The CISAC decision — creating competition between collecting societies for music rights

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1. Introduction

On 16 July 2008 the European Commission adopted a decision prohibiting 24 European collecting societies from restricting competition as regards the conditions for the management and licensing of authors’ public performance rights for musical works (2). The collecting societies were found to have restricted the services they offer to authors and commercial users outside their domestic territory.

The Commission took the view that a series of measures, including membership and territorial restrictions incorporated in the reciprocal representation agreements concluded between the collecting societies constituted infringements of Article 81 of the EC Treaty and Article 53 of the EEA Agreement.

The case was initiated following complaints lodged by the broadcasting group RTL and the UK online music provider Music Choice Europe, which both sought to obtain multi-territorial licences for public performance rights for musical works but were denied such a possibility by the collecting societies.

2. Reciprocal representation agreements signed by collecting societies

Music authors (lyricists and composers) hold the copyright, including public performance rights (3), on the works they have created. They usually sign over to collecting societies the rights to manage on their behalf, worldwide, the copyright on their musical works. This portfolio of rights constitutes the repertoire of the collecting society.

All the European collecting societies are members of the Confederation of Societies of Authors and Composers (‘CISAC’). One of the major objectives of CISAC is to promote reciprocal representation agreements among collecting societies by means of model contracts. Based on the CISAC model contract, collecting societies have concluded reciprocal representation agreements for the collective management of the public performance rights of their musical works of their right holders enabling each collecting society to offer on its domestic territory the repertoire of all the artists represented by the other collecting societies participating in the representation agreements. Under this system, each collecting society collects 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.

3. The relevant markets

The Commission took the view that as regards the management of public performance rights for musical works three different markets were affected by the reciprocal representation agreements: (a) the market for the provision of copyright administration services to authors, (b) the market for the provision of copyright administration services to other collecting societies and (c) the market for the licensing of public performance rights for satellite, cable and internet transmissions to commercial users.

4. The restrictive clauses contained in the reciprocal agreements

The decision does not challenge the existence of the reciprocal agreements as such, but certain of their clauses and a concerted practice among collecting societies.

4.1. The membership clause

A number of bilateral agreements concluded among collecting societies contain a membership clause under which the contracting collecting societies may not, without the consent of the other, accept as member an author who is either already a member of another collecting society or a national of the territory where the other collecting society operates (4). The membership clause

(1) Directorate-General for Competition, unit C-2. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

(2) Case COMP/C2/38.698 — CISAC.

(3) Public performance rights enable authors of musical works to authorise or prohibit the exploitation of their works by commercial users such as TV channels and radio stations, and to receive royalties every time their music is played.

(4) The CISAC model contract also incorporated a mem-
was found to restrict the ability of an author to become a member of the collecting society of their choice or to be simultaneously a member of different EEA collecting societies for the management of their rights in different EEA territories. The membership clause has the object and effect of restricting competition between collecting societies on the market for the provision of copyright administration services to authors.

4.2. The exclusivity clause

Under the exclusivity clause, a collecting society authorises another collecting society to licence and administer its repertoire on the territory of the latter on an exclusive basis (7). This clause, still present in a substantial number of reciprocal agreements, prevents a collecting society from licensing its own repertoire in other territories (direct licensing) or allowing an additional collecting society to represent its repertoire in the territory of the domestic collecting society (8). As a consequence, collecting societies are reciprocally guaranteed a monopoly in their domestic markets to give licences to commercial users (broadcasters and online content providers). The exclusivity clause therefore restricts competition between collecting societies on the market for licensing public performance rights to commercial users.

The infringements relating to the membership and exclusivity clauses concern all forms of public performance rights, including live (discos, bars, concerts), online (internet), satellite, cable and broadcasting.

5. The concerted practice of restricting mandates to domestic territory

The decision also challenges the concerted practice among the 24 collecting societies whereby the collecting societies limit their mandates to the domestic territory of the other collecting societies for internet, satellite and cable exploitation of musical works. All the reciprocal representation agreements contain a clause on the territorial scope of the licence, under which a collecting society located in country A may authorise a collecting society located in country B to licence its portfolio solely within the territory of country B.

The Commission found that the systematic restriction to domestic territory for these three modes of exploitation amounts to a concerted practice because it is not the result of normal competitive conditions. The issue of the territorial restriction of mandates, in particular for new forms of exploitation, has been the subject of multilateral discussions among collecting societies within CISAC. For instance, when the issue of internet use arose, the European members of CISAC coordinated their positions and agreed on the so-called Santiago Agreement (9), which was jointly notified for a possible exemption under Article 81(3) of the Treaty. The fact that it was decided not to renew the Santiago Agreement, which resulted in a strict restriction to domestic territories, was an indication that the collecting societies coordinated their behaviour as regards the scope of licences for internet use.

Further, the systematic restriction cannot be explained by individual market behaviour or an alleged need for geographic proximity between licensor and commercial user. Parallel behaviour is strong evidence for a concerted practice, unless there are reasons indicating that market segmentation results from autonomous behaviour (9). The decision highlights that local presence is not required to monitor the use of licences for internet, satellite and cable and that collecting societies have the technical capacity to issue multi-territorial licences.

Because of the uniform territorial restriction, each collecting society’s authority to licence is limited in 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 restriction in all such agreements, the end result is that only one collecting society per country is able to grant multi-repertoire licences for use of the music concerned in that country. 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 copyright administration services

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(7) The Agreement concerned internet licensing and provided for collecting societies to issue multi-territorial licences. The Commission issued a Statement of Objectives in 2004 taking issue with the customer allocation clause, under which collecting societies undertook to issue worldwide licences only to users located in their domestic (i.e. national) territory. 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).

(8) See on this issue the ECJ court rulings of 1989 in Lucazeau and Tournier (cases 395/87 and joined cases 110/88, 2241/88 and 242/88).

(9) For example, the application of the exclusivity clause implies that under a reciprocal representation agreement concluded between two collecting societies Y and Z located in two different countries, Z will be the only collecting society authorised in its territory to licence the portfolio of public performance rights owned by Y. The CISAC model contract also incorporated an exclusivity clause until 1996.
which collecting societies provide to each other; and (ii) on the market for licensing public performance rights for internet, satellite and cable retransmission to commercial users.

6. No exemption under Article 81(3) of the Treaty

The collecting societies did not put forward arguments specifically addressing the application of Article 81(3) of the Treaty to the membership and exclusivity clauses. The decision therefore only assessed how Article 81(3) of the Treaty applied to the concerted practice, which amounts to a systematic territorial restriction to domestic territory.

Under the first condition of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement, the decision, agreement or practice in question must contribute to improving the production or distribution of products or to promoting technical or economic progress. None of the parties raised the argument that a concerted practice imposing a uniform national territorial restriction on CISAC members contributes to these potential benefits.

Furthermore, the prohibition of a concerted territorial restriction does not call into question the system of reciprocal representation agreements. Even without the restriction, the alleged benefits, in particular national one-stop shops and proper monitoring and reporting, can still be provided. The restriction is consequently not indispensable. In addition, it eliminates competition on the markets for administration of the repertoires of other EEA CISAC members and for the licensing of rights.

7. Failure of a commitment procedure under Article 9

Upon proposals submitted by the parties in March 2007, the Commission considered a commitment procedure under Article 9 of Regulation 1/2003. 18 collecting societies offered to remove the membership and exclusivity clauses from the reciprocal representation agreements concluded with each other. With regard to the territorial restriction, they 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.

The commitments were market-tested on the basis of the publication of a Notice on 9 June 2007 (9). More than 80 observations were submitted. However, market players generally considered that the commitments would not be effective. Given the exceptions and conditions listed in the proposed commitments, nearly no commercial users would have been eligible to obtain a multi-territorial and multi-repertoire licence. Further, some collecting societies who had offered the proposed commitments took the opportunity of the market test to criticise them. It was therefore concluded that the package of commitments was not sufficient to introduce effective competition on the market.

8. Impact of the decision

8.1 More competition to the benefit of authors, collecting societies and commercial users

The implementation of the decision will have a positive impact on the market in several respects. First, the decision will make it easier for authors to select which collecting society(ies) will manage their public performance rights. For instance, a Belgian author will be able to license his or her rights to any collecting society, including SACEM of France or BUMA in the Netherlands, and may decide not to license to the Belgian collecting society (SABAM). This is of interest for authors (irrespective of whether they are local composers or artists with an international audience), because efficiency, quality of services and conditions of membership differ appreciably between collecting societies.

The decision also allows collecting societies to licence their repertoire to more than one other collecting society per territory. For internet, satellite and cable exploitation, the decision improves the chances of commercial users (broadcasters and content providers) being able to obtain a licence covering more than one territory. By opening up the market to more competition between collecting societies, the decision will provide incentives to collecting societies to improve their efficiency and the quality of their services to the benefit of authors and commercial users.

8.2. The decision addresses cultural diversity issues

In line with Article 151(4) of the EC Treaty and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, the decision assesses its potential impact on cultural diversity. Cultural diversity in the music sector is not called into question by the decision, both in terms of authors’ revenues and the impact on local repertoires, in particular in small countries.

(9) See press release IP/07/829.
Collecting societies can maintain or introduce models to protect the author’s royalties as such and only allow competition in the level of administration fees (10). The decision does not affect collecting societies’ rights to decide how they distribute royalties between their members and to maintain a system of cross-subsidisation among members — including the offering of social or cultural services — or their right to distribute royalties only on the basis of the actual use of musical works. However, the decision will encourage competition in the level of administration fees charged by collecting societies to authors. It is likely to have a positive impact on authors’ income, because it will encourage collecting societies to be more efficient in their management of authors’ rights. The more efficient collecting societies are, in terms of maximising the collection of royalties due to authors and composers and minimising the costs of managing these rights (administrative fees), the more revenue will be paid out to authors.

8.3. The decision and the 2005 Recommendation concerning online licensing

The decision is in line with the Commission’s practice and policy concerning online licensing and in particular with the 2005 Commission Recommendation on rights management in the online environment (11), which 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 nationality of the right-holder. The Recommendation also clearly states that collective rights managers should grant licences to commercial users on the basis of objective criteria and ‘without any discrimination among users’, and advocates the introduction of multi-territorial licences. The Recommendation and the present 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.

9. Conclusion

The decision calls upon collecting societies to bring immediately to an end the infringements concerning the membership and exclusivity clauses contained in the representation agreements and to cease the concerted practice within 120 days. By removing restrictions in the system of bilateral representation agreements between collecting societies, the decision encourages collecting societies to bring their business practices up to speed with the borderless nature of satellite, cable and internet exploitation. It will also provide the necessary guidance to collecting societies by creating the framework for a more competitive market which should benefit authors, collecting societies and commercial users. The Commission will ensure a full and effective implementation of the decision.

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(10) For example, the current country of destination principle as accepted in the Simulcasting Decision of 2002 (Decision 38/014 of 30.04.2003) or agreement on a uniform royalty rate as accepted in the Cannes extension agreement decision of 2006 (Decision 38/681 of 15.11.2007).

(11) See press release IP/05/1261.