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Antitrust: Commission prohibits practices which prevent European collecting societies offering choice to music authors and users – frequently asked questions

(see also [IP/08/1165](#))

What is this case all about?

The case is about ensuring that specific agreements between collecting societies are not used to create artificial barriers to the provision of music across borders. The Commission's decision prohibits two separate terms in the agreements between collecting societies.

First, the case is about allowing music authors (composers and lyricists) to choose which collecting society manages their copyright (e.g. on the basis of quality of service, efficiency of collection and level of management fees deducted). The term in the agreements (the "membership clause") which prevented authors from doing this is prohibited.

Second, the case is about helping cross-border music broadcasting over the internet, by cable and by satellite by making it easier for users to obtain licences from a single collecting society of their choice. The term in the agreements (the "exclusivity" clause") and the concerted practice which prevented users from doing this are also prohibited.

Why will this decision benefit authors?

Authors deserve the best quality service from collecting societies in terms of the fair and efficient management of their public performance rights. The more efficient collecting societies are as regards maximising the collection of rights that are due to authors and minimising the costs of managing these rights (administrative fees), the more money is paid out to authors.

In many countries, authors are currently obliged to use their own national collecting society (membership clause) and so cannot choose a collecting society that may give them a better deal in terms of quality of services and fair and efficient management of their public performance rights.

Ensuring the right of authors to choose which collecting society administers their performance rights for several or all European countries will therefore benefit authors directly.

Why will this decision benefit users?

Broadcasting of music online and by cable and satellite should be allowed develop freely in Europe. The current system, whereby a broadcaster wishing to broadcast in several countries has to negotiate with the collecting society of each individual country, is a significant impediment to the creation of a Single Market in these services.

If these markets are allowed to develop, that will not only benefit the providers of these cross-border services, but also European consumers and, ultimately, the authors themselves (in terms of additional revenue from performing rights).

Does this decision undermine the role of collecting societies?

No. There is nothing in this decision that prohibits or undermines authors' from using collective management of their rights, and there is nothing in this decision that calls into question the important role of collecting societies.

The decision does not concern or affect the basic principles on which collective rights management is based – namely that each national collecting society negotiates and sets the level of rights paid to authors and composers on its own territory and that there can be no discrimination between the level of rights paid to a country's own authors and paid to other countries' authors (the principle of non-discrimination). There is no reason why the antitrust case should have any impact on the level of rights set at national level – i.e. no reason why there should be a so-called "race to the bottom".

Are reciprocal representation agreements between collecting societies prohibited?

No. This decision recognises the valuable role of collecting societies and does **not** challenge the existence of the reciprocal bilateral representation agreements, which allow each collecting society to each offer the repertoire of all the artists represented by all the collecting societies participating in the representation agreements.

Is the principle of a one-stop shop prohibited?

No. The decision recognises that the one-stop shop principle facilitates licensing through increased simplicity.

Are territorial agreements prohibited?

No. The draft decision only prohibits the fact that collecting societies agree between themselves to limit territories on the same basis, i.e. on a national basis. Collecting societies should decide on a bilateral basis what territorial scope to give to their reciprocal representation agreements. Collective societies can still introduce territorial delineation in their bilateral agreements.

Why did the Commission open this case?

The Commission received formal complaints from broadcasting group RTL and Music Choice, a British online music provider, and was also approached by other companies. These companies all had similar problems – they wanted to obtain multi-territorial licenses instead of having to negotiate with 24 different collecting societies.

What does the decision do?

The decision prohibits **membership restrictions** which prevent authors from choosing which collecting society they want to represent them.

Many collecting societies themselves regard this clause as anti-competitive and CISAC took it out from its model reciprocal agreement. However 23 collecting societies still have membership restriction clauses in some of their contracts.

The decision also prohibits the **territorial exclusivity clause** that prevents a collecting society from offering licences to commercial users outside a given territory as such a clause restricts competition among collecting societies, and forces users to deal with a monopoly provider in each territory.

The EU's Court of Justice has already considered in 1989 these clauses illegal, in the *Tournier* and *Lucazeau* judgements. And again, many collecting societies consider this clause anticompetitive and CISAC has taken it out from its model reciprocal agreement. 7 collecting societies have completely abolished the membership clause from their contracts. However 17 collecting societies still have it in some of their contracts and the exclusivity is *de facto* present in all collecting societies' domestic territory.

The infringements relating to the membership and exclusivity clauses concern all forms of copyright exploitation including off line (discos, bars, concerts), online (internet), satellite, cable and broadcasting.

Finally, the decision prohibits a **concerted practice** between collecting societies according to which the collecting societies limit their mandates to the domestic territory of the other collecting societies. The result is a *de facto* exclusivity for the granting of licences which cover the repertoire of more than one collecting society and a strict segmentation of the market on a national basis. It follows from the *Tournier* and *Lucazeau* judgements by the Court of Justice that a concerted practice which limits the right to grant licences to domestic territories is illegal.

The infringement relating to the concerted practice on the territorial segmentation of the licences only concerns internet, cable and satellite exploitation.

Is this the first time the Commission has applied antitrust rules to collecting societies?

No. The Commission first applied the antitrust rules (for abuse of a dominant market position), to a collecting society in 1971 to GEMA, the German collecting society, and subsequently did so in 1981 (GVL). These cases concerned membership restrictions that led to discrimination of authors on the basis of their nationality or other abuses stemming from the scope and length of the membership contract.

The Commission has also applied the antitrust rules on restrictive business practices to collecting societies in the Simulcasting case (see [IP/02/1436](#)) and to the Cannes Extension Agreement ([IP/06/1311](#)). These two cases have led to multi-territorial licenses in the context of a one-stop shop.

What is the role of a collecting society?

Authors (lyricists and composers) hold the copyright, including *inter alia* public performance rights, on the musical works they have created. Authors sign over to collecting societies the rights to manage on their behalf, worldwide, the copyright of their musical works. This portfolio of rights constitutes the repertoire of the collecting society. However, the global repertoire of a collecting society is much broader as it encompasses also the repertoires of other collecting societies which have signed a contract of reciprocal representation with it.

What is a reciprocal representation agreement?

A reciprocal representation agreement is a contract between two collecting societies whereby the societies give each other the right to grant licences for the copyright of the works of their respective members. All the collecting societies, including those active in the EEA, operate under the umbrella of CISAC (the International Association of Collecting Societies of Authors and Composers). CISAC has set up a model contract which serves as a non-mandatory model for reciprocal representation agreements between CISAC's members, especially for the licensing of public performance rights of musical works.

Who are the addressees of the Commission decision?

The decision is addressed to 24 collecting societies located in the EEA. These are:

AEPI (Greece), AKKA-LAA (Latvia), AKM (Austria), ARTISJUS (Hungary), BUMA (Netherlands), EAU (Estonia), GEMA (Germany), IMRO (Ireland), KODA (Denmark), LATGA-A (Lithuania), PRS (United Kingdom), OSA (Czech Republic), SABAM (Belgium), SACEM (France), SAZAS (Slovenia), SGAE (Spain), SIAE (Italy), SOZA (Slovakia), SPA (Portugal), STEF (Iceland), STIM (Sweden), TEOSTO (Finland), TONO (Norway), and ZAIKS (Poland)

Why are the collecting societies of Bulgaria and Romania not an addressee of this decision?

The collecting societies of Bulgaria and Romania are not addressees as their respective countries were not part of the EU when the Statement of Objections was issued in February 2006.

Why is CISAC not an addressee?

The complaint of RTL concerned the CISAC model contract and the reciprocal representation agreements between authors' collecting societies managing public performance rights which reflected to a great extent the language of the model contract. The investigation has shown that the anticompetitive clauses of the CISAC model contract have now been removed (e.g. the membership restriction was removed from the model contract in November 2004). However these clauses continue to exist in a number of reciprocal representation agreements between collecting societies. This is the reason why the decision focuses on the reciprocal agreements between collecting societies and does not address the conduct of CISAC, the umbrella organisation.

Why has the Commission not imposed a fine?

The Commission took several elements into account in assessing whether to impose fines. First, collecting societies have argued that imposing fines on them would result in penalising the authors and composers that they represent. Second, several collecting societies have started, since the proceedings were initiated, to remove restrictive clauses from some of their reciprocal agreements showing a certain degree of willingness to address the Commission's concerns.

Does the decision respect cultural diversity in Europe?

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 of impact on local repertoires, in particular in small countries.

On the contrary, the decision 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 rights that are due to authors and composers and minimising the costs of managing these rights (administrative fees), the more money is paid out to authors.

At the same time, the decision does not affect collecting societies' rights to set levels of royalty payments due within their domestic territory, to decide how they distribute royalties between their members and to maintain a system of cross-subsidisation among members - including offering social or cultural services - or distribute royalties on the basis of the actual use of musical works only.

Local repertoires, in particular in small countries, will not be weakened because the decision neither prohibits the reciprocal representation system as such, nor the possibility for collecting societies to introduce a certain territorial delineation together with certain conditions in their representation contracts. It prohibits only the coordination amounting to a systematic territorial delineation by national territory. The decision does not therefore constitute an incentive for collecting societies to leave the system of reciprocal representation. Quite on the contrary, it offers collecting societies the possibility to adapt the system of reciprocal representation to the needs of the online environment and to thereby make it more attractive for both rights holders and users.

In any case, the decision only prohibits the concerted practice as regards on-line licensing and does not touch on the traditional off-line market (which remains by far the biggest source of revenues for collecting societies).

Is the decision consistent 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?

Yes. The Commission's 2005 Recommendation on rights management in the online environment (see [IP/05/1261](#)) advocates that right holders should be free to choose their rights managers and to choose the scope of the rights managed, irrespective of the residence or the nationality of the right holder. Furthermore, the Recommendation clearly states that collective rights managers should grant licences to commercial users on the basis of objective criteria and "*without any discrimination among users*" and advocates the emergence 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.

As regards, more particularly previous antitrust cases, the commission has already dealt with similar issues in the context of the Simulcasting case. Under the Simulcasting agreement collecting societies can issue a global and multi-territory licence to any user in the EEA. Users therefore have a choice. Collecting societies compete only on the administrative costs, whereas the price of the "copyright" element is based on the country of destination principle.

How is the Commission going to implement the decision as regards the prohibition of the concerted practice among collecting societies?

The collecting societies have to review, on a bilateral basis, their representation agreements regarding the territorial delineation of the mandate for satellite, cable retransmission and internet. Collecting Societies are allowed to delimit a given territory in their bilateral agreements but the Commission needs to ensure that the territorial scope of each bilateral agreement is decided independently. The decision gives the collecting societies 120 days to inform the Commission about the revised agreements.

Given that collecting societies show differing degrees of efficiency, they could indeed have an interest in mandating a collecting society, with a particularly good record, to grant a licence for exploitation in a territory wider than the one in which it is located, or to mandate more than one collecting society in some regions, in order to increase the coverage of their licensing and thereby the remuneration for their authors.

The prohibition of a concerted practice which limits the mandate to the domestic territory of each collecting society will allow collecting societies to discuss models which would allow them to grant EEA wide licenses to any commercial user active in the EEA.

What will be the impact of the Decision on the revenues collected by authors?

The levels of royalties due to authors are not put into question by the decision. The decision is likely to encourage collecting societies to be more efficient in collecting royalties due to authors and to deduct less in terms of management fees from the royalties they pay over to authors.

Collecting societies will be able to maintain the current **country of destination principle** which ensures that competition does not take place on the level of royalty (accepted in the Commission's Simulcasting decision of 2002 - see [IP/02/1436](#)) or introduce other models which protect the royalty rate, for instance by agreeing on a uniform royalty rate (as in the Cannes Agreement – see [IP/06/1311](#)).

In addition, this decision encourages the development of the market for the supply of legitimate online music services and on cross-border broadcasting by cable, satellite and the internet, and so should also have a positive impact on the amount of revenues generated by the author's musical works.

Will the decision have an impact on the survival of small societies and local repertoires, especially in small linguistic markets, due to the concentration on bigger societies with an international appeal?

Local repertoires are the essence of cultural diversity in Europe. Recent

developments in the market show a strong demand at the national level for such local repertoire in parallel to the demand for a more "mainstream" repertoire with an international appeal. Therefore there will always be an incentive to have reciprocal agreements with all collecting societies in order to have access to all repertoires. Moreover, there is a practical interest in concluding agreements with as many societies as possible, since this will enable an easier monitoring of the market. The Commission considers therefore that there are no objective reasons why the present decision would put small societies at a disadvantage. An increase in competition will not benefit the "big" collecting societies to the detriment of the "small", but simply benefit the more efficient regardless of size.

Did the Commission exhaust all possible ways to reach an amicable solution?

Yes. The Commission tried to solve the case by a negotiated solution to be formalised in an Article 9 settlement procedure. In this context, CISAC and 18 collecting societies submitted commitments. The latter offered to remove the membership and exclusivity clauses from the reciprocal representation agreements concluded with each others. With regard to territorial delineation, 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 (see [IP/07/829](#)). More than 80 observations were submitted. However, market players, even certain collecting societies which offered the commitments, generally considered that the commitments would not be effective. Under 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 re-introduce effective competition on the market and that a negotiated solution with the collecting societies could not be envisaged.

Nonetheless, the Commission remains open to discuss implementation matters and future developments of the market.

Is the Decision in line with Commission previous decisions and court case law in the sector?

The decision is fully in line with Commission practice and current case law.

As regards **membership restrictions** of collecting societies, the Commission found already in its *GEMA* decision of 1971 that a collecting society infringes Article 82 of the EC Treaty if it engages in discrimination based on the nationality of the right holder. Further, it was made clear that a collecting society cannot impose contracts on its members which are too long term or oblige right holders to assign their rights on an exclusive basis and for a compulsory worldwide exploitation. In *BRT v SABAM*, the Court of Justice ruled that the conditions imposed by a collecting society on its members could infringe Article 82 of the EC Treaty if they encroached upon a member's freedom to exercise his copyright beyond that which is necessary to carry out its activities. In its *GVL* judgment, the Court of Justice upheld a Commission Decision which found that GVL, a German collecting society managing certain related rights for performing artists in Germany, had breached Article 82 by refusing to conclude management contracts with right holders who were neither German nationals nor resident in Germany and also by refusing to protect the rights of such artists in Germany.

Regarding territorial restrictions between collecting societies, in *Greenwich Film v. SACEM* the ECJ ruled that "the activities of [the collecting societies] may be conducted in such a way that their effect is to partition the Common Market and thereby restrict the freedom to provide services which constitutes one of the objectives of the Treaty".

In the *Tournier* and *Lucazeau* preliminary rulings, the Court held that reciprocal representation contracts for services could be restrictive of competition if the contracts established exclusive rights whereby copyright-management societies undertook not to allow direct access to their repertoires by users of recorded music established abroad". Further, the Court made clear that "any concerted practice by national copyright management societies of the Member States having as its object or effect the refusal by each society to grant direct access to its repertoire to users established in another Member States" is anti-competitive.

Does the Commission analysis properly reflect the latest market developments including the development of multi-territory licensing agreements between collecting societies?

The online market is in constant evolution. New business models seem to be arising. Several of these new licensing models involve collecting societies licensing on a multi-territorial basis. These initiatives, in the field mechanical rights for online use, started already three years ago and are independent of this decision.

This decision should provide guidance to collecting societies on what the Commission considers to be acceptable practices for the licensing of public performance rights while not calling into question the one-stop shop principle.