Online Commerce Roundtable

Report on

Opportunities and barriers to online retailing

I. Introduction

(1) On 17 September 2008, Commissioner Neelie Kroes hosted at the European Commission's Brussels headquarters the Online Commerce Roundtable comprising senior consumer and industry representatives (from now on, also referred to as "the Group") to discuss the business opportunities created by the Internet and the existing barriers to increased online retailing in Europe[1]. Commissioner Kroes is concerned about restrictions which prevent EU consumers from legally accessing to and benefiting from goods and services online, wherever these consumers are located, despite the technology available and the growing demand for such goods and services. On 16 December 2008, the services of the Commission hosted, at the premises of DG Competition in Brussels, a second full day meeting of the Group.

(2) The present document, which takes stock of both meetings, is a report prepared by the Group for the Commission.

II. Context of the online retailing issues

A) Online retailing of music

(3) EU consumers seeking to buy via the Internet content protected by Intellectual Property (IP) Rights such as music, films, videos and pictures as electronic data files, are often only allowed access to online stores directed to their country of residence. In spite of the open and borderless nature of the Internet, territorial restrictions prevent a true and genuine internal market for online services, limit business opportunities and harm consumers.

(4) In the field of online retailing of music, the iTunes case (see MEMO/07/126[2]) has shown that there is no EU common market for digital music downloads. Even though Apple abolished the price discrimination of UK consumers (see IP/08/22[3]), it still does not allow

[1] See IP/08/1338, available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1338&format=HTML&aged=0&language=EN&guiLanguage=en.

[2] Available at http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/126&format=HTML&aged=1&language=EN&guiLanguage=fr.

[3] Available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/22&format=HTML&aged=0&language=EN&guiLanguage=en.

EU consumers to buy from any iTunes online store in Europe. The *de facto* impossibility to buy IP-protected content from any EU online store is particularly harmful to consumers from the new Member States, who currently have a very limited choice of what music they can legally buy on the Internet, even though the demand for such content is growing[4]. The Commission's antitrust proceedings allowed clarifying that there is no prohibited agreement under Article 81 EC between Apple and the major recording companies regarding how the iTunes store is organized in Europe. As a result, Apple decides whether and when to make its iTunes online store accessible in the new EU Member States. But music licensing practices and the current copyright framework might make it difficult to operate online stores accessible for any consumer, anywhere in the EU.

(5) In fact, the provider of an online music store has to secure a number of IP rights before being in a position to offer music data files to customers. IP rights have a territorial nature, which means that they can be granted Member State by Member State.

(6) In order to operate an on-line music distribution service a distributor needs to obtain two essential inputs. First, the online music store needs agreements with the record companies who will provide it with the sound recordings to be sold in digital form. These contracts also involve the licensing of mechanical and public performance rights pertaining to the record companies as phonogram producers and to the performing artists involved in the recording which the record companies have previously cleared. Recording companies grant their rights either for the whole of the EEA or for certain countries only, but not for others, even if they own them for all territories. A typical example of country-specific licensing models by record companies are "staggered releases", according to which recording companies make available new songs or albums country by country within a time-frame of some few weeks, in order to be able to maximize their marketing efforts in each country.

(7) Second, the online music store needs to obtain contracts with collecting societies[5] in order to clear the relevant mechanical and public performance rights pertaining to the author(s) of the music used for the sound recording. Historically, each national collecting society has granted a licence which covers the global repertoire, but only for its domestic territory. An online provider with an EEA-wide offer therefore had to enter into licence agreements with all national collecting societies. Recently, some big publishers withdrew their Anglo-American mechanical rights from the network of collecting societies[6] (e.g. see below the "CELAS" initiative) and started with selected rights managers the EEA-wide licensing of their rights. The territorial scope of the licence was thereby extended, but only for a limited repertoire, with the consequence that a commercial user wishing to offer the global repertoire has to continue concluding licensing agreements with each national

[4] The IFPI Digital Music Report 2008 indicates that online music services currently exist in Bulgaria (2), Poland (5) and Slovenia (2). None of them is an iTunes online store.

[5] Collecting societies are bodies authorized by right holders to commercially exploit their rights. As right holders cannot individually monitor all the different uses made of their works, they entrust this task to collecting societies.

[6] Reference is made here to the "reciprocal representation agreements" that collecting societies have concluded among themselves. Under such bilateral agreements, one collecting society grants to the other the right to represent its repertoire in the territory of the other.

collecting society for the remaining repertoire, and must in addition secure agreements with the right managers mandated to licence the withdrawn Anglo-American rights of big publishers[7].

(8) As regards the management of authors' public performance rights of musical works, the Commission issued a prohibition Decision against 24 EEA collecting societies on 16 July 2008[8]. The Decision prohibits membership and exclusivity clauses of the reciprocal representation agreements between the parties and a concerted practice concerning the territorial delineation of these representation agreements. Even for new modes of exploitation such as internet, satellite or cable retransmission, for which no physical presence is required to monitor the use of the granted licence, collecting societies continue to limit their mandates to the domestic territory of the other collecting societies. The result is a *de facto* exclusivity for the granting of licenses which cover the repertoire of more than one collecting society and a strict segmentation of the market on a national basis. The systematic delineation of the domestic territory amounts to a concerted practice because it cannot be explained by individual market behavior or an objective need for geographic proximity between the collecting society and the commercial user.

(9) For the internet use, collecting societies had already agreed on the principle of multi-territory licensing. The Santiago Agreement between collecting societies[9] authorized each party to grant licenses for the online-exploitation of musical works pertaining to the repertoire of the other party on a world-wide basis for the users. However, only the society of the country where the content provider had its actual and economic location was able to grant such a licence. The customer allocation clause prevented any competition between collecting societies for the granting of multi-repertoire licenses. The Commission formally objected to the agreement on 30 April 2004[10]. The agreement expired on 31 December 2004 and was not renewed. Collecting societies returned to granting mandates limited to the domestic territory of the other collecting societies.

(10) The Commission dealt with online licensing also in the framework of merger control. By decision of 22 May 2007, the Commission approved the acquisition of BMG's music publishing business by Universal, subject to conditions. The Commission found that the proposed merger, as initially notified, raised serious doubts as regards adverse effects on competition in the market for music publishing rights for online applications. Regarding the online rights for Anglo-American repertoire, Universal could get into a position to exert control over a large percentage of titles becoming in a number of countries a "must-have" product for all online and mobile music services whose possibilities to circumvent Universal would have been significantly reduced by the merger. Universal's pricing power would in particular increase following the withdrawal of its rights from the network of collecting societies. However, the Commission's investigation found that these concerns

[7] For instance, Universal has mandated SACEM to administer the Anglo-American mechanical rights, and Sony/ATV has mandated GEMA.
[8] Case COMP/38.698 *CISAC Agreement* (see DG COMP website on http://ec.europa.eu).
[9] The Agreement was notified to the Commission in April 2001 by the collecting societies of the UK (PRS), France (SACEM), Germany (GEMA) and the Netherlands (BUMA), which were subsequently joined by all societies in the European Economic Area (except for the Portuguese society SPA) as well as by the Swiss society (SUISA).
[10] See press release IP/04/586, available on the "Rapid" website (http://europa.eu/rapid).

would be removed by the remedies package proposed by the parties concerning the divestiture of a number of publishing catalogues.

(11) By decision of 3 October 2007, the Commission confirmed clearance under EU merger control rules for the creation of Sony BMG, a joint venture combining the recorded music businesses of Sony and Bertelsmann. The in-depth investigation showed that the merger has not led to the creation or strengthening of a collective dominant position of the majors in any recorded music market, neither the physical market (CDs), nor the on-line market (internet and mobile phones music download).

B) Online retailing of goods

(12) Online markets for goods are not necessarily partitioned along national borders. Nevertheless, consumers sometimes complain that they are prevented from engaging in cross border transactions over the internet[11] while companies claim that they do not engage in such transactions for reasons of payment security or State barriers resulting from differences in national legislation such as consumer protection, copyright, taxation laws etc. There is no competition law instrument to deal with this kind of barriers. However, the EC competition rules are particularly relevant for online barriers set up by companies within the framework of a distribution agreement.

(13) The EC competition rules on distribution agreements, the Block Exemption Regulation and Guidelines on vertical restraints (hereinafter referred as *"the Block Exemption Regulation"* and *"the Guidelines")*[12], do not allow anticompetitive resale restrictions on distributors. Therefore, in most distribution agreements, including those providing for sales over the internet, restrictions on where and to whom the distributor may sell the product (resale restrictions) infringe in principle the competition rules. In this regard, the current policy towards vertical agreements is already very supportive of internet sales. Restrictions on the distributors' use of the internet – having a website, using various languages on that site, sending e-mails to individual customers – as a general rule infringe the competition rules. The Guidelines make it clear that *"every distributor must be free to use the internet to advertise or to sell products"* (paragraph 51).

(14) There are however two specific types of distribution systems, exclusive and selective distribution, which are block exempted under the current competition rules while they include certain resale restrictions, including some restrictions of sales over the internet. That is because it is considered that they may bring efficiencies, such as the preventing of "free riding" between distributors, which can benefit consumers.

[11] The most common reported practices are (a) website redirection, *i.e.* when consumers are re-routed to the websites of distributors of their Member State when they want to buy online in another Member State and (b) credit card checks which lead to termination of the transaction process over the internet once the credit card data reveal an address that is not that of the targeted Member State.

[12] Commission Regulation (EC) 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] OJ L 336, 21–25; Commission Notice Guidelines on Vertical Restraints [2000] OJ C 291, p. 1–44.

(15) When the manufacturer's market share is below 30%, the Block Exemption Regulation covers protecting an exclusive distributor against active sales of other exclusive distributors via the internet, such as e-mails, directly addressed to customers in the exclusive territory or the use of banners or links in pages of providers specifically available to customers inside an exclusive territory. Furthermore, the current regime does not generally interfere with the selection criteria the producer with a market share below 30% applies to select its dealers since selective distribution is covered by the Block Exemption Regulation. That is to say a manufacturer can exclude from online sales companies which do not fulfill the selection criteria. He may for instance require, as a selection criterion, its distributors to have a brick and mortar shop or showroom to allow consumers to taste/feel/experience the product, thereby excluding internet-only-shops from the distribution network. More in general, the supplier may require quality standards for the use of the internet site to resell his goods.

(16) The current Block Exemption Regulation will expire on 31 May 2010. The Commission is currently examining the way this Regulation has been applied so far. At this preliminary stage of the procedure, it became clear that online distribution will be one of the main areas of the review since it offers tremendous opportunities for businesses and consumers while still facing sometimes barriers for further development. In this regard, it is important to see whether the existing rules offer an appropriate framework in the online world for companies and consumers and whether there is need for further changes. The Commission is also reflecting on how the ongoing review can contribute to a broader agenda of reducing barriers to sales over the internet.

III. The Roundtable on opportunities and barriers to online retailing

(17) Those present at the meeting of 17 September 2008 were:

- Ben Verwaayen (Chair), Alcatel-Lucent
- Bernard Arnault, LVMH
- John Donahoe, eBay
- John Elkann, Fiat
- Roger Faxon, EMI
- Sir Mick Jagger
- Steve Jobs, Apple Inc.
- Bernard Miyet, SACEM
- Thomas Houghton, Which?

(18) The aim of the Group was to discuss how to increase the business opportunities on the Internet and to ensure that European consumers have access to the widest possible range

of goods and services online. Before and after the meeting, the participants submitted to the Commission their views on the future of the online retailing in Europe.

(19) Stakeholders not present in the meeting have had the opportunity to send written contributions which have been made public on the website of the Roundtable[13].

III.1 Online retailing of music

A) Opportunities for the online music business

(20) **Apple** perceives the Internet as an opportunity rather than as a threat, but observes that large-scale piracy is a big problem that still needs to be tackled effectively. Apple observes that its iTunes store is not available in every EU country[14] because many countries do not offer a large enough marketplace to justify the expense and effort required to sell in that country. Since it cannot obtain the rights in the sound recordings and the global repertoire of musical works on a pan-EU basis, iTunes has to examine the situation in each country individually to determine whether the benefits are likely to outweigh the costs of distributing content into that country.

(21) **EMI** points out that the digital revolution has permitted great innovation, creating new opportunities for consumers and the businesses that serve them. Music is available nowadays in an increasing number of new formats and through an increasing number of channels, platforms and devices. This, in turn, has attracted new participants in the value chain, with different strategies and business models; and it has also encouraged a number of artists to cut out the music companies altogether and make their music available directly to their fans.

(22) **EMI** makes its content available as widely as possible, in any form: in recorded music, it has made available DRM-free downloads – an initiative which it first launched in partnership with iTunes[15]; in music publishing, it has taken the initiative to license its rights on a pan-European basis, as widely, efficiently and cost-effectively as possible (see below the "CELAS" initiative). For EMI, the more consumers that can be reached, the more likely its businesses will be able to find an audience for their products. In such context, it observes that the Internet provides music businesses with the potential to reach huge numbers of consumers.

(23) **SACEM** observes that online services greatly vary depending on their nature (simulcasting, webcasting, streaming, subscription, downloading), the cultural and linguistic environment in which they are offered (cultural goods are often limited to their linguistic area except for the Anglo-US repertoire) as well as on the users' commercial

[13] Around 35 European companies and associations reacted to the Issues Paper (see http://ec.europa.eu/competition/consultations/2008_online_commerce/online_issues_paper_annex.pdf). These submissions are available at: http://ec.europa.eu/competition/consultations/2008_online_commerce/index.html.
[14] iTunes is currently available in 15 EU countries, plus Norway and Switzerland.
[15] See press release of 2 April 2007, "EMI Music launches DRM-free superior sound quality downloads across its entire digital repertoire", at http://www.emigroup.com/Press/2007/press18.htm.

objectives (certain online services restrict the geographic scope of the service). In SACEM's view, such variety explains that the market is not automatically national, multi-territorial, pan-European or worldwide and that it is necessary that the licensing process and regulating framework take this factor into account.

(24) **SACEM** recognizes that the Internet has brought about opportunities also for authors and composers, as shown by the licensing agreement it concluded with iTunes in 2004. However, it also observes that the re-distribution of the revenues among the right holders is a complex operation[16] which requires developing expertise and software to support publishers and other right owners to get a transparent and cost effective management of their rights and to keep control on the conditions under which their rights are licensed and managed.

(25) **Which?** observes that the Internet has been one of the truly revolutionary changes of modern times and there is no doubt that the opportunities it offers to consumers are immense; in Which? view these opportunities are more obvious in relation to music, film, books and electronic goods, while at present they appear more limited in the luxury sector or for high value purchases such as cars. However, the success of eBay shows, in Which? opinion, that consumers are, given the choice, willing to purchase almost anything online. Accordingly, Which? would suggest the policy position should be to create consumer choice – taking care not to prejudge consumer needs prematurely.

B) Barriers to the digital distribution of music

(26) Focusing on the barriers to the legitimate business, **Apple** observes that the overall licensing system in Europe is much more complex than in the US. Unlike the US, in the EU commercial users are obliged to negotiate with a high number of different entities to clear all the rights involved in digital downloads for one and the same territory, depending usually on the shares of ownership of the rights in the musical composition, and the entity through which each rights holder licenses its rights. Moreover, such entities do not always provide – or have - the full information which is needed to identify the right holders of a specific song. From Apple's point of view, this was not an issue when each national collecting society offered a so-called blanket licence (i.e. for all repertoire, globally), for sales by iTunes in their own territory, covering both mechanical and performing rights in each work in their repertoire. Therefore, the possibility of multiple authors and/or multiple publishers each having an ownership interest in a given work did not impact iTunes' licensing situation. The recent withdrawal of rights from collecting societies by various publishers means that the local national collecting society is no longer able to offer a so-called blanket licence, but rather the various rights may now have to be sought via a myriad of different licenses from different licensors.

[16] For example, in 2007 France's iTunes customers downloaded about 476,000 different songs, 290,000 of which were downloaded only once. This means that SACEM will distribute 7 eurocents (which roughly correspond to 8% of the unit price which is split among authors, composers and publishers) 290,000 times between at least 3 right owners – each category of right owner (author, composer and publisher) possibly comprising more than one person e.g. there can be up to 40 or 50 right holders for just one song.

(27) **Apple** also observes that some performing rights societies are not permitting entities that may be entitled to license mechanical rights on behalf of a particular publisher to also license the performing rights of their author members, causing a split between the society that is able to license the mechanical rights and the society that is able to license the performing rights, adding an additional layer of complexity. Further, in the absence of so-called blanket licensing, and with the emergence of multi-territory, single repertoire licensing, the absence of a central repository for data about who owns what rights in a song, and a central place to which users can report and pay for publishing, makes the work of commercial users even harder.

(28) Against this background, **Apple** believes that it is currently very difficult for start-up companies to enter the EU online music business and that it would be impossible for them to negotiate with large numbers of entities to clear the repertoire they plan to make available. Apple observes that new business models in the online world are being delayed and taking longer because of the arduous path.

(29) **EMI** shares Apple's view that one of the key challenges raised by digital technology is piracy. The Internet provides for an additional distribution channel, but also for an engine of growth for the pirate economy. Better online retailing could be possible only if this distribution channel offers enough security against counterfeiting and piracy. In EMI's view, without strong laws and the cooperation of ISPs and the telecommunication industry, it will be impossible to build a stable marketplace for legitimate commerce on the Internet.

(30) Focusing on the legal barriers, **EMI** observes that the market for copyrighted goods and services is fragmented geographically because the copyright industries and the underlying rights have a national structure, and the institutions and processes for the provisions of those underlying rights are nationally based. In EMI's view, these national structures do not work in the online world, as the Internet is not innately geographically based and is capable of serving consumers across geographic boundaries; moreover, online users typically require an array of rights, and the current system is not structured to deliver these efficiently. EMI believes that this geographic fragmentation is a significant impediment to the development of the online market.

(31) Moreover, **EMI** observes that the administrative burden on users of musical rights in the borderless world of the Internet is very significant as, in order to bring the rights necessary to stream music across the EU or to sell music as a download, such users must obtain a licence from a large number of entities and the complexity becomes even more striking when a user wants to broaden its offering to include video representations, lyrics and other rights that are not controlled by collecting societies, as these rights must be obtained by going directly to each publisher(s) of the underlying composition. In EMI's opinion, this complexity discourages innovation and locks out all but those with the resources to approach online services with a pan-European footprint.

(32) **SACEM** points to the difficulty that collecting societies face when they deal with millions of works: for some works, they perfectly know who owns the rights; but for others, they need to check carefully the information. However, in SACEM's view the new

technological context is not a barrier for the management of rights, as shown by both the Sidney[17] and the (now expired) Santiago[18] agreements dealing with multi-territorial licenses.

(33) In **SACEM**'s view, a real challenge for collecting societies is compliance as, with some exceptions, new users rarely show up to pay for music, for lack of knowledge about copyright or in an attempt to avoid payment. SACEM experiences difficulties every day in licensing users as billions of digital files are exchanged without compensation for right holders and access providers do not give any compensation to right holders for losses of their income. In SACEM's view, the need for compliance and enforcement tends to be greater in the online world: if it is not easy to convince the website around the corner to pay for a repertoire when it uses it, it is certainly much more difficult for a website uploading its content far away. This is the reason why authors' societies have for a long time been relying on the local sister societies to collect the money in the offline world and this was also the logic behind the Santiago and Sidney agreements.

(34) Moreover, **SACEM** points to the recent decisive move in the direction of a fragmentation of the world repertoire. In the opinion of SACEM the Commission's 2005 Online Music Recommendation triggered a major move by international publishers away from collective management towards direct multi-territory licensing for certain of their internet rights, notably for the reproduction rights of their Anglo-American repertoires which are assigned directly to them by authors and composers.

(35) In the view of **SACEM**, a system whereby right holders and collecting societies are pushed towards direct licensing and consequently more fragmentation of rights would not be satisfactory for users, such as Apple, who prefer to obtain a "blanket licence" from one stop shops: the rights being fragmented, these users need to request and get a separate licence for each repertoire. Moreover, SACEM observes that this evolution is strongly opposed by broadcasters and also some societies have voiced their concerns as to a possible marginalization of their repertoires which could in turn threaten cultural diversity[19].

(36) **Which?** observes that online distribution still continues to face multiple obstacles to further development, such as linguistic barriers and territorial barriers such as the widespread territorial licensing for music content. In the view of Which? these barriers lead directly to price discrimination between consumers located in different Member States. In this regard, Which? recalls the complaint that it submitted to the European Commission because the UK consumers were paying more to download songs from iTunes than their European counterparts and observes that, although Apple agreed to align the prices across the EU, consumers are still unable to shop cross border. This prevents consumers in some countries from accessing iTunes at all, while others are prevented

[17] Signed in 1987, the Sidney agreement enabled "one stop shop" licenses for multi-territorial satellite broadcasting.

[18] In 2000, the Santiago agreement provided for the possibility for a user to obtain a world-wide multi-repertoire license from the society of the country where it had its economic residence.

[19] SACEM informs that, on the contrary, a recent example against this trend towards direct licensing is the cooperation between SACEM, SGAE and SIAE to pool the licensing of their repertoires in order to facilitate the life of users interested in the global Latin repertoire.

from accessing all the songs they wanted. In this respect, Which? observes that EU consumers would be pleased if iTunes allowed passive sales cross-border.

(37) In **Which?**'s view, similar issues will arise in other circumstances than music, such as in relation to downloadable films and videos. Which? has been given the explanation that the relevant IP rights are spread across a large number of companies and individuals. The position is further complicated because in any given musical composition there are a variety of different copyrights and these are often owned by different individuals. As a result, not only is it difficult to identify who owns what, but in order for a retailer to offer a wide range of music, it is necessary to negotiate with a large number of counterparts. Furthermore, Which? observes that collecting societies operate on a national basis, having failed to establish a pan-European model, which effectively forces companies, such as iTunes, to operate on a country by country basis. In the opinion of Which?, until and unless the market compartmentalisation that is permitted under IP law is addressed, it will not be possible to deliver the full benefits that competition can bring.

(38) Another barrier is online music piracy. While **Which?** does not condone piracy, it observes that it is likely some consumers will seek to download tracks unlawfully where it is perceived that the lawful ability to purchase downloads is deliberately being withheld from consumers, or otherwise, the market is being manipulated such that consumers do not receive value for money.

C) The way forward for an improvement of online music licensing and of the online distribution of music products

(39) There are a range of views on the way forward to solve the music online licensing issue.

(40) **Apple** suggests considering models in which the performing rights always follow the mechanical rights i.e. if one may be licensed by a given society then so can the other. In Apple's view, performing rights societies should not be permitted to refuse to allow the relevant mechanical rights society to license the performing rights in the same works, whether via sublicense or agency. Apple believes that a more effective bundling of the mechanical and performing rights would allow the licensing of content online to more closely replicate licensing of content in physical formats.

(41) **Apple** also believes that publishers should not be allowed to refuse to license their rights to collecting societies, with that society having a right to sublicense to users such as iTunes or to other collecting societies via reciprocal agreements. In Apple's view, this would allow collecting societies to reconstitute licenses that cover substantially all relevant right holders' repertoires. Moreover, to the extent that publishers are permitted to withdraw their rights from collecting societies, at least exclusive arrangements should be prevented.

(42) Further, **Apple** observes that there is currently a significant information deficit with respect to the identification of copyright ownership in Europe, as neither collecting societies nor licensees have complete information as to ownership of copyrights;

moreover, even if publishers were required to license their rights through collecting societies, in the absence of blanket licenses whereby a single licence covers substantially all repertoires in a given territory neither the need for this information nor the problems caused by its absence would be diminished. Finally, to the extent information is currently available it is only accessible in a variety of inconsistent formats. Apple therefore advocates the creation of a central electronic repository for ownership information into which all collecting societies and other right holders feed information in a common format, and which could be accessed by licensees, so that the problems caused by the information vacuum can be eased and timely and accurate remuneration can be fostered.

(43) Another means of stemming the fragmentation of rights, and therefore licensing, would be, in **Apple**'s view, to prohibit publishers, authors and/or collecting societies from refusing to license their rights to labels in some manner that would allow labels to either sublicense publishing rights (both mechanical and performing rights) to users such as iTunes as part of a complete bundle of rights in both sound recordings and musical compositions to licensees, or provide them as an agent on behalf of the ultimate rights holder. Such solution should be achieved in a transparent setting of full disclosure that would contribute to open and honest competition.

(44) On a long-term perspective, **Apple** suggests to explore the creation of a single pan-European copyright, as opposed to the current country-by-country basis of national copyrights. However, it realizes that this would bring about significant hurdles to overcome and, moreover, would not eliminate split ownership in a single copyright because of the contribution of more than one author, and the possible need to license each share from a different licensor.

(45) In **EMI**'s view the 2005 Online Music Recommendation has indicated the way forward by choosing to adopt the principle of competition for the provision of licensing services without territorial limit. In EMI's view, competition among collecting societies will lead to more effective representation of rights holders and more flexible licensing for users, as this is the desire of owners of music and that of the developers of online services as well; however, in its opinion several collecting societies have been more motivated by the defence of their respective national monopolies than meeting the needs of rights holders and users of music.

(46) With the CELAS initiative[20], **EMI** observes that it has been the first music publisher to license its songs on a pan-EU basis. Although it has encountered resistance from a number of national collecting societies, EMI believes that such initiative is a functioning example of how the existing legal framework can be applied with a view to overcoming the problems inherent with the traditional system of licensing in the EU. However, it observes that there are other business models which can achieve the same objective of promoting more efficient licensing of online rights and which should be given a genuine opportunity to be tested in a competitive environment.

[20] CELAS is a joint venture between GEMA, MCPS-PRS; it licenses EMI Music Publishing's Anglo-American repertoire for digital and mobile exploitation across Europe. See www.celas.eu.

(47) For **EMI**, users must be sure that they can bring together efficiently all the rights they need. Right holders and potential licensees should interact more (as under the current US model) to construct licensing regimes that are more reflective of the commercial requirements of the new services but also continue to create incentives for right holders to promote cultural diversity. In EMI's view, the consolidation into a smaller number of competitive and efficient rights managers, such as collecting societies, for the representation of pan-EU rights should be encouraged. However, consolidation should take place to create a more efficient market place, not to create new monopolies.

(48) On the contrary, **SACEM** believes that what is needed is not an automatically pan-European licence. For instance, also national licenses and licenses extending to only some European territories are realities which should be taken into account. In fact, in SACEM's view the absence of a simple and efficient multi-repertoire multi-territorial licensing system is hindering the development of online markets. At the same time, SACEM believes that the need for compliance and enforcement, which is the reason why authors' societies have for a long time been relying on the local sister society to collect the money in the offline world, tends to be higher in the online world.

(49) **SACEM** is convinced that territorial delineations in the societies' reciprocal representation agreements are important also in the online field. In this regard, it is willing to discuss with users and customers how to provide for licenses which have the widest possible territorial coverage while ensuring at the same time that right holders are duly remunerated for the online exploitation of their works.

(50) For **Which?,** it is necessary to find solutions with all stakeholders involved in a balanced way, not only in order to combat piracy and counterfeiting, but also to eliminate the current barriers to the legitimate online business. Which? believes that establishing a lawful regime through which consumers can purchase songs quickly and easily on a pan-European basis, will lead to a significant reduction in piracy, especially where combined with enforcement action. In this regard, Which? would find it useful if the record companies, retailers such as iTunes and the collecting societies could reach an agreement as to how pan-European copyright licensing can work effectively in practice. If no such solution can be found, Which? suggests DG Competition considers whether it would be appropriate to declare that copyright infringement claims are not a justifiable measure to combat passive sales by companies, such as iTunes.

(51) However, **Which?** also observes that IP rights are used by manufacturers to manipulate the markets in the physical world. For example, companies regularly sell slightly different products in different countries but using the same trademark. This means, in Which? view, that although the doctrine of exhaustion applies and the products can be moved freely around the EU, the practical reality is different. Which? brings the following example: if a manufacturer sells product A in country A and a slight variation, product B, in country B, a retailer will be able to buy product A and sell it in country B, but he will not be able to sell it there as if it is a product B equivalent – the fact it is different needs to be made clear. Examples where this arises include, in the content sector, CDs (where an additional track is included or different track order is used) and DVDs (which have different language versions and different additional features) and, in the goods sector,

toothpastes (where different levels of fluoride are used) and washing powder (where different chemical compositions are used).

(52) In the experience of **Which?** the practical reality is a product that is less attractive to consumers and territorial protection. However, while Which? would not advocate measures that seriously undermine the importance of IP rights, it observes that where businesses are taking advantage of the law to segment markets, arguably steps should be taken to prevent this. In Which? opinion, the use of IP law to create territorial protection for identical products would seem to fall into this category and so would situations where artificial differences are made to products (e.g. using different trade names or slight variations in compositions) so that essentially identical products can be sold as "different" products in different territories. However, Which? admits that there will be situations where product differences will be necessary and where territorial protection could be justified – but these need to be identified and the appropriate protection for the right holders assured.

D) Follow-up meeting on the online distribution of music

(53) On 16 December 2008, the European Commission hosted a second full day meeting of the Group. This second meeting focused on the online distribution of music and was limited to the participants of the Roundtable which deal with this issue i.e. **SACEM** (Mr. Bernard Miyet); **EMI** (Mr. Roger Faxon); **iTunes** (Mr. Eddy Cue); **Which?** (Ms. Deborah Prince). The following topics were discussed:

1. Consumer's access to online music services;
2. Multi-territory licensing, the availability of the global repertoire and competition between rights managers;
3. Tools to achieve the transparency of information on rights ownership;
4. Main regulatory obstacles to the EEA-wide access to online music services.

(54) As regards consumer concerns, **Which?** stated that online access to music should not be impeded by the complexities of the current copyright framework and licensing practices. Consumers would expect to be able to shop across borders, to have clear Internet usage rules and parity between the sales of goods and services. In the view of Which?, consumers should get all possible advantages of cross-border sales under the highest standards of consumer protection which is given by national and EU laws.

(55) **iTunes** pointed out that a number of barriers to the cross border sale of music remain, including different national regulatory requirements and the fact that credit cards are not widespread in some countries. Further, the difficulties in clearing the rights for each country are a major obstacle to the European wide access to online music services for all consumers.

(56) For **EMI**, the global online world is an efficient means of delivery of music. In fact, its strategy is to make its music available to the widest possible extent; but it feels that the full potential of the Internet is not yet unlocked in Europe.

(57) **SACEM** observed that there are many different types of music services which cannot be stopped at borders.

(58) The participants' views differed on multi-territory licensing, availability of the global repertoire and competition between rights managers.

(59) **iTunes** observed that, in Europe, music service providers need to clear various rights country by country. The overwhelming number of negotiation partners and the lack of information as to who owns which rights are the biggest problems for iTunes. This concerns predominantly the licensing of the authors' mechanical and performance rights. For iTunes, the preferred solution is an EEA-wide one-stop-shop i.e. one place where to clear the rights and where to pay for them. No blanket licence (i.e. for the global repertoire) for any territory in Europe is currently available due to the withdrawal of parts of the global repertoire from the collective management system by some of the publishers (e.g. EMI's withdrawn repertoire is now being licensed by CELAS only). iTunes emphasizes that, from a commercial user point of view, being able to obtain a licence in the global repertoire, even if limited to a particular territory, is more important than having available various multi-territory licenses in limited repertoire that together may or may not add up to the entire global repertoire.

(60) In **EMI**'s view, competition between rights managers is needed and the right holder should be empowered to base his choice of the right manager on the competence of the latter. Such competition is the prerequisite for efficiency and for development of innovative ways of licensing necessary for the emergence of new business models in on-line music distribution. However, for EMI blanket licensing is not always the answer. It is appropriate for some types of uses but not for others. According to EMI, the aim of CELAS was to assure that its repertoire was available on a pan-European basis. EMI claimed that CELAS is only the first piece of a puzzle that should lead to overcome the national monopolies of collecting societies and to offer EEA-wide licences. In EMI's view, the CELAS model works, but needs improvements. For instance, it would be possible to appoint several rights managers for the same repertoire, if in doing so each of these managers would commit to consistent standards for the licensing and administration of EMI's rights.

(61) According to **Which?**, the other participants assume that rights are licensed on the basis that the end-user must use them in a particular territory. Which? would question this assumption and argues that if distribution rights are granted in a single Member State, it should be sufficient for those rights to be granted on the basis that the contract for sale of those copyright works is made within that Member State. By seeking to control the origin of the end-user, the copyright owner and distributor are, in the view of Which?, using IP law to segment the market unjustifiably.

(62) **SACEM** maintained that collective rights management provides simplicity, clarity, legal security and efficiency. For SACEM, collecting societies are best placed to manage rights, including for Internet uses, as they could cope with differences between the copyright regulations. According to SACEM, if competition between managers for users is introduced, there would be a risk of "race to the bottom" of royalty income, while efficient systems of rights management should reduce the negotiation costs and ensure that all efficiencies go back to the authors. SACEM wishes to make its repertoire available in a way which suites users and observes that while some users need multi-territorial licences, other need national licenses only. SACEM believes that there is a need of cooperation among all players in order to reduce the transaction and administration costs. For instance, when new IT systems are developed, cooperation should be preferred to competition.

(63) In respect of transparency of information on rights ownership, the idea of a database gathering such information was in principle regarded as useful. It was mentioned that some collecting societies and publishers are working on similar tools already. However, there seems to be no common view on the way of putting in place and operating such database, including its design and the responsibility for running it. Other outstanding issues concern the need to preserve the confidentiality of the data; how to make sure that the local repertoires are fed into the databases and properly maintained; how to remedy the marginalization of local repertoires and authors; how to create the common standards and format for the information.

(64) While **SACEM** would like to see 27 local databases, maintained by the local collecting societies but interoperable and linked between them, **EMI** would like to see a virtual database, based on shared standards, where rights would be available from a central location. For EMI, the design of such database should not result in an oligopoly by the collecting societies for access to the information. For **iTunes**, a user would like to have access to the information in a consolidated form in order for it to know where to go to get a licence, and to be sure that it is paying the correct entities for sales in any given work. Other important issues were discussed, such as the legal certainty for potential users offered by the database; how to ensure that the database is accessible to all stakeholders and, moreover, who will finance the whole project.

(65) Finally, the discussions on regulatory obstacles to on-line music services focused on the territoriality of copyright, on the lack of full harmonization of copyright laws and on other differences between the national e-Commerce and consumer laws. It was the common view that, if the licensing practices of right holders would allow the acquisition of EEA-wide rights, the regulatory obstacles to the provision of pan-European services can be overcome.

(66) On the basis of the discussion, the participants agreed on the following:

(a) Multi-territory licensing is needed in the online world. Both **EMI** (through CELAS) and **SACEM** are therefore offering EEA-wide licenses and are willing to continue doing this.

(b) **SACEM** expressed its willingness to act as non-exclusive rights manager for publishers and other collecting societies. SACEM is, in principle, also willing to entrust other collecting societies with the pan-European licensing of its repertoire.

(c) **EMI** is ready to entrust more than one rights manager to offer its repertoire for the whole EEA. Different entities (for instance, local agents) could be entrusted for efficient licensing purposes. However, in appointing such additional agents, a mechanism should be in place to ensure that the standards for licensing and administration are comparable between them.

(d) Full availability to users of the information on the ownership of rights should help simplifying the current complexities of the negotiation process and enhance cross-border licensing. To achieve this, the relevant information would have to be shared among right holders/collecting societies. However, several questions should be solved first, in particular the issues of avoiding the "monopolization" of the information by a single entity and open access to the database.

(e) If all the above is implemented in practice such that **iTunes** is readily able to license rights on a multi-territorial basis from the publishers and collecting societies, iTunes would agree to consider making its content available to all European consumers, including those from the Eastern European countries where iTunes is currently not available.

III.2 Online retailing of goods

A) Opportunities in online retailing of goods

a) Online retailing of goods in general

(67) **Which?** states that online distribution has grown considerably in the recent years (flights, music, books, holidays etc). Online distribution benefits European consumers because it contributes to an increased choice of products, a sustainable growth of cross border trade between the Member States of the EU, and deeper market integration. For Which? online opportunities exist in almost every commercial sector. Although they are more obvious in some sectors, for example, such as music, films, books and electronic goods, and more limited in the luxury sector or high value purchases such as cars. However, the success of eBay shows, in Which? opinion, that consumers are, given the choice, willing to purchase almost anything online. Accordingly, Which? would suggest the policy position should be to create consumer choice – taking care not to prejudge consumer needs prematurely.

b) Car industry

(68) **Fiat** notices that car manufacturers rely more and more on the purchase of standard components through online auctions. This brings major benefits to producers and consumers because the market size of spare parts has increased and as a consequence prices of standard components have fallen.

(69) **Fiat** points that the internet has an impact on advertisement since online publicity became important for the car industry. Fiat gives the example of its Fiat 500 car model which benefitted a lot from the Web 2.0 co-operation with customers. Five hundred days before

the launch, Fiat opened a specific web site ("500 wants you"), where people could share their ideas and contribute to the final shape of the car.

(70) Finally, **Fiat** believes that the internet will affect the sales of cars and trucks. For the time being, it is observed that customers use the web extensively in order to gather information on prices and car's characteristics, but they tend to conclude the purchase at dealers' premises.

c) Distribution of luxury brands

(71) For **LVMH**, the internet is a new medium to sell products which offers significant commercial opportunities for the sale of luxury brands. LVMH does not intend to undermine online retailing since it allows its authorised dealers to engage in online sales.

d) Online platforms

(72) **eBay** stated that platforms such as eBay enhance consumer welfare in many ways. For eBay, one of the immediate effects of online sales is considerable price savings for consumers. Research undertaken by Frontier Economics shows that consumers in the UK, Germany and France can obtain savings of around 17% for a range of new products - such as consumer electronics, computers, DVDs, clothing - by purchasing on eBay rather than in an offline store[21]. Frontier Economics estimates the total savings of European users on the eBay platform at around 1.1 billion Euros per annum[22].

(73) **eBay** believes it provides better choices of products through the access to listings from local, national and international sellers, thus allowing consumers to choose from an extensive range of products at reduced search and transaction costs. eBay shows that online platforms like eBay facilitate cross border trading by providing buyers and sellers located in one EU country with ready access to trading partners located elsewhere in the EU.

B) Barriers to online retailing of goods

a) Business practices in online retailing of goods

(74) **Which**? points that cross border trade is hindered because passive sales are relatively rare in practice given, for example, that manufacturers know what the national demand is for each product and supply their distributors accordingly and/or deter their dealers to sell outside their territory by imposing poorer trading terms to those dealers who engage in

[21] See the section *"Average price savings by country and by category"* from the *"Economic study of the consumer benefits of eBay"*, pages 18-19.
[22] See the section *"Estimated total saving made by eBay customers"* from the *"Economic study of the consumer benefits of eBay"*, pages 20-21.

such sales. Further, even where poorer terms are not imposed, Which? believes that the risk of such terms being imposed has a significant chilling effect on a distributor's freedom to engage in passive sales.

(75) **Which**? argues also that selective distribution is very often used in circumstances that cannot be objectively justified. Which? accepts that selective distribution is necessary in some circumstances, such as health and safety reasons. While the brand owner may believe that a certain level of staff qualification or after sales care is required, Which? doubts whether the average consumer would usually share the same view. Which? believes that in many cases an appropriate level of service can be provided online and therefore manufacturers should not as of right be able to insist retailers have a bricks and mortar presence.

(76) **eBay** argues that some specific business practices hinder further growth of online markets. On the basis of its experience with online sales of luxury brands, eBay gives some examples of competition related strategies being put into practice by luxury brands owners that limit the freedom of the brand's selected dealers to engage in online sales. Those strategies include business practices such as:

- stopping the supply of goods to distributors who sell online;
- prohibiting distributors from selling certain products online or on specific platforms such as eBay; or
- imposing onerous requirements on websites as a condition for reselling goods online such as obligations to create websites exclusively dedicated to a product, obliging a mandatory minimum price for the products concerned, and demanding that online distributors also have a bricks-and-mortar shop.

(77) **LVMH** disagrees with eBay. LVMH does not intend to eliminate online retailing since it allows its authorised dealers to engage in online sales. To preserve brand image, online sales should be consistent with the selective criteria used for the distribution through the bricks and mortar shops. "Cheap" online distribution could have a short term effect on prices (lower prices), but it would undermine in the long run the brand image of the goods valued by the consumers. LVMH points that the demand for luxury goods does not depend only on price, but also on brand image. Investment in brand image cannot be regarded as "bad" compared to "good" investment in R&D or new product development. This investment takes many forms such as advertising, expensive packaging and distribution through select retail physical channels that have themselves invested heavily in image and reputation. LVMH believes that for luxury products restricting online distribution - by prohibiting sales from non authorised dealers or requiring certain quality standards from authorised dealers - is a means of enhancing product image and, therefore, more demand for luxury products.

b) Counterfeiting

(78) **EMI** stressed that online piracy and counterfeiting is a corrosive factor which limits further development of online retailing. EMI believes that the internet provides for an additional distribution channel, but also for an engine of growth for pirate economy. For Which? online piracy has a "chilling" effect on consumers to buy online.

(79) For **LVMH**, counterfeiting is a form of "free riding" because it allows sellers of counterfeit luxury goods to take advantage of the brand image of those goods. LVMH explained that the internet offers "tremendous" opportunities for sales of counterfeit products, especially on eBay platforms. **Fiat** also believes that the internet can easily host counterfeits and fraud. Fiat mentions that the online trade with counterfeit spare parts on platforms such as eBay is a major issue which should be addressed.

(80) **eBay** recognizes that counterfeiting is a problem that obviously predates the Internet. However, in response to LVMH's position, eBay stressed that, despite certain public campaigns suggesting the contrary, it is the industry leader in consistently deploying a large range of anti-counterfeiting measures and employing more than 2000 people in its efforts to stop counterfeiting and fraud. Moreover, eBay made clear that some manufacturers (especially those from the luxury industry such as LVMH) abuse the current vertical restraints guidelines and mischaracterize online goods as being "counterfeits" because online distribution constitutes a threat to their traditional, lucrative business models.

c) Regulatory barriers to online retailing of goods

(81) With regard to regulatory barriers, **eBay** mentions inter alia the EC legislation on Intellectual Property Rights and consumer protection rules. It is argued for instance that the principle of Community-wide trade mark exhaustion provided for in the EC legislation[23] - although alleged to enhance intra-Community trade – unduly limits the flow of online goods to Europe from non EU countries. eBay also submits that the existing EC "*Consumer Acquis"*[24] based on minimum harmonisation has led to a continued fragmentation of the Internal Market since consumer protection rules differ in the 27 EU Member States.

(82) For **Which?** online distribution still continues to face multiple obstacles to further development, such as linguistic barriers and territorial barriers (i.e. widespread territorial licensing for music content). Different national legislations such as contract and consumer rules clearly hinder further development of online markets. Which? is concerned because

[23] First Council Directive 89/1004/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks; OJ 11 February 1989, L 40 ("Trade Mark Directive"); Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark; OJ 14 January 1994, L11 ("Community Trade Mark Regulation").

[24] The *"consumer acquis"* encompasses *inter alia* the following Directives: Unfair Contract Terms Directive 1993/13/EC; Directive on Sale of Consumer Goods and Guarantees 1999/44/EC, the Distant Selling Directive 1997/7/EC, the Doorstep Selling Directive 1994/47/EC, the Directive on Injunctions 1988/27/EC and the Price Indication Directive 1998/6/EC.

these barriers lead directly to price discrimination between consumers located in different Member States. Furthermore, Which? points that consumers are also concerned about issues of privacy and their ability to control how their personal data are both collected and subsequently used.

C) Solutions

a) Review and enforcement of the competition rules on Vertical Restraints

(83) **eBay** urges the European Commission to clarify the Block Exemption Regulation of vertical agreements so as to ensure that restrictions on dealers' abilities to use the Internet are prohibited. eBay proposes to add in the Block Exemption Regulation a new "hardcore" restriction which would cause manufacturers to lose the benefit of the block exemption if they impose any discriminatory limitation on the freedom to sell online.

(84) **eBay** recommends to take action against those manufacturers who prohibit or limit online sales of their distributors in violation of the existing competition rules. This behaviour clearly violates Article 81(1) EC since it amounts to a limitation or restriction of passive sales prohibited under the EU law.

(85) **LVMH** is more supportive of the current rules on selective distribution. According to LVMH, the vertical restraints inherent to selective distribution allow the upstream supplier to remedy free riding distortions among retailers (a); to offset biases in retailer dimensions of competition induced by consumer heterogeneity (b); to protect retailer incentives for investing in adequate inventories (c).

(86) It is therefore the view of the **LVMH** that suppliers should be free to select the criteria for admission into their selective distribution networks, thereby excluding "pure play" internet retailers. That is necessary to enhance a better brand image for LVMH's products and reduce "free riding" from other retailers (i.e. internet only shops would free ride on the investment made by bricks-and-mortar retailers to increase demand for their products; this would lead to underinvestment in activities that consumers value and are happy to pay for). Therefore, according to LVMH only authorized retailers having a bricks and mortar shop can engage in online sales in order to maintain the brand image and avoid any "free riding" from non authorized retailers. Furthermore, online distribution of the authorized dealers must be compliant with the integrity of the brand image of the luxury products.

(87) **LVMH** is of the view that antitrust authorities need not to worry that selective distribution systems and consequent limitations on internet sales are used for products the nature of which does not require selective distribution. LVMH believes that employing expensive distribution systems - such as selective distribution – increases the demand for its products and is ultimately more profitable than adopting a "cheaper" and less selective distribution method. LVMH's incentives to choose selective distribution are therefore closely aligned to the nature of the luxury products.

(88) **LVMH** believes also that for exclusive distribution there is clear efficiency rationale for suppliers to restrict active sales by retailers operating in different territories. In particular this prevents free riding on the effort of retailers operating in different territories. LVMH is suggesting reconsidering the application of the distinction between active and passive sales in the online context. Given that the internet diminishes considerably the search costs and the shipping costs are often not high for international sales, creating a website to offer some products can essentially be viewed as a means of generating active sales.

(89) **Fiat** believes that a company should be free to choose the distribution model that it regards as the most appropriate and it sees little scope for regulatory intervention on online and offline distribution channels besides that it is already included in the European competition law such as the general Block Exemption Regulation and Guidelines on vertical restraints and the sector specific block exemption regulation[25]. This is to say that if a specific producer considers it useful to impose limitations on Internet distribution, it may as well do so, provided of course that it does not exploit a dominant position. At the end of the day, it is the marketplace which will punish the producer if such limitations make no commercial sense.

(90) **Fiat** notices that it makes sense for manufacturers to adopt a multi channel strategy whereby traditional showrooms are used alongside with online channel. This should increase the array of choices available to customers, who might decide to buy online if they believe they have enough information in order to purchase the vehicles; alternatively they might resort to traditional sale channels if they think they need advise or after-sales assistance.

(91) In general, **Fiat** observes that customers use the web extensively in order to gather information on prices and car's characteristics, but they tend to conclude the purchase at dealers' premises. Therefore, the dealers' network is a crucial ingredient of the car industry. Having a well trained, motivated and efficient group of dealers is essential. With such a complex good as a motor vehicle the expert advice and the assistance provided by the network is a relevant part of the customer's experience for any brand. As a consequence it can be expected that "physical" dealers will still play a paramount role even when online sales will become more widespread.

(92) **Apple** is also supportive of the existing rules on selective distribution. Apple believes that suppliers should be able to exclude internet-only-shops from their distribution system because there would be very little incentive for selected dealers to invest in showrooms capable of demonstrating the look and feel of the product if that investment could be undermined by internet-only shops that did not need to make the same level of investment.

(93) **Apple** is also supportive of the existing rules on exclusive distribution. In Apple's view the distinction between active and passive sales for online distribution is a valid and useful distinction that should be defined in a manner that can be effectively applied to

[25] Commission Regulation 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector; OJ, 1 August 2002, L 203, pages 30-41.

online distribution. It would be reasonable to prevent an exclusive distributor from active selling into exclusive territory of another distributor.

b) Counterfeiting

(94) For **EMI** better online retailing could be possible only if this distribution channel offers enough security against counterfeiting and piracy.

(95) For **LVMH** it is essential for the future development of online sales that the online products are authentic and are sold from authentic and secure sites.

(96) For **Fiat** online counterfeiting is a major issue which should be addressed by increasing the security of the online transactions.

c) Harmonization of national legislation and reform of EC law

(97) **eBay** proposes inter alia to extend the EU's trade mark exhaustion regime and to use the current revision of "the Consumer *acquis*" launched by the European Commission in 2004 to introduce maximum harmonization of consumer legislation across the Member States[26].

(98) **Which?** noted that further harmonisation of contract and consumer law is necessary to unlock the full potential of the online markets, but it opposes maximum harmonisation if it would lead to less consumer protection in some Member States. Which? also noted this was neither the only issue nor necessarily the most important one.

IV. Conclusions

A) Online distribution of music (legal offers)

(99) There is agreement that the Internet provides all actors involved in the music value chain with tremendous opportunities to foster their creativity and business activities, to the benefit of the end-consumers. Thanks to the new technology, the digital consumption of music can take a wide variety of forms and manners and be delivered through many different channels, platforms and devices, which are increasing every day and provide the consumers with a wide choice.

(100) There is clearly a challenge to develop systems of rights management in which, under competitive conditions, service providers can distribute music on a legitimate basis and with substantial benefits for consumers, artists, publishers and creators. There is a need of

[26] The current revision of the *"consumer acquis"* encompasses the Directives mentioned in footnote 4; after the Online Roundtable, on 8 October 2008 the Commission adopted the Proposal for a Directive on Consumer Rights which merges in one document 4 existing Directives on Sale of Consumer Goods and Guarantees (99/44/EC); Unfair Contract Terms (93/13/EC); Distance Selling (97/7/EC) and Doorstep Selling (85/577/EC).

a collective effort of all those involved in the music industry to make the legal distribution of music online as easy as possible for all users - big and small.

(101) All participants recognise the need for EEA wide licensing in the online environment. The above is a good starting point to allow EEA-wide licensing of both performance and mechanical rights for a wider repertoire and in competition between several rights managers. If effectively implemented, this could lead to online licensing practices which would benefit all stakeholders. It is in the interest of right holders, publishers and collecting societies that online rights are effectively licensed and that as much music is sold as possible. It is to the advantage of the consumers who will have a wider choice as they can accede to online music services from anywhere in the EEA.

(102) The conclusions of the Group on the issue of online music licensing will have an effect on the market if implemented not only by the participants, but also by other market players, in particular by other publishers and collecting societies. In fact, it is the responsibility of the industry involved to develop workable licensing solutions which would allow easy access to the global repertoire in a competitive environment. The success of a rights manager should not depend on its size, but on its efficiency and the quality of services it is able to offer. These are the criteria on which right managers should compete.

(103) One licensing model which seems to satisfy the needs of commercial users is to have several rights managers offering a licence which covers a repertoire which comes close to the global repertoire and thereby de-facto offers a one-stop-shop. Nevertheless, a limited number of rights managers which offer an important, even though not global repertoire could still be a workable solution if a common database can provide transparency on who offers what at which price.

(104) If the conditions for clearing rights are substantially improved, in particular **iTunes** would agree to consider making its offering available to all European consumers, including those from the Eastern European countries where iTunes is currently not available.

B) Online retailing of goods

(105) There is a consensus that online sales provide all businesses – including car and luxury industries - with huge commercial opportunities and consumers with huge opportunities for access to a wider range of goods at attractive prices. So the Internet is a new route to the consumer, complementary to other channels.

(106) There is no consensus in relation to business practices which limit online distribution. On the one hand, **eBay** and **Which?** claim that manufacturers of luxury and more common branded goods unduly hinder the online sales of their selected dealers and that there is a need for an increased level of enforcement action. On the other hand, **LVMH** argues that the limitations inherent to selective distribution - such as the exclusion from the distribution network of the "internet only" players or the prohibition on selected dealers to use platforms such as eBay – are demand enhancing. **Fiat** defends a similar view since it argues that a company should be free to choose the mode of distribution that it regards as the most appropriate and it sees little scope for regulatory intervention.

(107) There is also consensus that online piracy and counterfeiting is a corrosive factor which limits further development of online retailing. It is obvious that effective authentication of the goods is helpful for free and unrestricted opportunities for online distribution.

(108) Finally, despite significant growth, businesses and consumers engaging in online sales continue to face important regulatory barriers such as, for instance, the rules on IP rights and consumer protection.

(109) As far as the business practices are concerned - and more particularly the points where the participants strongly disagree - their views and submissions so as those of the third parties who participated in the public consultation will be assessed in the context of the ongoing review of the legal regime of vertical restraints (the Block Exemption Regulation and Guidelines on vertical restraints).

(110) On the regulatory side to tackle piracy and counterfeiting, **eBay** stressed in its submission that *"stakeholders need to cooperate in their efforts to fight counterfeits"* and gave some examples of cooperation with manufacturers[27].

(111) **LVMH** had also mentioned during the meeting that there are some available technologies which might help platforms such as eBay to fight online counterfeiting. Cooperation between stakeholders is possible and can clearly help to enhance online sales. During the meeting it was announced that the two companies would hold bilateral discussions subsequently.

[27] See the section "Fighting Counterfeits and Empowering Consumers in the 21st Century Market" from the paper *"Empowering Consumers by Promoting Access to the 21st Century Market- A Call for Action"*, p. 25.