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THE EMPIRE STRIKES BACK:
CISAC BEATS COMMISSION IN GENERAL COURT

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The Empire Strikes Back: CISAC beats Commission in General Court

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Case T- 442/08 *CISAC v. European Commission* and related Cases decided by the General Court of the European Union on April 12, 2013.

ABSTRACT. The General Court's judgments in Case T-442/08 and related cases annulled Article 3 of the Commission's 2008 decision against CISAC and 20 collecting societies, on the basis of the Commission's failure to prove the required evidentiary legal standard for the existence of a concerted practice on national territorial limitations. These judgments should have an impact on the legislative process of the proposed Directive on collective rights management, namely in what concerns the multi-territorial licensing of rights in musical works for online uses.

Legal Context

On 12 April 2013, the General Court of the European Union delivered its judgment in Case T-442/08 *CISAC v European Commission* (CISAC 2013), as well as in 22 related cases involving a like number of European collecting societies, partially annulling the Commission's decision of 16 July 2008 in Case COMP/C2/38.698 (CISAC 2008).

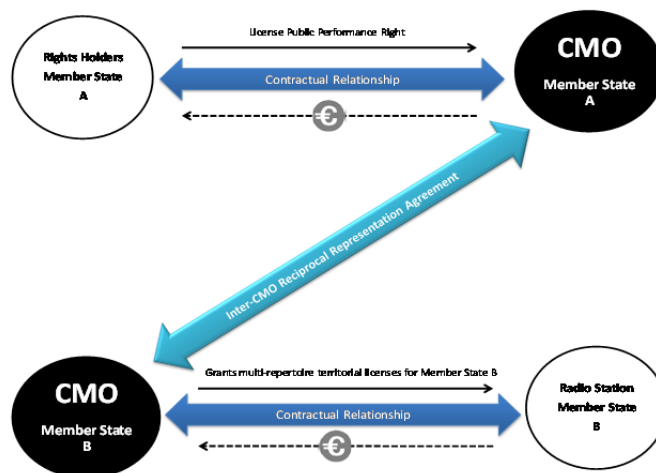
The latter decision was taken under Article 81 of the EC Treaty (now Article 101 TFEU) and Article 53 of the European Economic Area (EEA) Agreement, both prohibiting inter alia practices by undertakings (here collecting societies) that restrict competition within the internal market by limiting the provision of collective rights

management services outside domestic territories. The main focus of CISAC 2013 was the evidentiary legal standard for establishing the existence of a concerted practice in the context of national territorial limitations. Such discussion must be seen also in light of Article 253 EC (now Article 296 TFEU), under which the Commission has the burden to prove the existence of said concerted practice.

Facts

The International Confederation of Societies of Authors and Composers (CISAC) is an umbrella organization representing collecting societies in over 100 countries. Its members provide services in their countries of establishment relating to the management of musical works, intermediating between authors (and foreign collecting societies) and commercial users, such as broadcasters or organisers of live shows.

The majority of EU collecting societies in this field provide services on the basis of the non-binding CISAC model contract for cross-border management and the licensing of authors’ public performance rights of musical works. Collecting societies have adapted this model to Reciprocal Representation Agreements (RRAs) which cover the exercise of offline uses, as well as uses via the internet, satellite and cable broadcast. Through a network of RRAs, each collecting society is granted multi-repertoire licences covering the portfolio of other members, but is only allowed to license uses in its territory of establishment, thus restricting its ability to engage in multi-territorial licensing (MTL). Figure 1 provides a simplified illustration of this model.



CISAC model for cross-border licensing (simplified). Figure taken from J.P. Quintais, 'On Peers and Copyright: Why the EU should consider collective management of P2P' (Nomos 2012), p.87.

This restrictive licensing approach resulted in refusals by collecting societies to grant Community-wide licences to commercial users seeking them, namely television and music broadcasters. As a result, some of these users—RTL in 2000 and Music

Choice Europe in 2003—lodged formal complaints with the European Commission, which led to CISAC 2008, applying solely to ‘public performance’ uses via the internet, satellite and cable transmission.

CISAC 2008 applied Article 81 of the EC Treaty and Article 53 of the EEA Agreement to prohibit 24 European collecting societies from engaging in practices that limited the provision of services outside their domestic territory, as these were deemed restrictive of competition. Significantly, the decision allowed for the subsistence of RRAs, subject to compliance with three prohibitions: (i) the imposition (or de facto application) of membership restrictions that limit author’s freedom of choice of collecting society; (ii) the grant of exclusive licences to collecting societies in their territory of establishment; and (iii) the existence of concerted practices between collecting societies leading to national territorial limitations.

The first two prohibitions were addressed by CISAC and its members through amendments to the model contract and the RRAs. Regarding the third prohibition, CISAC (and the collecting societies in question) brought an action for the partial annulment of the decision. This action was later supported by the European Broadcasting Union (EBU—a representative association of broadcasters, among the largest users of musical works). Both CISAC and the intervener EBU claimed that the General Court should annul Article 3 of the CISAC 2008 decision, which stated *inter alia* that CISAC and the collecting societies had coordinated ‘the territorial delineations in a way which limits a license to the domestic territory of each collecting society ...’.

Analysis

CISAC supported its action on two main alternative pleas of law: (i) infringement of Articles 81 and 253 EC, insofar as the Commission failed to prove the ‘existence of a concerted practice with regard to the national territorial limitations’; and (ii) should a concerted practice be found, the non-restrictive (to competition) nature of the same (para 80). It is therefore important to understand the Commission’s case regarding the existence of concerted practices and then examine the General’s Court reasoning and judgment.

The Commission’s Case

In its 2008 decision, the Commission argued that concerted practices between collecting societies resulted from at least three elements. First, the joint decisions and draft of a standard model under CISAC; secondly, the coordinated behaviour of collecting societies tending to the adoption of territorial limitations for online uses that transpired from the Santiago Agreement process (see COMP/C2/38.126); thirdly, the parallel behaviour of collecting societies in continuing to apply territorial restrictions and market segmentation, despite the removal of exclusivity causes from the RRAs adapted from the Santiago Agreement.

These elements transpire from the Commission's interpretation of several factors, which include (i) the lack of legal or technical/factual justifications for territorial restrictions in the provision of management services for these rights fragments or for the enforcement of rights by the local collecting society, and (ii) the existence of agreements in the area of internet exploitation exemplary of the lack of justification of national territorial restrictions (eg International Federation of the Phonographic Industry 'Simulcasting'—see COMP/C2/38.014; the Webcasting Agreement; the 'Nordic and Baltic' model; and the joint venture CELAS; paras 35–39).

The combination of these factors, since they establish a link between exclusivity clauses and territorial limitations, led the Commission to conclude that the collecting societies in question were engaged in concerted practices. These practices were deemed restrictive of competition insofar as they created a territorial exclusivity for each collecting society in relation to the uses concerned, allowing them to charge uncompetitive administration costs, to the potential detriment of authors in different Member States.

The General's Court reasoning and judgement

In analysing this claim, the court noted that, in disputes on the existence of an infringement, the burden of proof rests with the Commission, which must adduce 'precise and consistent evidence' ('viewed as a whole'), establishing the prerequisite circumstances of the same (paras 91 and 96–97). As such, the subsistence of doubts regarding evidentiary elements would benefit CISAC and the collecting societies (paras 92–94).

In the Court's view, and in the absence of documentary evidence, the factors susceptible of proving the existence of concerted practices, other than the parallel conduct of the collecting societies, are the following: "... the discussions on the scope of the mandates contained in the RRAs ..., the Santiago Agreement, the Sydney Agreement, and the historical link between the exclusivity clause and the national territorial limitations (paras 88 and 103)." Analysing each factor, the Court considered that the Commission failed to establish the requisite legal standard of evidence of concerted practices concerning national territorial limitations (paras 106–32). Consequently, the Commission's decision could not be upheld unless it provided evidence sufficient to dismiss the alternative justifications for parallel conduct put forward by collecting societies.

CISAC and EBU argued that the decision to provide for territorial limitations in RRAs was justified by the necessity to maintain a local presence so as effectively to combat infringement committed via unauthorized uses of musical works. In this respect, the Commission's analysis focused mostly on authorized uses, failing to demonstrate how it would be possible for collecting societies to untangle the monitoring of permitted uses and the enforcement of unauthorized uses. For this purpose, it is not sufficient to note the existence of technical solutions and agreements that allow remote monitoring of licensees' online uses, such as the 'Nordic and Baltic' model, the Simulcasting and Webcasting Agreements (applying solely to related/neighbouring rights), the Santiago Agreement, the CELAS joint venture (facilitating the grant of direct licences) or even a document signed by several collecting societies entitled

'Cross-border collective management of online rights in Europe' (which endorses multi-territorial repertoire licensing). In fact, by themselves, these practices, agreements and documents do not constitute evidence that effective enforcement of unauthorized uses is possible absent geographic proximity, as where multiple collecting societies can provide licenses for a given national territory, thus undermining the economic incentive and practical possibilities for cooperation in this field (paras 156–81).

In light of these considerations, the Court concluded that the Commission failed to prove the required evidentiary legal standard for the 'existence of a concerted practice relating to the national territorial limitations', either (i) by demonstrating the existence of a concerted practice to that aim or (ii) by showing that the collecting societies' justifications for the parallel conduct—those related to the need effectively to enforce unauthorized uses—were implausible (para 182). As a result, Article 3 of the CISAC 2008 decision was annulled, to the benefit of CISAC and 20 of the collecting societies involved. In the case of two applicants—STIM and SGAE—the actions were dismissed or found inadmissible on procedural grounds.

Reactions and (potential) Practical Significance

The court's decision was welcomed by CISAC, which signalled its intent to revert to an RRA model based on territorial restrictions, deeming it the most efficient model to deal with the market's needs and ensure a fair income to rights-holders. In its reactions, CISAC further noted that technologic developments per se do not make existing collective rights management structures anti-competitive, and that there are valid justifications for structuring such services through a one-territory/one-society model.

The court's judgment is particularly critical of the Commission's evidence-gathering, noting that it led both to unsubstantiated claims and to blatant contradictions between the 2008 decision and its posterior interventions in replies to the court and in the course of oral hearings. This is significant insofar as the judgment should impact the legislative process of the Proposed Directive 'on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses' (COM(2012) 372 final).

The proposed Directive's Title III is aimed at enabling and promoting the granting by collecting societies of MTL for online rights in musical works, through a rather complex 'European Licensing Passport System'. This MTL system is an 'offspring' of the Commission's model proposed in the 2005 Online Music Recommendation (2005/737/EC) and it seeks to dismantle—at least for online exploitation of author's rights in musical works—the RRA system favoured by collecting societies, with the aim to foster competition at the rights holders' level. In its (thorough and critical) comments to proposed Directive the max planck institute for IP & Competition Law notes that the previous RRA model emerged as a result of a natural monopoly of collecting societies in national territories, which 'adequately responded to the economic

needs of both rightholders and users’.¹ This position of natural monopoly, coupled with the RRA model (allowing for the aggregation of repertoire) and the practice of blanket licensing allowed for collecting societies to address the challenges of fragmentation of rights and legal uncertainty in a way that the Commission's MTL passport system does not. The Max Planck Institute scholars conclude that the proposed system is contrary to the foundations of collective rights management; they appear to advocate a preference for the option of a centralized licensing portal, identified as Option B5 in the Impact Assessment document accompanying the proposed Directive (COM(2012)372; see Drexl et al, paras 64–65 and 72).

In sum, the CISAC 2013 decision undermines the Commission's justification for the proposed MTL system, even if it is mostly the result of a failure by the Commission to produce evidentiary support for its claims. If national territorial limitations are not deemed anti-competitive but are instead perceived as the most efficient collective rights management scheme for online exploitation of author's (public performance) rights—an assertion emphasized by CISAC's intention to return to that model—it is arguable that the Commission's intentions to foster an MTL passport system should be reconsidered. Irrespective of the Commission's decision to appeal this judgement to the Court of Justice, it is to be expected that the discussions within the European Parliament under the ordinary legislative procedure regarding the proposed Directive, namely its MTL provisions, be significantly affected by CISAC 2013.

¹ J. Drexl et al., ‘Comments of the Max Planck Institute for Intellectual Property and Competition Law on the Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market COM’ (2012)37, IIC 44:3 (May 2013), pp.322–350, para 64.