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Collective Management and EU Competition Law

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I Introduction

The traditional issues concerning the application of the competition rules to collecting societies are the following:

- the level of fees,
- the relationship between members and their collecting society and
- the network of relations between collecting societies.

Digitalisation and the internet (or more precisely digital intangible distribution, possibly followed by reproduction) mean that these issues have been brought sharply back into focus. It is inevitable that we must once again embark on a substantial re-evaluation of how Community competition law applies to each of these issues.

In this context, it may be helpful to describe a little of the policy background against which the Commission views the activities of collecting societies and against which it considers whether collecting societies are meeting their need to comply with the competition rules.

The first point is that collecting societies are absolutely necessary for the mass of authors and may be the only way of making copyright function for certain types of works. They are therefore in the frontline of efforts in the Community to promote creativity and cultural diversity. Community competition policy recognises the legitimate need to protect the interests of authors, composers and publishers of music, and should not intervene if the result of that intervention would be to increase the overall costs of managing contracts and monitoring the use of protected musical works.

The second point is a Europe without internal frontiers. Whereas rights may be owned on a national basis and indeed exploited on a national basis², it remains to be seen whether they need to be *managed* on a national basis³. The Common Market has over time evolved into the European Union. The original Community of six members has not only grown to its current fifteen members but has developed from an internal market to an economic and monetary union. The internal market itself is more than a customs union, it is an area where state measures are not permitted to hinder the free movement of goods, services and capital between Member States. The golden principle is that discrimination on grounds of nationality is prohibited⁴.

¹Deputy Head of Unit, Media and Music Publishing, Directorate General for Competition, European Commission. All views are personal. Copies of almost all of the material cited can be found at <http://europa.eu.int/comm/competition> or at <http://www.cc.cec/clxint>.

² Coditel I, 1980 ECR 881

³ GEMA, 1981 ECR 147.

⁴ Leclerc, 1985 ECR 1. Purely national measures fall outside the scope of Community competence, although the advent of the internet is blurring these distinctions in a number of important areas.

The competition rules underpin the principles of the internal market by seeking to prevent private undertakings from taking measures which could amount to private barriers to trade. Competition policy in the EU has the overt purpose of seeking to integrate national markets into a unified market⁵.

The third point is eEurope. There are three main objectives, including the need to stimulate the use of the Internet⁶. One of the ways to achieve this is by promoting electronic commerce, particularly in the area of business to consumer interactions (B2C commerce). Private measures which block this development are unlikely to be well received.

I intend today not to seek to summarise the state of the law on competition and collective management but to highlight some of the issues which we at the Commission are considering. In this respect, my view is that the existing case law and jurisprudence remains the framework for our discussions, but that there is substantial scope for revising these in the light of technological and commercial developments.

This approach is necessarily prospective and my comments should carry a 'health warning' of even greater strength than normal. These are issues where we have identified problems and where we hope to work with all sides to find solutions. My comments are most relevant to the societies engaged in the management of authors' rights, but there are clearly issues of relevance to other societies.

II The Level of Fees

The starting point for a discussion on the level of fees charged by a collecting society (and for several other discussions) is the Tournier case⁷. In that case it was argued that Sacem's rates were higher for discothèques than those in other Member States and that the rates paid by discothèques in France bore no relation to the rates paid by other large scale users of recorded music such as television and radio stations. Sacem argued, *inter alia*, that in fact the differences between Member States were minor.

At the risk of being accused of selective quotation, emphasis and inversion, it is useful to remember exactly what the Court held.

46 *...Article 8[2] of the Treaty must be interpreted as meaning that a national copyright-management society holding a dominant position in a substantial part of the common market imposes **unfair trading conditions** where the royalties which it charges to discothèques are **appreciably higher than those charged in other Member States**, the rates being compared on a consistent basis. That would not be the case if the copyright-management society in question were able to justify such a difference by reference to **objective and relevant dissimilarities***

⁵ see for example Ford, ECJ ECR 1985 2725 at para 21 and Volkswagen, CFI ECR 2000 II-2707 at para 236

⁶ eEurope 2002, An Information Society For All, Action Plan prepared by the Council and the European Commission for the Feira European Council 19-20 June 2000.

⁷ *Ministère Public v Tournier*, ECR 1989 2521.

between copyright management in the Member State concerned and copyright management in the other Member States.

42 *...It is apparent from the documents before the Court that one of the most marked differences between the copyright-management societies in the various Member States lies in the **level of operating expenses**. Where ... the staff of a management society is much larger than that of its counterparts in other Member States and, moreover, **the proportion of receipts taken up by collection, administration and distribution expenses rather than by payments to copyright holders is considerably higher**, the possibility cannot be ruled out that it is precisely the lack of competition on the market in question that accounts for the heavy burden of administration and hence the high level of royalties.*

Two conclusions which may be drawn from this analysis are the following.

First, there is no reason to suppose that this part of the judgment should be restricted to royalties paid by disothèques. It should be read as applying to every broadcasting medium: TV, radio, internet etc. Moreover, there is no reason to believe that the comparison should be restricted to the rates paid by users in other Member States. Although the Court was unable to deal with the question, it is possible that a comparison can be made with the rates paid by other types of user in the same Member State.

Second, where a collecting society in one Member State charges rates which can be shown to be higher than those charged in other Member States, it must justify the difference. The Court specifically ruled out the relevance of a number of criteria put forward by Sacem to justify differences. It also appears to have ruled out the relevance of operating expenses – and thereby to have ruled operating expenses in as a potential source of abusively high levels of rates.

It is of course correct to point out that in many cases, collecting society rates are subject to scrutiny and review at the national level. The findings of a national Court, tribunal or administrative body with jurisdiction in competition matters amount to evidence which the Commission must take into account if it intends to act in a contrary manner⁸.

There is some reason to think that a number of issues based on the level of fees would fall away, or at least be easier to defend if collecting societies studied the way the Commission has in recent years refined its policies relating to services of a general public interest⁹.

Services of a general interest are services which public authorities consider need to be provided even when the market may not have sufficient incentives so to do. This may lead to the granting of special or exclusive rights, or the provision for specific funding mechanisms. The former has to be examined under the provisions of Article 86 and the latter under the state aid rules.

⁸ Publishers' Association, ECR 1995 I-23

⁹ Communication from the Commission on Services of General Interest in Europe, 20/9/2000 (COM 2000/580).

It seems fairly well established that collecting societies do not qualify as undertakings entrusted with the operation of services of general economic interest¹⁰. However, there are a number of similarities and there is an argument for seeing the accounting principles applicable to public undertakings applied to collecting societies. The main principle is that the accounts “should show the distinction between different activities, the costs and revenues associated with each activity and the methods of cost and revenue assignment and allocation”¹¹.

There are a number of very important issues where the burden of proof is on the collecting society. In particular, members, users and public are entitled to know the extent of and justification for cross-subsidisation across genres and across different classes of user. In competition terms, cross-subsidisation can easily amount to discrimination and must be objectively justified. Similarly, solidarity funds are much easier to defend where there is full transparency as to the origin, destination and purpose of the funds. Finally, such transparency clearly assists outsiders in understanding what measures are being taken by collecting societies to reduce the overall level of their operating expenses.

III The relationship between members and their collecting society

I said in my introduction that collecting societies are absolutely necessary for the mass of authors and may be the only way of making copyright function for certain types of works. In *Tournier*¹², the Court found that

Copyright-management societies pursue a legitimate aim when they endeavour to safeguard the rights and interests of their members vis-à-vis the users of recorded music. The contracts concluded with users for that purpose cannot be regarded as restrictive of competition for the purposes of Article 8[1] unless the contested practice exceeds the limits of what is necessary for the attainment of that aim.

It is perhaps useful at this point to break out of a reflection on collective management and consider how the Commission applies the test spelled out in the second sentence of this quotation. The effect of the indispensability test is that not only must the benefits to competition outweigh the disadvantages but that the means of achieving those benefits must be the least restrictive (in terms of scope, territory and duration) possible. This, I would argue, is not simply a proportionality test, but also part of the complex economic evaluation the Commission must make in every case¹³.

¹⁰ BRT-II ECR 1974 313, at para 23.

¹¹ Commission Directive 2000/52/EC of 26 July 2000 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings, OJ 2000 L 193/75.

¹² at paragraph 31

¹³ *Remia v Commission* [1985] ECR 2545 at 34. The Commission is criticised more often for lack of evaluation than for faulty evaluation.

In considering these aspects, the basic framework remains that constructed by the Commission's GEMA decisions of 1971¹⁴, 1972¹⁵ and, to a lesser extent, 1981¹⁶. In the first of these, the Commission considered to what extent it was compatible with Articles 81 and 82 for GEMA to require the assignment of rights in respect of all categories of rights arising from a musical work and on a world-wide basis.

The Commission required, *inter alia*, that GEMA members should have the right:

- to assign their rights entirely to GEMA or to divide them by category among several authors' rights societies; and
- to withdraw the administration of certain categories of rights after due notice at the end of each year and without losing membership status or incurring penalties.

These categories of rights (the GEMA categories) comprise:

1. the general performing right;
2. the broadcasting right, including rights of transmission;
3. the right of cinematographic representation;
4. the right for mechanical reproduction and diffusion, including transmission rights;
5. the right of cinematographic production;
6. the right to produce, reproduce, diffuse and transmit on bases for optical sound;
7. the right of exploitation resulting from technical development or a change in the law in the future.

Thirteen months' later the Commission developed these principles by giving GEMA guidance as to what would not constitute the abuse of a dominant position. This amounted to giving GEMA members a choice. They could either elect to withdraw from GEMA the administration of one or more of the seven original categories "after due notice at the end of the year", or alternatively withdraw from GEMA "the administration of certain forms of utilisation after due notice at the end of three years maximum".

The "forms of utilisation" are a list of 12 "utilisation categories" similar to the original seven categories, but more narrowly defined. They include:

- a) The general performance right;
- b) The broadcasting right;
- c) The public performance right of broadcasting works;
- d) The television rights;
- e) The public performance right of televised works;
- f) The right of cinematographic exhibition;
- g) The right of mechanical reproduction and diffusion;
- h) The public performance right of mechanically produced works;
- i) The cinematographic production right;
- j) The right to produce, reproduce, and diffuse on video tape;
- k) The public performance right of works reproduced on video tape;
- l) The exploitation rights resulting from technical developments or future changes in the law.

¹⁴ OJ 1971 L 134/151.

¹⁵ OJ 1972 L 166/22.

¹⁶ OJ 1982 L 94/12.

The Commission explicitly accepted GEMA's right to require the assignment of all the works of a member within a single category or utilisation right. The Commission recognised that for any given category of rights the collecting societies may require right-holders to license all their works within that category¹⁷. In addition, there is no obligation on collecting societies to permit the withdrawal of rights other than by category or utilisation right¹⁸.

This approach fits in with the principle “as few rights as possible, as many rights as necessary” and represents an extremely fine balance of interests. However, that balance was fixed in the analogue world and questions have been asked as to whether it still holds true.

The most recent case on this subject has been the Daftpunk case. In December 1996, the two members of Daftpunk apply to become members of Sacem in respect of all of their rights in France except for two categories: 4 and 7. Daftpunk wished to individually manage their rights for internet exploitation, CD- ROM, DVD etc. At the end of August 1997, Sacem informed the two that it would be necessary to show that another collecting society had been appointed in respect of the excluded rights. In essence, this amounted to a prohibition on individual management of the rights in question.

Sacem defended this substantial curtailment of individual liberty on the grounds that it protected artists from the unreasonable demands of the record industry and prevented a creaming-off of the most valuable rights. The Commission considered that the rule amounted to an abuse of Sacem's dominant position. Its reasoning was based on the number of collecting societies which did not have the rule and the fact that individual management of internet and certain other rights is feasible.

Consequently, Sacem agreed to modify its rules in the following manner: « *nonobstant les stipulations du présent article, le Conseil d'Administration, sur demande motivée et à la majorité des membres le composant, peut accepter qu'un auteur ressortissant de l'Union Européenne ne fasse pas apport de certains de ses droits à la société ou à une ou plusieurs autres sociétés d'auteurs. Sa décision doit être motivée* ».¹⁹ The Commission accepted this modification, pointing out that any refusal by Sacem to grant such a derogation would not only have to be exceptional but also based on objectives reasons.

What then, if any, are the conclusions to be drawn from this? First, the Commission has accepted that Sacem may retain its rule against individual management provided derogations can be granted. The reason for this was that the Commission considered it legitimate for Sacem to retain the means to monitor which artists wish to manage certain rights individually and why. This is something which the Commission can keep under review.

¹⁷ e.g. if an author has the category of public performance rights to the collecting society, he will not be able to retain the public performance rights of certain of his compositions

¹⁸ e.g. Internet exploitation

¹⁹ Notwithstanding the provisions of this Article, the Administrative Council, on receipt of a reasoned request and by a majority of its members, may accept that an author who is a citizen of the European Union does not assign certain of his rights to [Sacem] or to one or several other collecting societies. Its decision shall be reasoned.

Secondly, it suggests that the rules on withdrawing rights which were established in the analogue era may need to be revisited in the digital era. For example, at first sight it would appear that internet exploitation rights fall within GEMA category 7, or utilisation category 1. On the other hand, such rights usually require at least

- the right to make a sound recording,
- the right to make an audio-visual recording (i.e. the synchronisation right),
- the right to transfer recordings by wire (broadcasting, diffusion services or otherwise),
- the right to re-record original recordings, for example in servers and/or as part of transmission process;
- the right to reproduce lyrics and musical notations in or associated with the recording for reproduction on screen or by downloading,
- the rights to communicate to the public.

Therefore, if a music publisher or author wished to self-administer on-line exploitation rights in respect of one or more of its musical works, it would need to withdraw only part of some of the GEMA category or utilisation rights granted to the collecting societies. Current agreements with collecting societies, however, do not provide for partial withdrawal and the GEMA decisions do not require them to permit it.

If such rules are to remain justified, it is essential to spell out the reasons for which a revision to the GEMA categories or partial withdrawal from existing categories are thought to substantially undermine the operational interest of the collecting societies and that the rules as they stand continue to be indispensable.

IV The network of relations between collecting societies

Here also, it pays to consider the text of the Tournier judgment.

17 *...a "reciprocal representation contract", as referred to by the national court, must be taken to mean a contract between two national copyright-management societies concerned with musical works whereby the societies give each other the right to grant, within the territory for which they are responsible, the requisite authorizations for any public performance of copyrighted musical works of members of the other society and to subject those authorizations to certain conditions, in conformity with the laws applicable in the territory in question. Those conditions include in particular the payment of royalties, which are collected for the other society by the society which it has empowered to act as its **agent**. The contract specifies that each society is to apply, with respect to works in the other society's repertoire, the same scales, methods and means of collection and distribution of royalties as those which it applies for works in its own repertoire.*

19 *Consequently, it is apparent that reciprocal representation contracts between copyright-management societies have a twofold purpose : first, they are intended to make all protected musical works, whatever their origin, subject to the same conditions for all users in the same Member State, in accordance with the principle laid down in the international provisions; secondly, **they enable copyright-management societies to rely, for the protection of their repertoires***

in another State, on the organization established by the copyright-management society operating there, without being obliged to add to that organization their own network of contracts with users and their own local monitoring arrangements.

20 *... the reciprocal representation contracts in question are contracts for services which are not in themselves restrictive of competition in such a way as to be caught by Article 81 of the Treaty. The position might be different if the contracts established exclusive rights whereby copyright-management societies undertook not to allow direct access to their repertoires by users of recorded music established abroad; however, it is apparent from the documents before the Court that **exclusive-rights clauses** of that kind which previously appeared in reciprocal representation contracts were removed at the request of the Commission.*

23 *Concerted action by national copyright-management societies with the effect of systematically refusing to grant direct access to their repertoires to foreign users must be regarded as amounting to a concerted practice restrictive of competition and capable of affecting trade between the Member States.*

Leaving aside the issue whether an agency arrangement can amount to a concerted practice, these findings bear both a narrow and a broad reading. The narrow reading is well known and has been the basis for our analysis for the last decade or so. Indeed, the issues in the Tournier case were discussed on the basis of a set of facts established in the early nineteen-eighties. Put simply, this narrow interpretation is that given the practical impossibility for a collecting society in one Member State to duplicate its necessary monitoring and control activities in another Member State, collecting societies are not competitors in respect of these activities. Accordingly, absent concerted action or exclusivity, individual reciprocal representation contracts do not fall within Article 81(1). (Forgive me if I have some difficulty in reconciling these two statements, which appear to me to be capable of being somewhat contradictory.) This view is also found in *Lucazeau*²⁰.

The broader interpretation is also capable of being put in rather simple terms. In the context of the monitoring of the use of copyrighted material in discothèques, it was certainly the case in the early nineteen-eighties that it would be uneconomic to duplicate these labour intensive and time consuming tasks. However, to the extent collecting societies are or become actual or potential competitors in respect of such services, the agreements between them could be capable of restricting competition and falling within the scope of Article 81. It may well still be the case today that collecting societies remain non-competitors in respect of the kinds of activities the Court was considering in the Tournier and Lucazeau cases, the monitoring of music played in and the collection of royalties from discothèques.

However, the question arises whether this analysis holds true if there are users in respect of whom monitoring and enforcement activities can feasibly be carried out by a collecting society in another Member State. The example on which the Commission has an open case is international broadcasting. We have been told that since there is a

²⁰ *Lucazeau*, ECR 1989 2811.

simultaneous internet broadcast or because the activity can be monitored by telephone, there is no technical reason why the monitoring can not be carried out by a collecting society in another Member State to the Member State of reception. This would appear to make the collecting societies in those two Member States at least potential competitors.

The case is even more apparent with satellite broadcasting since monitoring can be carried out by means of a reception dish anywhere within the footprint of the satellite. In Europe the satellite footprints cover in all cases most of the western part of the European continent.

However, it has been put to us that an agreement by collecting society A to grant to collecting society B the right to grant to users an authorisation for public performance of works of members of collecting society A contains a territorial restriction if that grant is restricted to the territory of collecting society B. We are examining whether such a restriction falls within the scope of Article 81(1) where the two collecting societies are actual or potential competitors. As discussed above, in respect of users for whom remote monitoring is technically feasible, this may now be the case.

It is clear that, in principle, such restrictions can be exempted. However, in other cases concerning vertical reciprocal arrangements between competitors, a distinction is made between active and passive sales, whereby the former is permitted but not the latter. On the whole, bans on passive sales are not permitted for the reason that they amount to market sharing agreements. Unlike bans on active sales, they do not promote investment in the distribution of the goods or services in question.

I should stress at this stage that Tournier does not address the question of the applicability of Article 82 to a refusal of a collecting society to offer certain international licences, or to acquire the means to do so, and we are not looking at this issue either. However, in so far as a collecting society chooses not to offer these services, it may be appropriate to raise the question whether the exclusive grant by, say, an author to a collecting society for a particular set of rights should remain exclusive or whether the author should have the possibility to have these rights exploited on a non-exclusive basis.

The way forward for a resolution of at least some of these issues appears to have been at least partially defined in the IFPI case relating to simulcasting agreements. Simulcasting, is the simultaneous transmission by radio and TV stations via the Internet of sound recordings included in their single channel and free-to-air broadcasts of radio and/or TV signals, in compliance with the respective regulations on provision of broadcasting services.

The notified agreement is intended to establish a framework to ensure effective administration and protection of producers' rights in the face of global Internet exploitation. At the same time, it will enable collecting societies to grant "one-stop" licences covering all the territories in which the local producers' collecting society is a party to the agreement. In this way, simulcasters will have a simple alternative to obtaining a licence from the local society in every country in which their Internet transmissions are accessed, although this latter approach will still be available to them. Broadcasters whose signals originate in the EEA will be able to approach any EEA

collecting society established in the EEA in order to seek and obtain a multi-territorial simulcasting license²¹.

Clearly it would not be lawful to require, by any means, an undertaking which had legitimately obtained a license elsewhere in the Community to broadcast musical works in a particular Member State to obtain a further license from a undertaking established in that Member State.

V Conclusions

As I mentioned in my introduction, the key change in circumstances in any re-examination of the ways in which the competition rules are applied to collecting societies is the advent of the digital era. This means not only the emergence of on-line exploitation but also on-line management of rights.

One thing should be clear – we are not talking about conflict of laws. Accordingly, if a Belgian uploads a French work onto his internet site and a German downloads it, all that matters is that the competition analysis takes into account the need to protect the author's interest in being paid. We are not talking about unauthorised transmissions but where to obtain the authorisation.

The issues of indispensability and balancing the interests of the individual against the many are not fixed in stone and the way in which the collecting societies adapt to the changes I have identified is of major significance to their future. I would suggest that an open dialogue between collecting societies, members, users and competition authorities has become a pressing and unavoidable necessity.

²¹ Article 19(3) Notice, OJ C231, 17.08.2001, p. 18.