS and other Addressees of the Statement of Objections argued that in light of this comfort letter it was not readily comprehensible why the Commission had changed its assessment and how the Commission could fine PRS and the other Addressees of the Statement of Objections for having proposed or

⁹² Case 258/78 L.C. Nungesser KG and Kurt Eisele v Commission of the European Communities [1978] ECR 2015.

⁹³ In the context of these proceedings, PRS requested access to the Commission file relating to Case IV/34.991. PRS was granted access to this file on 28 March 2006. It was also afforded the opportunity to take photocopies of whichever accessible documents they deemed appropriate.

implemented the membership and territorial restrictions of the CISAC model contract.

120. However, a comfort letter does not preclude the Commission from reassessing the agreement or the practice at stake, as indicated in the comfort letter itself.
121. In substance, considerable new market developments have occurred since 1999 and the present case also brought new information to the Commission's attention. In short, the emergence of the internet radically modifies the way copyright is exploited. In addition, market players have developed new business models, as explained in Recital 98. In its complaint, RTL submitted information concerning satellite and cable exploitation which was not known at the date of the PRS notification. That additional information included evidence that the reciprocal representation agreements have precluded the development of the international business activities of broadcasters. The PRS notification only contained information relating to procedural aspects of the membership rules and agreements with other EEA CISAC members.
122. To conclude, the comfort letter sent to PRS in 1999 does not prevent the Commission from finding an infringement on the basis of the facts which are relevant for this Decision.

7.4. Membership restrictions

123. This Section concerns the membership restrictions in the bilateral reciprocal representation agreements between EEA CISAC members, which constitute agreements between undertakings within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.
124. Article 11(II) of the CISAC model contract provides⁹⁴ that neither of the contracting collecting societies may, without the consent of the other, accept as 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. When implemented in bilateral reciprocal representation agreements, Article 11(II) implied that a collecting society needed to ask for permission from another collecting society – a potential competitor in the market for administration of rights to authors – before it could accept an author who was either already a member of another collecting society, or who was a national of the territory where the other collecting society operated, which is normally the country where the other collecting society was located.
125. That provision restricts the ability of an author from becoming a member of the collecting society of their choice or to be simultaneously a member of different EEA collecting societies for the management of his or her rights in different EEA territories.

⁹⁴ Although the clause was formally removed from the CISAC model contract in June 2004 it continues to be implemented by a number of collecting societies in their bilateral reciprocal agreements as explained in Recitals 30 to 34.

126. The membership restrictions affect two forms of competition. First and foremost, they restrict competition between collecting societies on the market for the provision of services to right holders. Second, and more indirectly, the resulting impact on the repertoires held by each collecting society may also affect competition between collecting societies on the market for the licensing of rights to commercial users. The clauses are liable to limit the repertoires of each collecting society to the rights of right holders of the same EEA country, thereby rendering the repertoires more complementary than would otherwise be the case. Therefore, the restrictions are liable to reduce potential competition between collecting societies on the licensing of their own repertoires. The membership restrictions must also be taken into account in the assessment of the territorial restrictions confining the licensing activities of the collecting societies to a single EEA country. The more the repertoires of individual collecting societies maybe considered substitutable, the more the territorial restrictions restrict the competition that would otherwise occur in the absence of the bilateral reciprocal representation agreements. The membership restrictions contribute to bringing about clearly separated national repertoires since they make it more difficult for authors to become members of other collecting societies. Without the membership restriction this distinction by nationality is less likely to exist, and this would potentially render the repertoires more homogeneous in the long term.
127. The membership restrictions are therefore caught by the prohibition in Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement and constitute an infringement by object.
128. The Commission's investigation and the Oral Hearing have shown that some EEA CISAC members themselves consider this model clause to be anti-competitive⁹⁵.
129. IMRO contends that some practical reasons justify the need to obtain the consent of the other collecting society and that this provision was applied only where an author was already a member of another collecting society and sought to transfer membership⁹⁶. It seems indeed necessary that collecting

⁹⁵ For example, in an exchange of letters of April 2005 with STIM, SACEM wrote concerning Article 11(II) of the CISAC model contract that: "Une telle clause n'est pas conforme à l'article 81(1) du Traité de Rome. Par conséquent, il apparaît nécessaire de (la) supprimer du contrat de représentation réciproque conclu entre la SACEM et la STIM... »" Such a clause does not comply with Article 81(1) of the Treaty of Rome. For this reason, it appears necessary to remove it from the reciprocal representation agreement between SACEM and STIM" (See the letter of M. Thierry Desurmont, SACEM, of 4 April 2005 sent to M. Kenth Muldin, STIM, page 1). In a letter to SACEM dated 18 May 2005, ZAIKS wrote that: " l' article 11(II) ...n'est pas conforme aux dispositions de l'article 81(1) du traité de Rome". "Article 11(II)... does not comply with Article 81(1) of the Treaty of Rome". AKKA-LAA wrote on substance similar observations to SACEM in a letter dated 7 June 2005: "Referring to your letter dated 13 May 2005 concerning reciprocal representation agreement in compliance with Article 81(1) of Rome Treaty, I would like to confirm that AKKA-LAA agrees to consider as excluded Article 11(II) from the signed reciprocal representation agreement between SACEM and AKKA-LAA". Other collecting societies started, during the procedure, to remove the clause from their reciprocal representation agreements which indicates that either this clause is not necessary for the smooth operation of these contracts or that the clause is implicitly perceived as anti-competitive by these parties (for example, ARTISJUS, BUMA, KODA, OSA).

⁹⁶ IMRO limits these reasons to the scenario whereby a member of another collecting society decides to join IMRO and to consequently leave their own collecting society. IMRO considers that it is obliged to

societies should communicate between each other in order to smoothly transfer a right holder's membership from one collecting society to another. However, this is not what is suggested by the clause and requiring consent on whether or not the right holder is entitled to choose another collecting society should not be necessary irrespective of whether refusal of consent must be motivated or not.

130. The argument raised by some EEA CISAC members that the membership clause has not been applied does not change the restrictive nature of the clause. As the clause has the object of allocating authors according to their nationality, by putting the decision into the hands of the "domestic" collecting society as to whether or not authors may join a different collecting society, it is not necessary to show that the clause was applied or enforced. The mere existence of the clause creates a "visual and psychological" background which deters collecting societies from attracting authors who are currently either members of other collecting societies or who are not nationals of their domestic territory⁹⁷. Similarly, the argument raised by some EEA CISAC members that there were simply no requests by authors to become members of a collecting society, other than the one in the country of which they are a national, does not negate the restrictive nature of the clause. On the contrary, there would be no need for such a clause if this statement was correct.
131. In addition, the investigation has shown that there is a low proportion of members who are not nationals of the domestic territory of the collecting society. In March 2005, the Commission asked EEA CISAC members, via a request for information, if they had any non-national members. AKKA/LAA replied that it had no non-national members. Certain EEA CISAC members presented very low figures: AEPI replied that it had 11 non-national members. Non-nationals represented 0,8% for TEOSTO, 1% for ARTISJUS and OSA, 1,43% for SGAE. Other EEA CISAC members did not provide figures (ZAIKS, TONO, SPA, SOZA, STIM, SIAE, SABAM, LATGA-A, KODA, EAÜ, STIM, AKM). GEMA indicated that 6,83% of its members were not German. According to PRS (which does not have an explicit membership clause in its reciprocal contracts) 11,3% of its members were not British. Non-nationals comprised 19% of SACEM's membership, though that figure can be explained by the fact that SACEM operates directly in several countries, either in the Community (Luxemburg) or outside the Community (mainly in Africa).
132. There are clear indications that competition between collecting societies on the provision of copyright administration services to right holders of musical works could benefit the latter. This is because, in most instances, the international royalties are subject to multiple or different deductions for the

obtain the consent of the other collecting society in relation to the start and end dates of the membership of the right holder in question. See paragraphs 38 and 39 of IMRO's Reply to the Statement of Objections of 31.1.2008, and its letter of 28.9. 2005.

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To this effect see Case 19/77 *Miller International Schallplatten GmbH v Commission of the European Communities* [1978] ECR 131, at paragraph 7; Joined cases 32/78, 36/78 and 82/78 *BMW Belgium SA v Commission of the European Communities* [1979] ECR 2435, at paragraphs 27 to 36; Case 246/86 *SC Belasco and others v Commission of the European Communities* [1989] ECR 2117, at paragraph 15.

administrative costs of other collecting societies situated in various jurisdictions. Therefore, the revenue finally accruing to the right holder may vary depending on the collecting society which is managing his or her right. The Commission asked EEA CISAC members for their typical fee and royalty structure and whether they apply different administration fees for the rights flowing from their reciprocal representation agreements⁹⁸. The answers were threefold: (i) certain collecting societies do not charge further administration fees on revenues coming from other societies⁹⁹; (ii) other societies charge a specific rate which varies from one society to another;¹⁰⁰ and finally (iii) certain societies do not apply a different rate for rights collected directly by them or flowing from the reciprocal representation agreements¹⁰¹. As a whole, the rates applied by EEA CISAC members for the rights flowing from the reciprocal representation contracts vary from 0% to around 27,7%¹⁰².

133. Another indication related to the efficiency of services provided by EEA CISAC members to right holders is the level of administration fees or the so-called “administrative overhead ratio”. STIM has indicated in its Reply to the Statement of Objections that: “collecting societies use an international benchmark called “administrative overhead ratio” for the purpose of measuring efficiency”¹⁰³. In that respect, it appears that the administration fees charged by the EEA CISAC members to their members vary significantly¹⁰⁴.
134. Thus, right holders would have an incentive to choose copyright administration services on the basis of many criteria, notably: (i) the cost elements (commission related deductions, membership fees and associated costs such as pension or cultural deductions); (ii) the quality of service (transparency, accountability, royalty payment terms, information, legal protection and enforcement); (iii) the benefits derived from the membership (such as pension or illness schemes); and (iv) the ability to collect the highest proportion of rights due to the authors.

⁹⁸ Request for Information of September 2006 sent to all EEA collecting societies.

⁹⁹ For example, IMRO (see the Section entitled “International administration costs” or its non-confidential Reply to the request for information of September 2006) or KODA (see Section I.B.1.2 in its non-confidential Reply to the Request for Information of September 2006).

¹⁰⁰ For example, OSA (see Section I.B of its non-confidential Reply to the Request for Information of September 2006).

¹⁰¹ For example, GEMA (see page 3 of its non-confidential Reply to the Request for Information of September 2006).

¹⁰² See page 2 of the non-confidential version of STEF Reply. It should be emphasised that these examples are provided on the basis of the available data. Indeed, certain collecting societies did not reply to this question.

¹⁰³ See point 14 of STIM Reply to the Statement of Objections.

¹⁰⁴ The result of the request for information sent to the EEA collecting societies in September 2006 shows that the administration fees charged by collecting societies vary from 10 % to 27% of the collected rights.

135. The interest that right holders have in increased competition between collecting societies is not a merely theoretical hypothesis. For example, in 1998, a French right holder (the “Daft Punk” group) wanted to transfer only certain categories of its copyright to SACEM and only for its domestic territory (France). SACEM considered that request to be incompatible with its statutes and therefore rejected it. Following a complaint lodged by the band, the Commission considered that SACEM's refusal could constitute an abuse of its dominant position. Accordingly, SACEM modified its statutes and established the option for its right holders to individually manage certain categories of their rights or to transfer them to another collecting society¹⁰⁵.
136. Collecting societies may also have an interest in competing for the signing up of authors, as this could have a positive impact on their total turnover which is the basis for the administration fees they charge. In the absence of the membership clause, collecting societies would be less restricted in competing for the 'signing up' of right holders.
137. To conclude, in the absence of the membership clause, competition would intensify between collecting societies in the market for copyright administration services to right holders. In addition, in the absence of the membership restrictions, collecting societies could negotiate directly with members of other collecting societies and could therefore try to build their own “global” repertoire, or at least repertoires which have more variety than purely national repertoires because they include works of authors from different countries. The restrictions therefore create artificial dependence between collecting societies because purely national repertoires, although an important part of the repertoire of any society, are rarely a commercially attractive product for commercial users.

7.5. The exclusive representation

7.5.1. General observations

138. Some EEA CISAC members have raised the argument that the reciprocal representation agreements between the collecting societies constitute agency contracts and would consequently not fall under Article 81(1) of the Treaty. This argument cannot be accepted. First, only obligations which are inherent in an agency agreement fall outside Article 81(1).¹⁰⁶ Agreeing that the authority to licence be granted on an exclusive basis, or implementing a concerted practice as regards the definition of limitations on the territory in which a collecting society may licence, are certainly not covered by such obligations. Second, a collecting society has normally no authority over "prices" (the royalties) charged by the collecting society exercising the mandate; the latter will apply the same royalty rates as it does to its own repertoire.

¹⁰⁵ Commission Decision in Case COMP/C2/37.219 Banghalter and Homem Christo (Daft Punk) v SACEM of 12.8.2002.

¹⁰⁶ See Commission Notice - "Guidelines on Vertical Restraints", OJ C 291, 13.10.2000, pgs. 1–44, paragraph 18.

139. Third, agency agreements cover the situation in which an agent is vested with the power to negotiate on behalf of another person who alone carries the risks connected to the contracts concluded and to market-specific investments.¹⁰⁷ Collecting societies make investments, for example, in the electronic processing of large amounts of data relating to the administration of or the monitoring of the use of such rights in new applications (for example, online music services). The risks connected with these investments are borne by the collecting societies who undertake such investments and not by their partners in the reciprocal system who assign their rights to them. Fourth, EEA CISAC members have submitted, in the context of the discussion on the scope of Article 6(II) of the CISAC model contract that the collecting society giving the mandate cannot interfere at all with the work of the collecting society exercising the mandate, so that, for example, it cannot give it any instructions¹⁰⁸. This appears to contradict the argument that the collecting society exercising the mandate is simply an agent of the other collecting society. Fifth, the Court of Justice has clearly confirmed, in its *Lucazeau* judgement, the applicability of Article 81(1) to reciprocal representation agreements when they provide for exclusivity, or to concerted practices which would have a similar object or effect.

7.5.2. *Article 1 of the CISAC model contract: the exclusivity clause*

140. Article 1 of the CISAC model contract stated, until May 1996¹⁰⁹, that the reciprocal representation of repertoires was to be done on an exclusive basis. This exclusivity is restrictive of competition and has a foreclosure effect in the domestic market of collecting societies which are granted exclusivity insofar as no other collecting society may licence the relevant repertoire for exploitation within the territory of that collecting society. For example, if KODA grants the Danish repertoire to SGAE for licensing in Spain on an exclusive basis it thereby guarantees to SGAE not only that no other collecting society will be granted the Danish repertoire for exploitation in Spain, but also that KODA itself will not grant a licence over its own repertoire in Spain and therefore will not allow direct access to its repertoire. The exclusivity clause therefore restricts competition on two levels: (i) competition on the market for administration services provided by collecting societies to each other; and (ii) competition on the licensing market.
141. On the market for administration services granted to other collecting societies, each collecting society is assured that no other collecting society will be appointed in its territory. Accordingly, no other collecting society will be able to grant multi-repertoire licences (or indeed, any licence at all) for exploitation in that territory, whether or not the users are located in that territory. This restriction equally applies to the market for licensing, since users face a monopolistic collecting society in each country and, regardless of their own location, must obtain a mono-territorial licence from each

¹⁰⁷ See Commission Notice - "Guidelines on Vertical Restraints", at paragraph 12 et seq.

¹⁰⁸ See Section 7.5.3.

¹⁰⁹ As of that date, CISAC no longer proposed the use of exclusive reciprocal representation agreements to its EEA members, under Article 1 of its model contract.

collecting society if the use of the copyright work is considered to take place in several countries. The exclusivity clause restricts competition since collecting societies do not compete against each other on the basis of the same foreign repertoire, for the administration of which they could be appointed in parallel.

142. Therefore, the bilateral reciprocal representation agreements, insofar as they contain clauses similar to Article 1 of the CISAC model contract as worded until May 1996, restrict competition contrary to Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.
143. The EEA CISAC members did not challenge this element of the Statement of Objections and recognised, both in their written replies and during the Oral Hearing, that the exclusivity clause was contrary to EC competition rules, as interpreted in the *Tournier* and *Lucazeau* judgements by the Court of Justice. The position of the addressees of the Statement of Objections may be summarised by the CISAC Reply: “The (Legal and Legislation) Committee stated that, in accordance with EC competition law, these authors’ societies could not obtain exclusive mandates from foreign authors’ societies”¹¹⁰.
144. It is noted that 12 years after the CISAC recommendation of May 1996 to its EEA members to avoid usage of any exclusivity clause in their reciprocal representation agreements, and 19 years after the *Tournier* and *Lucazeau* rulings, the majority of the EEA CISAC members have not yet modified their reciprocal representation agreements in compliance with these judgments, even though they all recognised that the exclusivity clause is contrary to EC competition rules.

7.5.3. *Article 6(II) of the CISAC model contract*

145. The Commission considered in its Statement of Objections that pursuant to Article 6(II) of the CISAC model contract, the EEA CISAC members agreed to abstain from operating in the territory of the other collecting society. The Commission considered that Articles 1 and 6(II) fully protected the exclusive and reciprocal representation¹¹¹. As explained in Recital 78, the Court of Justice made clear in its *Tournier* and *Lucazeau* preliminary rulings that there are competition concerns if collecting societies undertake not to allow access to their own repertoire for users outside of their domestic territory.
146. CISAC and most EEA CISAC members replied that the Commission had completely misinterpreted Article 6(II). These replies may be summarised by quoting the position of SACEM: “Article 6(II) only aims at ensuring a rational management of our reciprocal agreement. Indeed when a society has been given a mandate to manage the repertoire of the other society in its territory this mandate itself can be exercised only by the society which holds the mandate. In other words it is up to the society which holds the mandate to negotiate with users...But it must be underlined that such a rule does not prevent the society which has given a mandate to the other to deliver directly,

¹¹⁰ See paragraph 111 of the non-confidential version of CISAC's Reply to the Statement of Objections.

¹¹¹ See paragraphs 29, 91 and 92 of the Statement of Objections.

at its own conditions and regardless of this mandate, licenses to users established in the territory of the other”¹¹².

147. It appears that that reply is largely shared by CISAC and the EEA CISAC members. For example, PRS explained in its Reply to the Statement of Objections that: “PRS believes that the Commission has entirely misconstrued Article 6(II) of the CISAC model contract...PRS understands this clause simply to mean that it will not interfere with the other society’s ability to grant licences”¹¹³.
148. However, this position is at odds with other elements in the Commission's file. In a letter sent by PRS to SACEM on 3 January 2006, PRS seems to have a completely different interpretation of Article 6(II): PRS indicates to SACEM that the interpretation made by SACEM in its letter dated 4 November 2005 has “perplexed us” and that “we do not understand the point you have made”. PRS also emphasises that Article 6(II) “contains the very broad obligation to refrain from any intervention within the territory of the other society in relation to the mandate...it is open to misinterpretation that it negates or conflicts with the non-exclusive nature of the contract”¹¹⁴. That letter, which is not in line with the explanation made by PRS in its Reply to the Statement of Objections, indicates that Article 6(II) can indeed be understood as a clause which grants some degree of protection to the collecting societies in their domestic territories for the management of the respective foreign repertoires and that collecting societies do indeed interpret it in such a manner.
149. In the same vein, the position of CISAC or SACEM is also contradicted by SOZA, which, in its Reply to the Statement of Objections, considers that Article 6(II) is a "purely coordinative and logical" provision, because "any representation in the execution of delegated rights, which allow parallel action by the represented and representing, as well as other represented parties, would be confusing and lead to legal uncertainty"¹¹⁵.
150. CISAC stated that the reciprocal representation agreements signed between IMRO and BUMA, STIM and BUMA and between SABAM and BUMA contained a provision in their respective Article 1 clauses by which the licensing society remained entitled to directly license its repertoire in the territory of the licensee society¹¹⁶. The Commission takes note of this information, but observes that CISAC (or the other parties) presented a very limited number of reciprocal representation agreements containing such a

¹¹² See notably the letter sent by SACEM to PRS on 4 November 2005. This letter is attached to the non-confidential version of SACEM's Reply to the Statement of Objections.

¹¹³ See paragraph 33 of PRS' non-confidential Reply to the Statement of Objections dated 14.4. 2006.

¹¹⁴ See letter from PRS to SACEM dated 3.1. 2006. This letter is attached to the non-confidential version of SACEM's Reply to the Statement of Objections.

¹¹⁵ See Section 2.3.1. e) of SOZA's Reply to the Statement of Objections.

¹¹⁶ The sentence reads as follows: "BUMA reserves the right to issue the authorisations referred to above directly in (IMRO) territory...". See footnote 86 of CISAC Reply to the Statement of Objections.

provision. It cannot therefore be considered that this provision is the result of a general practice of collecting societies. Furthermore, the addition of such a provision is an indication that these collecting societies perceived a need to clarify the issue possibly in view of the interpretation of Article 6(II) as a clause which grants or reinforces exclusivity.

151. In addition, some EEA CISAC members started suggesting at the end of 2005 and in 2006 (before and after the sending of the Statement of Objections) that other EEA CISAC members should delete Article 6(II) in order to comply with Community competition rules. For example, BUMA sent a letter to all the other EEA CISAC members on 20 March 2006 requesting the removal of Article 6(II) from its own reciprocal representation agreements¹¹⁷. SGAE, SIAE¹¹⁸, STIM¹¹⁹ and EAÜ¹²⁰ also sent similar letters to other EEA CISAC members. The removal of the clause has been accepted by some EEA CISAC members, notably AEPI, AKKA/LAA, AKM, ARTISJUS, EAÜ, GEMA, LATGA-A, OSA, PRS, SAZAS, SOZA, SPA, STEF, STIM, TONO and ZAIKS.
152. The Commission takes account of the understanding according to which, and in spite of its unclear wording, Article 6(II) should not be interpreted as imposing any form of exclusivity. The Commission also takes into account the fact that some parties started to remove Article 6(II) from their reciprocal representation agreements. The Commission therefore refrains from intervening in relation to this provision insofar as CISAC and its EEA members understand it simply to mean that a collecting society will not interfere with the other society's ability to grant licences and that the clause is not interpreted as in any way limiting the possibility for the former to grant direct licences covering its own repertoire.

7.6. The territorial delineation of the authority to licence

153. This Section covers the management and the licensing of public performance rights for internet, satellite and cable exploitation of musical works.
154. The territorial limitation is reflected in the bilateral reciprocal representation agreements concluded by all the Addressees of the Statement of Objections¹²¹. Under Article 1 of the CISAC model contract, the licensor

¹¹⁷ A copy of the letters is attached to BUMA's Reply to the Statement of Objections. In this letter, BUMA wrote: "We have decided not to oppose the Commission findings...We will consider Article 6(II) as null and void and deleted from the agreement".

¹¹⁸ See page 10 of SIAE's Reply to the Statement of Objections.

¹¹⁹ In a letter dated 8 March 2006 STIM wrote to SIAE that "As for Article 6(II), we cannot see any reason to keep this clause. Given the non exclusive nature of our reciprocal agreement, this clause is in any case not significant". In a standard letter sent to the other parties, STIM wrote " We consider that Article 6(II) and 11(II) as null and void. Accordingly, *these clauses have not been applied*" (see, for example, the letter sent to BUMA on 8 March 2006).

¹²⁰ See point 3.2 of EAÜ's Reply to the Statement of Objections.

¹²¹ See the Replies to the Commission's Request for Information of 11.3. 2005. All the Addressees apply Article 1 of the CISAC model contract and reciprocally transfer their repertoire for the respective territory of the other collecting societies. PRS applies its specific model contract which also contains a

limits the transfer of its repertoire to the territory of the licensee, as defined in Article 6(I). When implementing the CISAC model contract, all EEA CISAC members have defined the territory within the EEA as corresponding to the domestic territory of the licensee of the respective bilateral reciprocal representation agreement. The defined territory of a collecting society does not extend to the domestic territory of another collecting society. Each collecting society thereby limits its authority to licence to its own domestic territory¹²².

155. This Section firstly examines why this parallel practice of collecting societies should be considered to be a concerted practice (Section 7.6.1). Second, it is explained why this practice is restrictive of competition. CISAC and the EEA CISAC members have presented a number of arguments intended to contest the preliminary finding that this behaviour would constitute an infringement of Article 81(1) of the Treaty (Section 7.6.2). In most cases, it is not clear whether the Addressees are contesting the existence of a concerted practice or a restriction of competition. For explanatory purposes, certain arguments are dealt with in Section 7.6.1 on the existence of a concerted practice, although some may also be relevant to Section 7.6.2. As shown in these Sections, none of the contrary arguments presented by the EEA CISAC members appear convincing.

7.6.1. The parallel territorial delineation constitutes a concerted practice

156. In essence, it must be noted that the fact that all the reciprocal representation agreements contain a clause limiting the mandate of a collecting society to the territory where it is established, is not the result of normal competitive conditions. These clauses are based on the CISAC model contract and limit themselves to uniformly defining the relevant territory as the domestic territory of the respective collecting society. Therefore, these clauses cannot simply be explained by autonomous behaviour prompted by market forces. By coordinating their behaviour on the basis of the CISAC model contract the risks of competition are substituted for practical cooperation between the EEA CISAC members.
157. Due to this uniform approach in the context of CISAC, each participating collecting society is granted a certain degree of certainty that national territorial delineation will not only be reciprocally accepted by the other collecting society, but will also be implemented in all the bilateral reciprocal representation agreements signed by the EEA CISAC members¹²³. This certainty also results from the mutual dependency of all EEA CISAC members which exists, in particular, in the field of offline applications. The rights management in this sector requires local monitoring networks. For the licensing of rights and the collection of royalties abroad, each collecting society is therefore dependent on the other collecting societies with respect to

similar territorial allocation (see the sections entitled “Administration” and “Allocation” in its “ABCD2” contract).

¹²² See point 102 of the Statement of Objections.

¹²³ See paragraph 104 of the Statement of Objections.

most traditional offline applications. Any collecting society which would be unwilling to perpetuate the historical market segmentation in the field of online rights might face the risk of losing support in offline rights management. This allows for discipline of collecting societies which consider deviating from the coordinated approach.

158. The existence of a concerted practice is supported by a number of elements, which will be examined in more detail in response to the arguments by the Addressees of the Statement of Objections. Collecting societies discuss the standardisation of their model contracts in the context of CISAC. The issue of territorial limitation of the reciprocal mandates, in particular for the new forms of exploitation, has been the subject-matter of multilateral discussions among the collecting societies, as illustrated by the Santiago agreement. This parallel behaviour has to be assessed in light of the previous situation where reciprocal agreements were granted on an explicitly exclusive basis. The deletion of express exclusivity has not led to any material change in the behaviour of the collecting societies. Further, parallel behaviour is strong evidence for a concerted practice, unless there are other reasons which may show that market segmentation results from autonomous behaviour. As will be shown below, this is not the case here.

7.6.1.1. Territorial restrictions are not explained by the territorial nature of copyright

159. Some EEA CISAC members argue that territorial delineation is part of the specific subject matter of this kind of intellectual property right. An elimination of territoriality would therefore affect the substance of such a right¹²⁴.
160. However, the territoriality of copyright does not require a national assignment of rights for the purpose of administration abroad on a strictly national basis. The fact that national legislations define copyright, as well as the scope of its protection and the consequences for infringements, does not mean that licences in a specific country have to be granted by the incumbent national collecting society. Authors assign their rights to collecting societies mostly for worldwide exploitation. Without exclusivity clauses in the reciprocal representation agreements, every collecting society would therefore be entitled to grant licences over their own members' repertoires on a worldwide basis. The former Santiago Agreement concerning multi-territorial multi-repertoire licensing, or the alleged claim that collecting societies can licence their own repertoire on a multi-territorial basis, show that there is no legal or practical requirement that only the collecting society located where the exploitation takes place can grant a copyright licence.

¹²⁴ See, for example, paragraph 48 of the non-confidential version of PRS' Reply to the Statement of Objections.

7.6.1.2. *In the context of satellite transmission, the behaviour of the 24 EEA CISAC members cannot be justified by legislative provisions and the Sydney Agreement is not an appropriate answer to the objections.*

(a) The practice of the 24 EEA CISAC members cannot be justified by legislative provisions

161. It has been argued by a number of Addressees that the Commission has misunderstood Directive 93/83/EEC. It is claimed that this Directive “provides that it is the uplink Member State whose copyright rules apply”¹²⁵. It seems that EEA CISAC members consider therefore that that Directive implies that only the collecting society located in the Member State where the uplink takes place can deliver the licence for satellite transmission. According to certain EEA CISAC members the system put in place by CISAC would be necessary to comply with Community legislation¹²⁶ and would also be an appropriate answer to the objections raised by the Commission concerning territorial restrictions¹²⁷.

162. The interpretation of Directive 93/83/EEC made by the Addressees of the Statement of Objections cannot be accepted. That Directive does not provide that the applicable law is the law of the Member State where the uplink takes place. Directive 93/83/EEC specifies that the act of communication to the public is the act of introducing the programme-carrying signal into an uninterrupted chain of communication leading to the satellite and down towards the earth¹²⁸. Consequently, the applicable law will be the law of the Member State where this act of communication takes place¹²⁹. However, this act does not automatically start with the uplink. As an example, the act of communication can be the signal sent by the television studio to the uplink radio station. The television studio and the radio station may not be located in the same Member State. In that example, the applicable law will be the law of the Member State where the television studio is located.

163. In addition, even in the situation where the uplink is indeed the place where the first act of communication takes place, this still does not imply that the collecting society established in the country of the uplink should be the only one competent to grant the licence. In fact, Directive 93/83/EC established the applicable law for satellite exploitation of copyright works. The fact that the law of a specific Member State is applicable is not relevant to making a determination on which collecting society can grant the licence. It merely means that in cases of conflict, the conflict should be resolved according to the applicable law. The law may well not be the law of the territory where the collecting society is located, as happens whenever a collecting society, which

¹²⁵ See, for example, paragraph 8 of the non-confidential version of the PRS’ Reply to the Statement of Objections.

¹²⁶ See paragraph 9 of the non-confidential version of the PRS’ Reply to the Statement of Objections.

¹²⁷ See paragraph 47 of CISAC’s Reply to the Statement of Objections.

¹²⁸ See Article 1(2)(a) of Directive 93/83/EEC.

¹²⁹ See Article 1(2)(b) of Directive 93/83/EEC.

is not located where the first act of communication of the public takes place, grants a licence. It is noted that neither CISAC, nor the EEA CISAC members, explained why it is necessary for the collecting society located within the satellite footprint to be the only one which can issue the licence for satellite exploitation of musical works. It must be recalled that Directive 93/83/EEC does not, and cannot, imply that only one collecting society would be entitled to deliver the licence for satellite exploitation; such a provision could be contrary to the Treaty, notably Article 49 thereof which establishes the principle of the freedom to provide services, and which is one of the legal bases of Directive 93/83/EEC.

(b) The "Sydney Agreement" is not an appropriate answer to the objections

164. In relation to satellite exploitation, CISAC and certain EEA CISAC members¹³⁰ stated in their Replies to the Statement of Objections that the so-called "Sydney Agreement" signed between CISAC members in 1987 is an integral part of the CISAC model contract and extends the rights conferred under Article 1 of the CISAC model contract to all countries within the footprint of the satellite. Under Article 2(III) of the CISAC model contract, when the satellite's footprint covers several countries, the collecting society located in the country where the satellite uplink takes place can issue a licence covering the entire footprint of that satellite. The "Sydney Agreement" offers three possible formulae:

(a) Under the first formula, collecting societies agree to allow the licensor collecting society located in the country of uplink to offer a licence for satellite transmission which covers the entire footprint of the satellite;

(b) Under the second formula, collecting societies agree to allow the licensor collecting society located in the country of uplink to offer a licence for satellite transmission which covers the entire footprint of the satellite, but with the prior agreement of collecting societies operating within the footprint;

(c) Under the third formula, collecting societies agree to allow the licensor collecting society located in the country of uplink to offer a licence for satellite transmission which covers the entire footprint of the satellite, but with prior consultation with collecting societies operating within the footprint.

165. The Commission takes note of Article 2(III) of the CISAC model contract which was agreed between the CISAC members in the Sydney Agreement¹³¹, but does not consider that it gives any relevant answer to the objections related to the concerted practice on territorial delineation. As explained in Recitals 161-162, under Directive 93/83/EC, only one single licence has to be obtained by the broadcaster for rights exploitation within the entire satellite footprint. The applicable law governing the licence will be the law of the country where the first signal is introduced (usually the uplink). As the act of communication takes place in that EEA country, a licence is needed only for

¹³⁰ GEMA, PRS, SACEM, SGAE, SIAE, STIM and ZAIKS.

¹³¹ The "Sydney Agreement" is not an element assessed by this Decision. The Commission reserves the right to examine that Agreement in the context of competition rules.

that EEA country. Consequently, the Sydney Agreement is obsolete in this respect and is not required for ensuring that the granted licence covers the entire satellite footprint¹³².

7.6.1.3. *The practice cannot be said to be the outcome of individual market reaction*

166. It cannot be assumed that the parallel behaviour is the outcome of individual market action. Every collecting society needs to have a reciprocal representation agreement with every other collecting society if it wants to gather all available repertoires and offer a multi-repertoire licence. However, this equal exchange of repertoires should not prevent collecting societies from granting their rights to more than one collecting society for the same territory. GEMA could, for example, have a reciprocal representation agreement with SACEM and with SABAM in order to get in exchange the French, as well as the Belgian rights, for exploitation in Germany. This would not prevent GEMA from granting the German rights for the combined territories of Belgium and France to both collecting societies thereby allowing for competition between them.
167. The collecting societies are very different. They differ in terms of efficiency and administration costs as well as in terms of size and number of works¹³³. PRS (in the United Kingdom) has a very large international repertoire whereas many smaller collecting societies have smaller repertoires which are mostly used nationally.
168. Despite these differences, all collecting societies mutually grant each other access to their own repertoires on an equal footing. Given that collecting societies show differing degrees of efficiency, they could have an interest in mandating one collecting society, with a particularly good record, to grant a licence for exploitation in a territory wider than the one in which it is located, or to mandate more than one collecting society in some regions, in order to increase the coverage of their licensing and thereby the remuneration for their authors.
169. Negotiations leading to bilateral reciprocal representation agreements had been preceded by previous coordination. When the issue of satellite or internet use arose, EEA CISAC members did not simply try to find a solution

¹³² This is especially clearly explained by KODA in its Reply to the Statement of Objections: "The reciprocal representation agreements do not distinguish between the different usage forms and thus, they also cover broadcasting via satellite, cable retransmission and the internet. With regard to broadcasting via satellite, the satellite and cable directive (93/83/EC) states that the restricted act takes place in the uplink country, which means that the sister societies are able to license KODA's repertoire in the entire footprint of the satellite. Article 1 of the satellite and cable Directive entails that the restricted act only takes place in the uplink country, and therefore it is not necessary to have specific provisions in the reciprocal agreements regarding satellite (emphasis added)", see page 8 of KODA's Reply to the Statement of Objections.

¹³³ It appears from various requests for information and public sources that the level of administration fees varies considerably between the EEA CISAC members (from 11% to more than 25% in 2005). This huge difference is also reflected in the amount of collected rights (from EUR 3,4 million to EUR 823 million in 2005). Other factors also suggest substantial differences between collecting societies. Examples are the timing of payments between collecting societies or the method for calculating and allocating royalties (either a calculation per second or via regular samples).

in the context of their bilateral relations. As a reaction, for example, to the increasing importance of the internet in the EEA, EEA CISAC members coordinated their positions and agreed on the so-called Santiago Agreement, which was jointly notified for a possible exemption pursuant to Article 81(3) of the Treaty. That it was decided not to renew the Santiago Agreement, which resulted again in a strict domestic territorial delineation, is yet another indication of the fact that EEA CISAC members do coordinate their behaviour as regards the scope of licences for internet use. This can hardly be said to be independent undertakings acting autonomously in the market.

170. Finally, it must be recalled that even in cases where no exclusivity clauses were inserted into the bilateral representation agreements, where such clauses have allegedly not been applied, or where they have been removed, the practice has continued whereby collecting societies limit the licences they grant to the exploitation of domestic territories only. This practice results from the continued existence of the territorial delineation in clauses replicating Article 6(I) of the CISAC model contract. In the *Lucazeau* judgment, the Court of Justice stated that, if even without explicit exclusivity clauses no change in behaviour occurs, this might be taken as indication of a concerted practice. The Court further ruled that the observed parallel behaviour may be considered as "strong evidence" for a concerted practice and therefore for coordination, unless there are other reasons which may show that the market segmentation is the result of individual market behaviour.¹³⁴

7.6.1.4. The need for local presence does not explain the systematic delineation of the territory as the territory of the country where the collecting society is established

171. The Addressees of the Statement of Objections¹³⁵ alleged in their Replies to the Statement of Objections and during the Oral Hearing that local presence is necessary for the monitoring of right uses. As one Addressee puts it: "As the use of copyrighted work via cable, satellite or the internet virtually always requires local verification outside the territory in which the authors' society operates, it is impossible for an author's society to issue authorisations for use of its repertoire outside its own territory (emphasis added)"¹³⁶. "It would be not realistic for authors' societies to monitor from their domestic territory the very large number of cable or internet operators active abroad"¹³⁷. "Remote monitoring is ineffective. For example the Finnish authors' society would

¹³⁴ Joined cases 110/88, 241/88 and 242/88 *François Lucazeau and others v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others*, [1989] ECR 2811, paragraph 18.

¹³⁵ See, for example, paragraph 54 of GEMA's non-confidential Reply to the Statement of Objections.

¹³⁶ This assertion contradicts the statements of certain collecting societies concerning the meaning of Article 6(II) of the CISAC model contract. It has been claimed that Article 6(II) does not prevent collecting societies from issuing a licence covering their own repertoire outside their domestic territory. Certain collecting societies claim that they can issue such a licence, but apparently only to certain of their domestic commercial users. However, it is at least an indication that collecting societies can technically issue multi-territorial licenses. See, for example, points 17 and 183 of SGAE's non-confidential Reply to the Statement of Objections.

¹³⁷ See paragraph 198 of CISAC's non-confidential Reply to the Statement of Objections.

have no other effective means of controlling physical acts of exploitation of the works of its members in Ireland”¹³⁸.

172. Those assertions are based on this assumption, that it would be necessary to have geographic proximity between the licensor (namely, the collecting society) and the licensee (namely, the commercial user). Some EEA CISAC members stressed, in addition, that litigation addressing infringements of their authors' copyrights abroad would be difficult and costly for any collecting society. It has also been argued that knowledge of local laws is important.
173. As regards proximity with the licensee, the current system is not based on such proximity. Under the current system, the territorial limitation of the mandate means that each collecting society grants licences or exploitation within its territory, irrespective of the residence of the licensee. As an example, if a website is directed to the German territory, GEMA would be competent to grant the licence, even if the company which offers the services on this website is based in France.
174. As regards internet, satellite and cable retransmission there are technical solutions which allow monitoring of the licensee even if the use is made outside the domestic territory of the collecting society or if the licensee is located outside the domestic territory of the collecting society. Collecting societies have already put in place licensing practices which demonstrate their capability to monitor uses and users outside their domestic territory and which show that different local laws are not an obstacle to multi-territory licensing. In addition, most EEA CISAC members argued (in the context of the discussion of objections relating to Article 6(II) of the CISAC model contract and its implementation) that they can grant multi-territorial licences.
175. As to the confusion which has been said to occur when one user may obtain licences from other collecting societies, and the effect this may have in carrying out monitoring activities in the market and searching for unauthorised use of music, it should be stressed that a commercial user would need to prove, if so requested, that it had obtained a licence for exploitation, and would thereby need to identify the scope of the licence and the licensor collecting society. According to some EEA CISAC members, already today it is possible to get a licence from another collecting society in certain circumstances (for example, direct licensing from the collecting society for its own repertoire).
176. As regards the link between litigation and enforcement, first, a distinction should be drawn between monitoring the market in general, as regards the unauthorised use of copyright work, and monitoring the activities of a licensee, in order to ensure that it acts in accordance with the licence and pays the royalties due to the licensor. Every time a collecting society grants a multi-territorial licence of its own repertoire it already relies on effective monitoring outside its domestic territory. Since acts of exploitation may be carried out abroad (indeed, potentially anywhere in the world), unauthorised

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See paragraph 198 of CISAC's non-confidential Reply to the Statement of Objections.

use in another country, contrary to the licence, may require that action be taken in that other country.

177. Second, it is perfectly conceivable to dissociate litigation from enforcement. In cases of litigation, geographic proximity and good local knowledge of the country where the user is located is necessary. However, whenever collecting societies grant a licence to an undertaking located in another country, such litigation can at present be initiated by another person, such as the local collecting society. Therefore, the granting of the licence is not inextricably linked to the ability of the licensor to itself litigate in another country.
178. Third, during the Oral Hearing, it was argued that the monitoring, auditing and controlling activities in the on-line environment need not be exercised by the licensor himself in each of the territories covered by the licence. SABAM explained that it is possible to adapt the CISAC model contract and the existing network of reciprocal representation agreements. Under the model suggested by SABAM, the collecting society which issues a multi-territorial multi-repertoire licence could, if necessary, ask other collecting societies to locally monitor and enforce the granted licence.
179. Fourth, in the same line of arguments raised by SABAM, Nordic collecting societies presented the “Nordic and Baltic” cooperation model (NCB). They explained that they operate a multi-territorial online licensing scheme which provides for one single licence covering both the requisite mechanical reproduction and the performing rights. In addition, this system allows a commercial user to obtain such a licence in respect of both sets of rights which covers Sweden, Norway, Finland, Denmark, Iceland, Estonia, Latvia, and Lithuania. The NCB is based on explicit contractual cooperation between the societies as mandated by the right holders. Nordic Baltic collecting societies argued that the NCB experience has shown that: (i) in any multi-territorial licensing model, the existence of a network of national societies cooperating in preserving the rights and interest of the right holders is essential (local presence is necessary in order to detect and monitor usage); and (ii) multi-territorial blanket licensing would require the provision of the requisite mandate by right holders and their representatives.
180. OSA seems to support the views and practices expressed by SABAM and the Nordic societies. OSA indicated in its Reply to the Statement of Objections that: "We believe that there is no substance to the claim that these days collecting societies issue licences for the use of a musical repertoire over the Internet and in satellite broadcasting covering solely the territory of a single country (in the case of the OSA the Czech Republic). Such a licence, at least in the case of users licensed by the OSA, would not be accepted by users, and it is doubtful whether the OSA could even grant such a licence under the Copyright Act, according to which the extent of a licence, including its territorial scope, stems from the purpose of the licence. We are convinced that the granting of a licence, for example, for Internet broadcasting solely within the territory of the Czech Republic would require excessive technical measures on the part of the user or the de facto impossibility of complying with the conditions of such a licence"¹³⁹.

¹³⁹ See section 4.A of the OSA's Reply to the Statement of Objections.

181. OSA also indicated that it grants multi-territorial licences for webcasting: "At present, the OSA licences several original webcastings, especially radio broadcasting; all the licences are granted without territorial limitation. All the licences have been granted to Czech entities; as yet we have received no licensing requests from foreign broadcasters."¹⁴⁰ It is obvious that OSA does not believe that technical issues impede the delivery of multi-territorial licences and considers that users need such a type of licence.
182. Finally, it needs to be stressed that the findings set out in the previous Recitals are without prejudice to the fact that, in specific circumstances, the decision not to grant authority to licence outside the territory where the collecting society is established may be due to the fact that the other collecting society may not be seen as having the technical capability to ensure proper monitoring and enforcement. Equally, the legal system of an EEA country may present features which will normally lead to the domestic society being the preferred choice, due, for example, to the particular status which it may enjoy in litigation before domestic courts. A territorial delineation which is the result of the assessment of the individual capabilities of the parties to the bilateral reciprocal representation agreement is not normally a concerted practice restrictive of competition.
183. However, the concerted practice, which is systematic, cannot be explained by the particular situation in a given legal system or by the limited technical capability of one or the other collecting society. Therefore, this Decision cannot be interpreted as precluding collecting societies as independent market actors, from taking account of each other's capabilities to monitor the market and ensure proper enforcement of authors' rights in their bilateral negotiations.
184. Admittedly, the Court of Justice¹⁴¹ has considered, in light of the need for local and physical monitoring of many premises in the case of off-line applications (bars, restaurants, discos, etc.), that the territorial delineation of licences along national borders might be justified on the basis that duplication of copyright usage monitoring structures in all territories would lack economic rationale. The cost of establishing a network of contracts with commercial users in another country and the implementation of own local monitoring arrangements would be simply excessive and would prevent collecting societies from becoming active outside their home territories. The necessity of having a local network of agents could, therefore, explain in the off-line world the strictly national definition of licensing areas and the absolutely symmetric mutual exchange between the collecting societies as the "natural" market outcome not based on a concerted practice.

¹⁴⁰ See the Section on "Original webcasting" in the OSA's Reply to the Statement of Objections.

¹⁴¹ Joined cases 110/88, 241/88 and 242/88 *François Lucazeau and others v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others*, paragraph 18. Collecting societies could, nevertheless, be actual competitors in the off-line environment if they establish a network of monitoring operations outside their domestic territory.

185. As explained in the following Recitals, this is not the case as regards, satellite, internet and cable transmission.
186. Satellite transmission: The Statement of Objections found that "...any satellite transmission can be monitored within the entire footprint. A collecting society may control content from any location within the footprint of the satellite. For example, this can be illustrated by a reciprocal representation agreement concluded by PRS which authorises each signatory of the contract to grant a licence not only for its own domestic territory but for the entire footprint of the satellite in case of a direct broadcasting use"¹⁴².
187. Some EEA CISAC members allege that geographical presence in the country of the broadcaster is necessary to collect information about the rights used and to enforce claims against the broadcasters. For instance, encrypted channels could only be monitored from the country to which they are directed.¹⁴³
188. However, the encrypted channels argument is flawed: collecting societies which intend to grant a licence to a broadcaster can perfectly tackle this issue during the negotiations for the granting of the licence and the broadcaster can always give to the licensor collecting society the required device for decrypting the broadcast. Concerning the need for a local presence, EEA CISAC members merely presented the arguments already discussed and rebutted above¹⁴⁴.
189. Internet use: The internet presents new features which are radically different from those of the traditional exploitation of music at issue in the Tournier and Lucazeau cases. During the Oral Hearing, it was demonstrated, especially by EDIMA¹⁴⁵, that remote monitoring for the online delivery of music (both streaming and downloading) can be accomplished in practice. Each musical work has an electronic identity and each personal computer has an internet protocol address. As a consequence of this information, the collecting society can ensure, when it delivers the licence, that the commercial user is in a position to know precisely which musical work is used, by which computer, and for which kind of use. The commercial user can then send this data to collecting societies which will exploit this information in order to accurately distribute royalties to right holders. In other words, collecting societies can agree on the modalities of the monitoring.
190. As already explained in the Statement of Objections, recent market developments in the field of collective management of intellectual property rights for online use do not support the claim that territorial limitations are

¹⁴² See paragraph 111 of the Statement of Objections.

¹⁴³ See paragraphs 62 et seq. of GEMA's non-confidential Reply to the Statement of Objections; page 10 of AKM's non-confidential Reply to the Statement of Objections.

¹⁴⁴ See paragraphs 173 et seq. of this Decision.

¹⁴⁵ EDIMA is an association representing firms involved in the provision of audio and audio-visual content on-line. EDIMA's members represent 70% of the online digital media market.

indispensable, notably for ensuring proper monitoring, auditing and enforcement activities by collecting societies.

191. First, in the *Simulcasting* case¹⁴⁶, subsequent to discussions with the Commission, IFPI (the “International Federation of the Phonographic Industry”) notified an amended version of the reciprocal representation agreement to the Commission which allowed broadcasters whose signals originated in the EEA to approach any collecting society established in the EEA which was party to the reciprocal representation agreement, in order to obtain a multi-territorial and multi-repertoire internet simulcasting licence. In addition, on 11 November 2003, IFPI announced the conclusion of a standard agreement between phonogram producers’ collecting societies for the purposes of delivering multi-repertoire multi-territory webcasting licences¹⁴⁷. The *Webcasting* agreement mirrors the structure of the *Simulcasting* agreement in that it allows participating societies to grant worldwide licences to commercial users located anywhere in the EEA. Thus the outcome in the *Simulcasting* case and the terms of the subsequent Webcasting agreement illustrate that it is not technically necessary for intellectual property rights collecting societies to have a territorial (that is to say, a local) presence in order to offer multi-territory multi-repertoire licences for internet use and to properly monitor such use.
192. In addition, the *Santiago* Agreement already provided for the granting of multi-territorial licences, even if this possibility was limited to users having their economic residence in the same domestic territory. This demonstrates that local presence in the countries of use was not deemed to be necessary.
193. Second, in January 2006, PRS and GEMA established a joint venture which will act as a pan-European one-stop-shop for the licensing of online and mobile rights of EMI’s Anglo-American repertoire. It is understood that this joint venture will deliver pan-European licences to commercial users located in any EEA country. Adam Singer, Group CEO of the MCPS-PRS Alliance recognised that “In online, no-one can hear your borders” and Jürgen Becker, then Head of the Executive Board of GEMA said: “This will provide licensees and consumers with a one-stop-shop and also guarantee that right holders and sister societies are efficiently protected in the global digital networks”¹⁴⁸. Accordingly, this new model is an example which demonstrates the technical possibility for collecting societies to offer a multi-territory licence and that the arguments related to the auditing, monitoring and enforcement tasks of collecting societies and the required geographic proximity between the licensor and the licensee do not validate the current parallel behaviour as regards territorial limitations. Some of the same

¹⁴⁶ Commission Decision 2003/300/EC of October 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/C2/38.014 *IFPI 'Simulcasting'*) (OJ L107, 30.4.2003, p. 58), at paragraphs 3 and 27.

¹⁴⁷ See press release "Recording industry announces new one-stop-shop for webcast licensing" of 11.11.2003 at www.ifpi.org

¹⁴⁸ See GEMA press release of 23.1. 2006 at www.gema.de

collecting societies which raised these arguments do not consider them as obstacles to concluding agreements such as the PRS/GEMA joint venture.

194. Third, certain EEA CISAC members put forward other solutions or mechanisms in order to offer multi-territorial licences in a competitive environment. It is notably relevant to quote a proposal made by some small and medium size EEA collecting societies which are EEA CISAC members. They suggest that a new and adequate model could emerge: under this model, “Every European collective right management society is entitled to grant European-wide online cross-border licences to every user having an economic residence within the EU/EEA...the licensing collective right management society applies the tariff and conditions of the country of destination”¹⁴⁹. This proposal made by some licensors demonstrates that no technical or economic reasons preclude the emergence of a multi-repertoire multi-territory licence granted to any commercial user located within the EEA rather than simply within the domestic territory of the licensor.
195. Cable retransmission of musical works: the Addressees of the Statement of Objections generally consider that the cable retransmission market presents features similar to the off-line market where a local presence and a local knowledge of the market remain necessary.
196. It is not challenged that cable exploitation of musical works remains for the time being national or local in scope. Channels retransmitted by cable are indeed usually proposed to consumers on a local scale (for example, cable operators offer a package of channels to consumers located in a specific area or in a city). This does not imply, however, that this market has no EEA interest. On the contrary certain programmes are retransmitted through cable in many EEA countries, such as major national television channels or programmes with a potential international appeal (for example, BBC World, TV5 and Euronews).
197. It is also not contested that cable operators need a specific licence for cable exploitation which is different from that of the satellite broadcaster.
198. As was made clear in the Statement of Objections¹⁵⁰, the retransmitted programmes at issue are only those which are first transmitted by satellite and then retransmitted by cable, insofar as the retransmission does not go beyond the footprint of the satellite. As a consequence, the content of the cable retransmission at issue would be strictly identical to the satellite transmission. Considering the fact that all collecting societies located within the satellite footprint can potentially issue a licence covering the entire satellite footprint and can properly monitor the use of that licence, it can be assumed in normal circumstances and unless there is a problem specific to the monitoring of a

¹⁴⁹ See the position paper of 29.8.2005 “Cross border collective management of online rights in Europe” signed by ARTISJUS, AKM, KODA, SPA, STIM, TEOSTO and TONO, page 2. These collecting societies which include some of the Addressees of the Statement of Objections took this position in the framework of the working document released on 7.7. 2005 by the Commission on “The cross-border collective management of copyright”.

¹⁵⁰ See paragraphs 109, 110 and 111 of the Statement of Objections.

given cable operator, that those collecting societies can also properly licence and monitor the cable exploitation of a work previously transmitted by the satellite transmission. Should a specific problem be encountered, due to the business model of the cable operator, it may be legitimate to refuse to deliver such a licence or otherwise agree on specific measures for monitoring, but the current reciprocal representation agreements do not even provide for the possibility of the delivery of such a licence in the first place.

199. To conclude, there is no objective reason which may explain why all collecting societies have implemented the same parallel behaviour in the market or why they have maintained their exclusive position in their domestic market for the delivery of cable retransmission licences, in so far as the retransmitted content takes place within the satellite footprint where the first transmission took place.

7.6.2. *The concerted practice is restrictive of competition*

200. The following Recitals explain why the concerted practice is restrictive of competition. It is explained, first, that it produces a segmentation of the market and, second, that it is not objectively necessary, from an economic and commercial point of view, to have a set of bilateral reciprocal representation agreements among collecting societies which impose national territorial delineation.

201. In examining each of the different issues relating to this topic, it is important to bear in mind the scope of the Commission's objections. This Decision does not take issue with the mere fact of delineating the scope of the mandate, but rather with the coordinated approach by all EEA CISAC members as regards such delineation. From the outset, it has to be noted that, in isolation, the granting of a licence limited to a certain territory, even to the domestic territory, is not automatically restrictive of competition. A licensor is normally entitled to limit a licence to a particular territory without falling foul of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

202. In the assessment of the effects of the bilateral reciprocal representation agreements concluded by collecting societies, it is necessary to take into account the actual conditions in which they function, the economic context in which the undertakings operate, the products and services covered by those agreements and the actual structure of the market concerned¹⁵¹.

7.6.2.1. *Territorial delineation and exclusivity*

203. Even in the absence of explicit exclusivity described in Section 7.5.2, limiting the territorial delineation of the authority to licence to the domestic territory (that is to say, the national territory) of the collecting society amounts to the granting of exclusivity to the domestic collecting society and the segmentation of the market into national monopolies.¹⁵²

¹⁵¹ Case 23/67 SA Brasserie de Haecht v Consorts Wilkin-Janssen[1967] ECR 407.

¹⁵² See paragraph 99 of the Statement of Objections.

204. The uniform territorial delineation has the effect of indirectly granting exclusivity insofar as it standardises the reciprocal representation between the EEA CISAC members: each collecting society's authority to licence is limited in the sense that it can only grant access to its portfolio of works for exploitation in its "domestic" territory (regardless of where the user is located). By including this territorial delineation in all such agreements, the end result is that only one collecting society per country is able to grant multi-repertoire licences for the use of the covered music in that country.
205. That delineation reflects, to some extent, the explicit exclusivity which had been set out in the CISAC model contract and the bilateral reciprocal representation agreements implementing it. If exclusivity is explicitly granted to the other collecting society concluding the bilateral agreement, collecting societies will delineate the authority to licence in the other bilateral agreements on the basis of the domestic territory of each collecting society. Any territorial delineation which would go beyond the borders of the domestic territory could encroach upon the exclusivity granted to another collecting society.
206. However, this also shows that since the two clauses concerning explicit exclusivity and territorial delineation go hand in hand, dropping the clauses on explicit exclusivity will not remove exclusivity altogether. Even in the absence of explicit exclusivity, collecting societies can achieve the same result by simply coordinating their behaviour so that the authority to licence is limited to the domestic territory of the collecting society. Even where collecting societies have, in individual cases, dropped the explicit exclusivity, no change in the allocation of territories among the collecting societies could be observed¹⁵³. Although a number of collecting societies claimed that they did not apply the existing exclusivity clauses, the collecting societies neither granted their own repertoires for exploitation in another country by a collecting society, other than the respective incumbent one, nor did they grant their repertoire to more than one collecting society in parallel for the same territory (covering several countries).
207. This effectively leads to national monopolies for the multi-repertoire licensing of public performance rights and has the effect of segmenting the EEA into national markets. Competition is restricted on two levels: (i) on the market for administration services which collecting societies provide to each other; and (ii) on the licensing market.
208. On the market for administration services which collecting societies provide to each other, the uniform territorial delineation ensures that each collecting society provides these administration services exclusively for its own home territory and also that it will not face competition from other collecting societies there. As an example, GEMA could in principle select the French SACEM to provide administrative services to GEMA in Belgium in parallel with the Belgian SABAM. However, on the basis of the coordinated rules applied by the collecting societies, GEMA selects SACEM only for France and SABAM for Belgium. In turn, SACEM and SABAM do not appoint

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See Section 7.6.2.1. of this Decision and paragraph 102 of the Statement of Objections.

anyone else other than GEMA, for the administration of French and Belgian rights in Germany.

209. The corresponding effect is reached on the market for the licensing of rights. Due to the allocation of the authority to license on a strictly national basis, the right users have no alternative for the acquisition of multi-repertoire licences other than the national collecting society for the respective country. A right user, regardless of its location, wishing to use music in Germany, for example, may only revert to GEMA for the necessary licence – no other collecting society may, on the basis of the concerted practice, grant licences to a user located in Germany. In principle, any collecting society could grant its rights to more than one collecting society per country. For example, SACEM could grant the rights over its repertoire (the French repertoire) for exploitation in Austria and Germany to both Austria's AKM and Germany's GEMA. Both collecting societies would then be able to grant licences over the French repertoire in Germany and Austria and the right-users would have a clear alternative with respect to that repertoire between two competing collecting societies.
210. The mutually guaranteed territorial monopolies for the licensing of public performance rights ensure that each collecting society will be able to charge administration costs for the management of rights and the delivery of the licence without facing competitive pressure on these fees from other collecting societies. Competition is thereby restricted. This lack of competition, as explained above, might also have negative repercussions at right holders' level.
211. The uniform territorial delineation creates effects which cement the structure of the market, exclude other forms of multi-repertoire licensing and confine each collecting society to operate only in its domestic territory. This network of reciprocal representation agreements has led to a situation where there is no scope for other means of organising and competing in the administration of copyright. It also creates barriers preventing access to the market by new competitors capable of administering the copyright in question, or new ways in administering copyright by existing players, and has the effect of constraining copyright distribution to the advantage of certain existing players.
212. In the absence of concerted practices on territorial delineations, collecting societies would be more likely to compete against each other by finding the most efficient means of rights administration. This would create differences between them in the territorial delineation of their licensing areas as well as in the number of collecting societies asked to administer their rights in another territory. The authors would consequently have an incentive to become members of those collecting societies which have found more efficient means of rights administration.

7.6.2.2. *Is the concerted practice objectively necessary for ensuring that EEA CISAC members grant each other reciprocal mandates?*

213. Some EEA CISAC members have submitted that in the absence of territorial delimitation, collecting societies would have no incentive to grant each other

reciprocal mandates to licence since it would force them to compete against each other in their respective territory and grant licence to the collecting societies in territories for which the latter may not have the prerequisite expertise or competence¹⁵⁴.

214. On the contrary, SABAM argued in its Reply to the Statement of Objections that: “there is no advantage for authors from obstructing the activities of legitimate multi national users of the world music repertoire who embark on modes of exploitation that are technologically new and inherently borderless”¹⁵⁵. SABAM also considers in its Reply that: “far from imperilling the quality of collective management of authors’ rights, a multi territorial licence produces advantages to authors and users alike... The territorial restrictions of the CISAC model contract generate the opposite from an improvement in collective management and preclude the emergence, growth and future maturity of this new market”¹⁵⁶. Competition will: “heighten the quality of services rendered to authors and users and no argument related to the existence of national exclusive rights can justify a non application of Article 81 of the EC Treaty. ... The national nature of copyright law can in no way sustain the claim of some collecting societies to be a natural and contractual national monopoly.”¹⁵⁷
215. First, it must again be observed that the ability of collecting societies to include territorial limitations in their reciprocal mandates is not contested. It is only the parallel territorial limitation applied to domestic territories which constitutes the objection raised by the Commission. There is no indication that such parallel conduct is objectively justified for having a network of reciprocal representation agreements, and the arguments of the Addressees of the Statement of Objections are mainly aimed at contesting the idea that territorial limitation would be, as such, restrictive of competition.
216. Second, the arguments developed by the EEA CISAC members are not convincing in general. The Addressees of the Statement of Objections have reiterated that monitoring abroad is difficult, and therefore that concluding reciprocal representation agreements with other collecting societies is vital in order to protect the interest of their members abroad. Without prejudice to the fact that some of the difficulties vis-à-vis monitoring exploitation beyond the domestic territory are exaggerated, the fact remains that it would hardly appear to be credible that collecting societies would simply give up the protection of their members abroad just because some degree of competition would arise as a result of the prohibition of such a concerted practice. In addition, since collecting societies have a fiduciary duty towards their members and are not entitled to discriminate as regard the royalties applied, a "race to the bottom" would imply that the collecting society would also

¹⁵⁴ See, for example, paragraph 53 of PRS's non-confidential Reply to the Statement of Objections.

¹⁵⁵ See p. 19, first paragraph of SABAM's Reply to the Statement of Objections

¹⁵⁶ See p. 19, second paragraph of SABAM's Reply to the Statement of Objections.

¹⁵⁷ See p. 20, last paragraph of SABAM's Reply to the Statement of Objections.

decide to charge lower royalties as regards its own members, which does not appear to be a realistic situation.

217. Third, collecting societies are not prevented from protecting the interests that their members may have in ensuring that revenues do not suffer as a result of the existence of some degree of competition in the granting of licences. Certain EEA CISAC members argued during the Oral Hearing that the main problem for issuing a multi-territorial licence is not related to the remote monitoring, auditing and enforcement activities of collecting societies, but to the price-setting of such a licence¹⁵⁸. According to this opinion, a collecting society would not have an interest in having other collecting societies compete against each other to licence its own repertoire abroad. This would mean – if the example mentioned in Recital 208 is used – that GEMA would, according to this opinion, not have an interest in SACEM and SABAM competing against each other to grant licences for the German repertoire since this would result in a race to the bottom for the prices for this repertoire and therefore in losses for GEMA (as opposed to the model with separate national territories per collecting society).
218. The Commission's position concerning this specific element has already been clarified in a similar case, in which all territorial delineations were dropped, and accepted a price mechanism in order to retain some control over revenues arising from such a mandate and to avoid any race to the bottom concerning the income of right holders. Indeed, in the *Simulcasting* Decision, it was stated that “the need for a collecting society to guarantee an appropriate level of remuneration for its own repertoire certainly results from the essential function of copyright and neighbouring rights, and consequently it is only natural that agreements between collecting societies will contain provisions on this issue”¹⁵⁹. As a consequence, the Commission accepted, as being exempted under Article 81(3) of the Treaty, the setting of a tariff mechanism: the price of a simulcasting licence is based on a global tariff to be charged by the licensor society and will reflect the different national tariffs determined by each of the participating collecting societies¹⁶⁰. The price of the licence issued by collecting societies is a combination of the administration fees and the price of the protected subject matter. Competition takes place on the administration fees and not on the rights themselves. It appears therefore that collecting societies have the option of securing the income of their members in a competitive environment for the delivery of multi-territorial multi-repertoire licences¹⁶¹.

¹⁵⁸ With regard to the price setting mechanism, see paragraphs 16 f. of GEMA's non-confidential Reply to the Statement of Objections.

¹⁵⁹ See paragraph 70 of Decision 2003/300/EC.

¹⁶⁰ A certain degree of competition concerning the price has been introduced, but only for the administration fees for licensors. Under this system, the “copyright” part of the price is not subject to competition, but only the level of administrative fees.

¹⁶¹ A similar system is currently applied by collecting societies in the EEA in the framework of the Cannes Extension Agreement, see Recital 82.

219. In addition, even without any such mechanism as used in the *Simulcasting* Decision, the mere deviation from the concerted approach and any resulting parallel assignment of identical licensing areas to more than one collecting society, does not necessarily lead to a race to the bottom. Currently a collecting society granting licences abroad for another collecting society which has given it a mandate, uses its own national tariffs and passes on a certain percentage of this income to the original collecting society. In order to avoid a race to the bottom on the repertoire of its own members which is licensed abroad by another collecting society, the collecting society giving a mandate could merely define a level of revenue (a sort of price) for its repertoire vis-à-vis the other collecting societies which grant licences abroad. It would thereby receive a guaranteed “wholesale” price for its repertoire and the distributor collecting societies would consequently compete on the margin they add to this wholesale price.
220. It cannot be assumed that even with certain adaptations of the pricing system, collecting societies would not have an incentive to create competition between their distributor collecting societies. A recent market trend clearly confirms that it may be an efficient strategy for right holders and therefore also for their trustees – the collecting societies – to grant their rights to several competing collecting societies. In the field of Anglo-American mechanical rights for online use, several initiatives have been initiated by the large publishers to withdraw these rights (which are in the hands of the publishers) from the current collecting societies system and to select one or several collecting societies for the EEA-wide administration of these rights. Warner Chappell has announced that it intends to designate several collecting societies who will have the power to grant, to commercial users, pan-European licences to exploit the Anglo-American mechanical rights of the Warner Chappell repertoire for online use¹⁶². This means that several collecting societies will compete for the granting of the corresponding licences in an identical territory. Warner Chappell considers that this will give it scope to withdraw its repertoire from any collecting society if the latter does not operate efficiently, without affecting the licensing market, because the other collecting societies will continue to be able to issue pan-European licences.
221. It can therefore be concluded that the practice at issue is not objectively necessary, in that there are less restrictive methods for ensuring that collecting societies have incentives to grant reciprocal mandates to licence.

7.6.3. Conclusion

222. Accordingly, a concerted practice between the EEA CISAC members is the only possible explanation for the current market outcome.
223. This concerted practice restricts competition within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement since it prevents

¹⁶² See press release of Warner Chappell dated 2.6. 2006, "Warner Chappell music launches its pan-European digital licensing (P.E.D.L.) initiative."

EEA CISAC members from choosing collecting societies, other than the domestic one, for the licensing of their repertoires abroad.

7.7. Effect on trade between Member States and between Contracting Parties to the EEA Agreement

224. In order to ascertain if the reciprocal representation agreements affect trade between Member States it must be determined whether they “may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States”¹⁶³.

225. For the purposes of that analysis the Commission should consider “all the consequences of the conduct complained of for the competitive structure in the common market”¹⁶⁴.

226. The Court of Justice has consistently adopted the view that the activities of collecting societies are capable of affecting trade between Member States¹⁶⁵. In this case, the effects on trade are two-fold:

(a) Membership restrictions restrict the ability of authors to obtain copyright administration services for their works from a collecting society outside their national jurisdiction; and

(b) Territorial restrictions and concerted practices on the uniform application of territorial delineations limit the ability of a prospective satellite, cable or internet broadcasters to obtain licences from several alternate collecting societies. In addition, a collecting society is prevented under the current system from offering licensing and administration services beyond its own national territory.

227. TONO from Norway and STEF from Iceland are both members of CISAC and have concluded reciprocal representation agreements with each collecting society in the Community.¹⁶⁶

¹⁶³ Case 42/84 Remia BV and others v Commission of the European Communities [1985] ECR 2545.

¹⁶⁴ Joined cases 6/73 and 7/73 Istituto Chemioterapico Italiano Spa and Commercial Solvents Corporation v Commission of the European Communities [1973] ECR 223, paragraph 33.

¹⁶⁵ Case 22/79 Greenwich Film Production v Société des Auteurs, compositeurs et éditeurs de musique (SACEM) and Société des Éditions Labrador; Case 7/82 Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v Commission of the European Communities, at paragraph 38.

¹⁶⁶ All reciprocal representation agreements of TONO and STEF contain Article 6(II) of the CISAC model contract. TONO and STEF take part in the concerted practice. Some of the reciprocal representation agreements concluded with collecting societies in the Community contain the membership clause and the exclusivity clause. Nevertheless, regarding those two restrictions, there is an effect on trade between Member States and EFTA States within the meaning of Article 53(1) of the EEA Agreement for the reciprocal representation agreements of all collecting societies in the Community. A membership clause between two collecting societies in the Community can have an impact on an author from Norway or Iceland if he or she is currently a member of one of those Community collecting societies. An exclusivity clause between two collecting societies in the Community has an impact on TONO and STEF because it prevents TONO and STEF from offering the repertoires covered by the exclusivity in the territories of those Community collecting societies.

228. Accordingly, the reciprocal representation agreements affect trade between Member States within the meaning of Article 81(1) of the Treaty and between Member States and EFTA States within the meaning of Article 53(1) of the EEA Agreement.

8. ARTICLE 81(3) OF THE TREATY AND ARTICLE 53(3) OF THE EEA AGREEMENT

8.1. Overview

229. In order to fulfil the conditions of Article 81(3) of the Treaty and of Article 53(3) of the EEA Agreement, the reciprocal representation agreements at bilateral level between collecting societies and the concerted practice of territorial delineation must satisfy four conditions, namely:

- (a) contribute to improving the production or distribution of goods or to promoting technical or economic progress;
- (b) allow consumers a fair share of the resulting benefits;
- (c) not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and
- (d) not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Those conditions are cumulative and must be satisfied in full. It is for the Addressees of the Statement of Objections to prove that the practice satisfies the cumulative conditions laid down by Article 81(3) of the Treaty¹⁶⁷.

230. The Addressees of the Statement of Objections did not put forward arguments which specifically address the application of Article 81(3) of the Treaty to the membership and exclusivity clauses. The following Section therefore assesses the application of Article 81(3) of the Treaty only to the coordinated approach which amounts to systematic territorial delineation by domestic territory.

231. Several EEA CISAC members have stated that the territorial restrictions in their bilateral reciprocal representation agreements constitute a pre-requisite for the mutual exchange of repertoires and, therefore, for collecting societies to offer multi-repertoire licences. It was stated that, without territorial limitations, no reciprocal representation agreements would be concluded, since collecting societies would not allow other collecting societies compete against them with their own repertoire. This would, as a consequence, destroy the one-stop shop which currently exists on national level on the basis of the reciprocal representation agreements.

232. However, the comments referred in the previous Recital address a scenario in which EEA CISAC members could not use any kind of territorial delineation

¹⁶⁷ Order of the Court of 28.9.2006, C-552/03-P Unilever Bestfoods (Ireland) Ltd v Commission of the European Communities, [2006] ECR I-09091, at paragraph 103.

in their reciprocal representation agreements. Since this Decision prohibits a concerted practice among the EEA CISAC members with respect to the definition and application of territorial delineation, the arguments raised by the EEA CISAC members do not apply. EEA CISAC members are not prevented from defining, on an individual basis, the licensing areas for their own repertoire abroad. As explained in Section 7.6.2.2., it cannot be accepted that, in the absence of the concerted practice, EEA CISAC members would refrain from entering into reciprocal representation agreements. There is therefore no need for EEA CISAC members to leave the reciprocal system following this Decision.

8.2. Contribution to improving the production or distribution of goods or the promotion of technical or economic progress

233. Under the first condition of Article 81(3) of the Treaty and of Article 53(3) of the EEA Agreement the decision, an agreement or practice must contribute to improving the production or distribution of products or to promoting technical or economic progress. This condition entails an examination of all the economic benefits flowing from the economic activity covered by the agreement. Efficiency claims must be substantiated¹⁶⁸ and only objective benefits, as opposed to the subjective views of the parties, may be taken into account¹⁶⁹. The improvement "must in particular show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition".¹⁷⁰

234. It is not disputed that the network of bilateral reciprocal representation agreements between collecting societies provides a national one-stop shop for a worldwide management of rights. Within a particular territory, the CISAC model contract and the bilateral reciprocal representation agreements implementing it, allow a collecting society to provide a one-stop shop for the licensing of public performance rights within that particular territory. As a result, a potential commercial user which intends to perform acts in Germany which require a licence from the right holder needs only approach GEMA for the relevant multi-repertoire licence within the German territory. The network of bilateral reciprocal representation agreements generally facilitates the licensing of public performance rights through increased simplicity.¹⁷¹

¹⁶⁸ Communication from the Commission - Notice - Guidelines the on the application of Article 81(3) of the Treaty.

¹⁶⁹ Joined cases 56/64 and 58/66 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] ECR 299.

¹⁷⁰ Order of the Court of 28.9.2006 in Case C-552/03-P *Unilever Bestfoods (Ireland) Ltd v Commission of the European Communities*, at paragraph 103: "as regards the first of those conditions, HB was required in particular to establish that the exclusivity clause contributed to improving the production or distribution of the goods in question, so that, were restrictions to be imposed on the possibility of implementing that clause, such an improvement could no longer be realised".

¹⁷¹ See, for example, paragraphs 13 and 154 f. of GEMA's non-confidential Reply to the Statement of Objections.

235. However, the arguments of the EEA CISAC members address a scenario in which EEA CISAC members could not use any kind of territorial delineation in their reciprocal representation agreements. As explained in Recital 232, there is therefore no need for EEA CISAC members to leave the reciprocal system following this Decision.
236. None of the parties raised the argument that a concerted practice on uniform national territorial delineation between CISAC members contributes to preserving these potential benefits. The prohibition of a concerted practice on territorial delineation does not call into question the system of reciprocal representation agreements. It may only change the degree of participation of each collecting society within this system. Individually concluded, reciprocal representation agreements would lead to the result that some EEA CISAC members would be granted the opportunity to issue licences for the administration and licensing of foreign repertoires beyond their home territory. This would be the case where particular collecting societies offer a better service in terms of, for example, better monitoring and recording of royalty collection, lower administrative fees. Due to the incentive to have reciprocal representation agreements with all collecting societies so as to have access to all repertoires, there is no risk for the national one-stop shop even if there were to be an increase in the number of alternative licensors with respect to certain territories.
237. To conclude, the Addressees of the Statement of Objections did not demonstrate that the concerted practice, amounting to the systematic territorial delineation of the authority to license by domestic territory, improves the delivery of public performance rights licences for internet, satellite and cable exploitation.

8.3. The indispensability of restrictions

238. The issue of indispensability raises the question as to “whether or not the restrictive agreement and individual restrictions make it possible to perform the activity in question more efficiently than would likely have been the case in the absence of the agreement or the restriction concerned”¹⁷². To assess the indispensability of individual restrictions, as is required in this Decision, it is particularly relevant to examine whether the Addressees of the Statement of Objections could have achieved the efficiencies by means of a less restrictive agreement.
239. In order to justify the territorial restriction, EEA CISAC members have referred to the need to ensure proper reporting, auditing and enforcement of rights.
240. As explained in Section 8.2, the current network of bilateral reciprocal representation agreements between collecting societies offers certain efficiencies: from a commercial user's perspective, the system offers a one-stopshop for the granting of a national multi-repertoire licence. Each collecting society fulfils this one-stop shop function within respective

¹⁷² See Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty, at paragraph 74.

domestic territories. The collecting societies' arguments seem to indicate that only in the current system proper monitoring, reporting, auditing and enforcement of rights may take place.

241. As indicated in Recital 236, the national one-stop shop is not put at risk by the prohibition of the concerted practice relating to the territorial delimitation based on domestic territories. The one-stop shop does not require a concerted definition of territorial restrictions. In the absence of the coordination on territorial restrictions, each collecting society will likely remain a one-stop shop within its territory for the granting of a multi-repertoire licence, since every collecting society has a strong incentive to conclude a reciprocal representation agreement with every other collecting society in order to receive all repertoires. However, any collecting society will have the opportunity to be selected for the administration of foreign repertoires for a broader geographic scope (that is to say, to grant licences beyond its home territory in competition with the incumbent collecting society).
242. The Commission's market investigation has shown that collecting societies are able to guarantee the proper administration of rights on a larger geographic basis. The recent market developments (the joint venture between PRS and GEMA for the management of the online rights of the Anglo-American repertoire of EMI¹⁷³, the tender launched by Warner Chappell for the management of its online rights¹⁷⁴ and the agreement between SACEM and Universal Publishing for online and mobile licensing¹⁷⁵) demonstrate that authors' collecting societies have solutions for licensing on a multi-territorial basis and for ensuring proper remote monitoring, auditing and local enforcement if necessary. In addition, the licensor of a multi-territorial licence may not automatically be the entity which will perform the tasks of monitoring, auditing and enforcement¹⁷⁶.
243. To conclude, the concerted practice on territorial delineation, which limits the licence to the domestic territory of each collecting society, cannot be considered as indispensable within the meaning of Article 81(3) of the Treaty or of Article 53(3) of the EEA Agreement.

8.4. Allowing consumers a fair share of the resulting benefit

244. Under the second condition of Article 81(3) of the Treaty and of Article 53(3) of the EEA Agreement, economic benefits must be shown to favour not only the parties to the agreement, or to the concerted practice, but also consumers,

¹⁷³ See Section 7.6.1.4, Recital 193.

¹⁷⁴ See Section 7.6.2.2., Recital 220.

¹⁷⁵ SACEM and Universal Publishing announced on 28 January 2008 that they have signed an agreement to allow SACEM to licence Universal Publishing's rights for online and mobile exploitation in Europe. Notably, Universal emphasises the technical capacities of SACEM – The Executive Vice President of Universal Publishing said "I have great confidence that SACEM's remarkable IDOLS system will facilitate the pan European administration of our repertoire". See joint press release of SACEM and Universal published on 28.1.2008.

¹⁷⁶ See Recital 178 et seq.

and these benefits must outweigh the negative effects caused to them by the restrictions on competition.

245. As indicated above, this Decision does not affect the potential benefits connected to a national one-stop shop on the basis of the reciprocal representation agreements. It does not put into question cultural diversity, whether at the level of creation (authors) or access (consumers), as explained above¹⁷⁷.
246. Whilst the issue of a "fair share" can therefore in principle be left open in the framework of this Decision, there are in any case doubts that consumers receive a fair share of the potential benefits provided by the system of uniform national territorial delineations.
247. It is recalled that the concept of "consumer" within the meaning of Article 81(3) of the Treaty and of Article 53(3) of the EEA Agreement is not synonymous with the final consumer. The term covers the customers of the parties to the agreement, in this case the right holders (that is to say, authors of musical works) and commercial users of public performance rights for satellite, cable and internet exploitation¹⁷⁸.
248. From a right holder's perspective, the existing network of reciprocal representation by domestic territory ensures that in each EEA country one collecting society (the incumbent collecting society) is in charge of the exploitation of their works. However, this only translates into an economic advantage if all the local collecting societies efficiently manage the repertoires they have been granted. As has been demonstrated¹⁷⁹, based on certain criteria such as the administration fee rates, the level of efficiency of the various collecting societies significantly varies.. The advantage of the restriction of competition resulting from the existing network of bilateral reciprocal representation agreements is therefore not evident from a right holders' perspective¹⁸⁰.
249. From a commercial user's perspective, the coordination on a uniform national territorial delineation enables the incumbent collecting society to offer a comprehensive repertoire to their domestic commercial users. This solution generates efficiency insofar as each collecting society is a one-stop shop for the delivery of a multi-repertoire licence. However, the disadvantages of this

¹⁷⁷ See Section 7.3.1.

¹⁷⁸ See Communication from the Commission - Notice Guidelines on the application of Article 81(3) of the Treaty, at paragraph 84.

¹⁷⁹ See Recital 133.

¹⁸⁰ In addition, as mentioned by SABAM in its Reply to the Statement of Objections, "The exercise of authors' rights by the collecting societies appointed by these authors requires to be carried out to these authors' advantage. No such advantage is gained from materially obstructing the activities of legitimate multi national users of the world music repertoire who embark on modes of reproductions and, specifically, of performance that are technologically new in that they are inherently borderless and allow the dissemination of protected works towards a number of national populations" (emphasis added) (see page 19 of SABAM's Reply to the Statement of Objections).

one-stop shop include the fact that any licence granted is strictly limited to single national territories and that the emergence of alternative providers of licences for the same territory are excluded. It can, therefore, be left open whether this would represent a fair share, since the application of Article 81(3) of the Treaty already fails on the basis of the other conditions.

8.5. No elimination of competition

250. According to the fourth condition of Article 81(3) of the Treaty and of Article 53(3) of the EEA Agreement, an agreement must not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products (or services) concerned¹⁸¹. For the assessment of the market situation in the light of the above criteria, both actual and potential competition must be considered.
251. Due to the territorial restrictions resulting from the concerted practice, a collecting society cannot offer administration services beyond its own territory and may not, as a consequence, offer licences which include more repertoires than its own one, for use by commercial users outside of its own territory. Commercial users have no choice but to obtain a multi-repertoire licence from the local collecting society for only that local territory. The coordination on territorial restrictions means, therefore, that collecting societies totally eliminate competition between each other in relation to licensing of the other collecting societies' repertoires for satellite, cable and internet broadcasting use and create a market partitioning between EEA CISAC members.
252. Due to the complementary nature of individual repertoires, which is exacerbated by the membership restrictions, the main source of competition in this market is at present competition on the repertoire which collecting societies would receive via the reciprocal representation agreements but for the territorial restrictions. The elimination of competition is particularly serious because the collecting societies themselves are the only ones who could realistically enter the other national markets. Their long-entrenched monopolistic positions, caused by exclusivity granted directly (through explicit provisions) and indirectly (through the concerted practice on territorial delineation), creates a barrier to entry which is impossible for a newcomer to overcome. The prospects for market entry by newcomers are consequently poor. In light of the above, the territorial restrictions eliminate competition in the relevant markets for the administration of rights and the licensing of repertoires.

8.6. Conclusion on Article 81(3) of the Treaty and on Article 53(3) of the EEA Agreement

253. The Addresses of the Statement of Objections have failed to demonstrate that the CISAC model contract and its application at bilateral level between EEA CISAC members, including the concerted practice on territorial delineation,

¹⁸¹ See Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty, at paragraph 105.

fulfil all the requirements of Article 81(3) of the Treaty and of Article 53(3) of the EEA Agreement.

254. Even without the restrictions, the alleged benefits, in particular national one-stop shops and proper monitoring and reporting can still be provided. The restrictions are consequently not indispensable. In addition, they eliminate competition on the markets for the administration of repertoires for other EEA CISAC members and the licensing of rights.
255. Accordingly, it must be concluded that neither the membership clause, the territorial restrictions in the bilateral reciprocal representation agreements, nor the concerted practice on the uniform national territorial delineation fulfil Article 81(3) of the Treaty or Article 53(3) of the EEA Agreement.

9. ARTICLE 86(2) OF THE TREATY

256. Some EEA CISAC members submit that they are undertakings entrusted with 'the operation of services of general economic interest' within the meaning of Article 86(2) of the Treaty and that therefore they are subject to the rules on competition only insofar as the application of such rules 'does not obstruct' the performance of the particular tasks assigned to them¹⁸².
257. The Court of Justice held in Case 7/82, the *GVL* judgment regarding the German performing artists' collecting society, that the fact that a company must be officially authorised, be subject to monitoring by a public authority and be under a duty to conclude certain management agreements, is not sufficient for it to be included in the category of undertakings referred to in Article 86(2) of the Treaty¹⁸³. The Court underlined that the German legislation does not confer the management of copyright or related rights on specific undertakings but defines in a general manner the rules applying to collecting societies¹⁸⁴. It can be left open whether the relevant laws of certain EEA countries describe the function and the status of the collecting society in a way which allows the assumption that the collecting society is entrusted with the operation of services of general economic interest¹⁸⁵.
258. In any case, as has been shown in Section 7.6.2.2, it has not been demonstrated by the EEA CISAC members who have raised this issue that the concerted practice on the territorial delineation, which limits a licence to the domestic territory of each collecting society, is necessary for the proper functioning of collective rights management. AKM puts forward that only a

¹⁸² See in particular pages 34 et seq. of AKM's non-confidential Reply to the Statement of Objections. GEMA is of the opinion that Article 86(2) of the Treaty should at least be applied by analogy – see paragraph 122 of GEMA's non-confidential Reply to the Statement of Objections.

¹⁸³ Case 7/82 *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v Commission of the European Communities*, at paragraph 31 et seq.

¹⁸⁴ *Ibid* at paragraph 32.

¹⁸⁵ In particular AKM argues that the legal situation in Austria differs appreciably from the one existing in Germany – see pages 35 et seq. of AKM's non-confidential Reply to the Statement of Objections.

territorial delineation of the licence could best guarantee its members' rights abroad because in the case of licences unlimited in their territorial scope, foreign collecting societies could compete on AKM's repertoire, which would put pressure on the right holders' royalties¹⁸⁶.

259. First, this Decision does not prohibit any territorial delineation, but the concerted practice among all EEA CISAC members relating to strict domestic territorial delineation. Second, as demonstrated in Section 7.6.2.2., there are mechanisms which allow collecting societies to retain some control over revenues in case they grant licences to several collecting societies for the same territory, in particular by limiting price competition to the administrative fees. On the contrary, granting a mandate to a very efficient collecting society in addition to, or instead of the domestic collecting society, could increase the number of licences granted to commercial users, which would have a positive impact on the royalties paid to the members of AKM. In addition, insofar as national laws have created exclusive or special rights, this Decision, which limits itself to assess the restrictions of competition which result from the collecting societies' autonomous behaviour (see Section 7.3.2.), does not affect the national laws. The prohibition of the concerted practice does not therefore obstruct the public performance of the tasks which might be assigned to certain collecting societies.

10. REMEDIES

10.1. Practices infringing Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement

260. Certain of the infringements covered by this Decision have been terminated. The exclusivity clause (in Article 1(I) and (II)) and the membership clause (in Article 11(II)) are no longer part of the CISAC model contract.¹⁸⁷ However, on the basis of the information in the Commission's possession, a series of clauses are still included in a number of reciprocal representation agreements and certain practices contrary to both Article 81(1) of the Treaty and Article 53 (1) EEA continue to be in place. This is true in particular for:

(a) the membership restriction clauses contained in reciprocal representation agreements concluded by certain collecting societies;

(b) the exclusive rights conferred in the reciprocal representation agreements concluded by certain collecting societies;

(c) the concerted practices relating to the territorial delineation by the collecting societies.

¹⁸⁶ See page 38 of AKM's non-confidential Reply to the Statement of Objections.

¹⁸⁷ These clauses were respectively removed from the CISAC model contract in 1996 and 2004. See Section 4.4.1. of this Decision, Recital 27 et seq.

10.2. Article 7(1) of Regulation (EC) No 1/2003

261. Where the Commission finds that there is an infringement of Article 81 of the Treaty it may, in accordance with Article 7(1) of Regulation (EC) No 1/2003 require, by decision, the undertakings and/or associations of undertakings concerned to bring such an infringement to an end. Pursuant to Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994, concerning arrangements for implementing the Agreement of the European Economic Area¹⁸⁸, "the Community rules giving effect to the principles set out in Articles 85 and 86 [now Articles 81 and 82] of the EC Treaty [...] shall apply *mutatis mutandis*" in respect of the EEA.
262. For that purpose, the Commission may impose on the undertakings any behavioural or structural remedies which are proportionate to the infringement committed and necessary to effectively bring the infringement to an end.
263. First, a series of clauses are still included in certain agreements and some practices are still in place. Second, although some EEA CISAC members claim to have removed restrictive clauses from all the bilateral reciprocal representation agreements, it cannot be safely assumed that such belated removal completely removes the need to order the undertakings in question to bring the infringement to an end. Third, bearing in mind that Article 81 of the Treaty may apply with regard to agreements which are no longer in force, if they continue to produce their effects after they have formally ceased to be in force,¹⁸⁹ it is not certain that the infringement has come to a complete end as regards certain anti-competitive practices carried out by certain collecting societies. Accordingly, the addressees of this Decision must first:
- (a) immediately bring to an end, if they have not already done so, the infringements concerning the membership restriction clauses and exclusive rights clauses contained in reciprocal representation agreements; and
 - (b) within 120 days of the date of notification of this Decision, bring to an end the infringement concerning the concerted practice relating to the territorial delineation.
264. The addressees of the Decision should also communicate to the Commission all the measures they have taken to implement these remedies. As regards the concerted practice on territorial delineation, it is first necessary to stop any concertation in the future of the type addressed in this decision. Second, although the fact of limiting the mandate to the territory of the other collecting society is not in itself restrictive of competition, it is also

¹⁸⁸ OJ L 305, 30.11.1994, p. 6.

¹⁸⁹ See, to this effect, Case 51/75 *EMI Records Limited v CBS United Kingdom Limited* [1976] ECR 811, paragraph 15; Case 243/83 *SA Binon & Cie v SA Agence et messageries de la presse* [1985] ECR 2015, paragraph 17; Case T-2/89 *Petrolina SA v Commission of the European Communities* [1991] ECR II-1087, paragraph 212; Case T-14/89 *Montecatini SpA (formerly Montedipe SpA) v Commission of the European Communities* [1992] ECR II-2409, paragraph 231; Case T-327/94 *SCA Holding Ltd v Commission of the European Communities* [1998] ECR II-1373, paragraph 95; joined cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, *Bolloré SA and Others v Commission of the European Communities* [2007] ECR II-00947, at paragraph 186.

necessary, insofar as past concertation is still reflected in existing agreements, to make sure that the bilateral agreements in the future are, as regards the territorial delineation of the reciprocal mandates, the result of bilateral negotiations and are not anymore influenced by the existence of a concerted practice which limits the territory of the mandate.

265. Further, the addressees of the decision should refrain from any agreement or concerted practice which might have the same or similar object or effect as the conduct described in Recital 260,

HAS ADOPTED THIS DECISION:

Article 1

The following undertakings have infringed Article 81 of the Treaty and Article 53 of the EEA Agreement by using, in their reciprocal representation agreements, the membership restrictions which were contained in Article 11(II) of the model contract of the International Confederation of Societies of Authors and Composers (' the CISAC model contract'), or by de facto applying those membership restrictions:

AEPI
AKKA/LAA
AKM
ARTISJUS
BUMA
EAÜ
GEMA
IMRO
KODA
LATGA-A
PRS
OSA
SABAM
SACEM
SAZAS
SGAE
SIAE
SOZA
SPA
STEF
STIM
TEOSTO
TONO
ZAIKS

Article 2

The following 17 undertakings have infringed Article 81 of the Treaty and Article 53 of the EEA Agreement by conferring, in their reciprocal representation agreements, exclusive rights as provided for in Article 1(I) and (II) of the CISAC model contract:

AKKA/LAA
ARTISJUS
BUMA
EAÜ
IMRO
KODA
LATGA-A
OSA
SAZAS
SGAE
SOZA
SPA
STEF
STIM
TEOSTO
TONO
ZAIKS

Article 3

The following undertakings have infringed Article 81 of the Treaty and Article 53 of the EEA Agreement by coordinating the territorial delineations in a way which limits a licence to the domestic territory of each collecting society:

AEPI
AKKA/LAA
AKM
ARTISJUS
BUMA
EAÜ
GEMA
IMRO
KODA
LATGA-A
PRS
OSA
SABAM
SACEM
SAZAS
SGAE
SIAE
SOZA
SPA

STEF
STIM
TEOSTO
TONO
ZAIKS

Article 4

1. The undertakings listed in Articles 1 and 2 shall immediately bring to an end the infringements referred to in those Articles, insofar as they have not already done so, and shall communicate to the Commission all the measures they have taken for that purpose.
2. The undertakings listed in Article 3 shall, within 120 days of the date of notification of this Decision, bring to an end the infringement referred to in that Article and shall, within that period of time, communicate to the Commission all the measures they have taken for that purpose.

In particular, the undertakings listed in Article 3 shall review bilaterally with each other undertaking listed in Article 3 the territorial delineation of their mandates for satellite, cable retransmission and internet use in each of their reciprocal representation agreements and shall provide the Commission with copies of the reviewed agreements.

3. The addressees of this Decision shall refrain from repeating any act or conduct described in Articles 1, 2 and 3, and from any act or conduct having the same, or similar, object or effect.

Article 5

The Commission may at its sole discretion and upon reasoned and timely request by one or several undertakings listed in Article 3 grant an extension of the time provided for in Article 4 second paragraph.

Article 6

This Decision is addressed to:

- (1) Ελληνική Εταιρεία Προστασίας της Πνευματικής Ιδιοκτησίας (ΑΕΠΙ), Fragoklissias and Samou street n° 51, 151 25 Amaroussio, Athens, Greece
- (2) Autortiesību un komunikēšanas konsultāciju agentūra – Latvijas Autoru apvienība (AKKA/LAA), A.Čaka street 97, 1011 Riga, Latvia

- (3) Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, reg.Gen.m.b.H (AKM), Baumannstrasse 10, Postfach 259, 1031 Vienna, Austria
- (4) Magyar Szerzői Jogvédő Iroda Egyesület (ARTISJUS), Meszaros u. 15-17, 1016 Budapest, Hungary
- (5) Vereniging Buma (BUMA), Siriusdreef 22-28, 2130 KB Hoofddorp, Netherlands
- (6) Eesti Autorite Ühing (EAÜ), Lille 13, 10614 Tallinn, Estonia
- (7) Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA), Rosenheimer Strasse 11, 81667 Munich, Germany
- (8) the Irish Music Rights Organisation Limited – Eagrais um Chearta Cheolta Teoranta (IMRO), Copyright House, Pembroke Row, Lower Baggot Street, Dublin 2, Ireland
- (9) Komponistrettigheder i Danmark (KODA), Landemaerket 23-25, Postboks 2154, 1016 Copenhagen, Denmark
- (10) Lietuvos autorių teisių gynimo asociacijos agentūra (LATGA-A), J. Basanaviciaus G. 4h, 2600 Vilnius, Lithuania
- (11) Ochranný svaz autorský pro práva k dílům hudebním, o.s. (OSA), Cs. Armady 786/20,16056 Prague 6, Czech Republic
- (12) Performing Right Society Limited (PRS), Berners Street 29-33, London W1T 3AB, United Kingdom
- (13) Société Belge des Auteurs, Compositeurs et Editeurs Scrl / Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM), Rue d'Arlon 75-77, 1040 Brussels, Belgium
- (14) Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM), 225 av Charles de Gaulle, 92528 Neuilly sur Seine Cedex, France
- (15) Združenje skladateljev, avtorjev in založnikov za zaščito avtorskih pravic Slovenije (SAZAS), Trzaska cesta 34, 1000 Ljubljana, Slovenia
- (16) Sociedad General de Autores y Editores (SGAE), Fernando VI-4, 28004 Madrid, Spain
- (17) Societa Italiana degli Autori ed Editori (SIAE), VIALE della Letteratura 30, 00144 Rome, Italy
- (18) Slovenský ochranný Zväz Autorský pre práva k hudobným dielam (SOZA), Rastislavova 3, 2108 Bratislava 2, Slovakia
- (19) Sociedade Portuguesa de Autores (SPA), Avenue Duque de Loulé 31, 1069-153 Lisbon, Portugal
- (20) Samband Tónskalda og Eigenda Flutningsréttar (STEF), Laufasvegi 40, 101 Reykjavik, Iceland

(21) Svenska Tonsättares Internationella Musikbyrå (STIM), BOX 27327, 10254 Stockholm, Sweden

(22) Säveltäjain Tekijänoikeustoimisto teosto r.y.(TEOSTO), Lauttasaarentie 1, 00200 Helsinki, Finland

(23) The Norwegian Performing Right Society (TONO), Postboks 9171, Gronland, 0134 Oslo, Norway

(24) Stowarzyszenie Autorów ZAiKS (ZAIKS), 2, Hipoteczna Street, PO Box P-16, 00092 Warsaw, Poland

This Decision shall be enforceable pursuant to Article 256 of the Treaty and Article 110 of the EEA Agreement.

Done at Brussels, 16.07.2008

For the Commission
Neelie KROES
Member of the Commission