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Publication date

2016

Document Version

Final published version

Published in

Collective management of copyright and related rights

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Article 25fa Dutch Copyright Act

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Citation for published version (APA):

Guibault, L., & van Gompel, S. (2016). Collective Management in the European Union. In D. Gervais (Ed.), *Collective management of copyright and related rights* (3rd ed., pp. 139-174). Wolters Kluwer.

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Collective Management of Copyright and Related Rights

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Third Edition

Edited by
Daniel Gervais

 Wolters Kluwer

Published by:

Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.wklawbusiness.com

Sold and distributed in North, Central and South America by:

Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:

Turpin Distribution Services Ltd
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-5441-5

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Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

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suggestions on earlier drafts, and to Lauren Winter, Vanderbilt University Law School Class of 2010, for excellent research assistance.

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CHAPTER 5

Collective Management in the European Union

Lucie Guibault & Stef van Gompel

1 INTRODUCTION

The establishment of a proper and comprehensive legal framework for the regulation of the collective management of copyright and neighboring rights in Europe has followed a long and winding road, paved with hurdles along the way. Roughly twenty years' span between the European Commission's first mention of its intention to address the functioning of collective management organizations (CMOs)¹ and the final adoption of Directive 2014/26/EC of February 26, 2014 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.² The newly adopted European legal framework pursues a twofold objective: (1) to establish rules on transparency and good governance for the collective management of copyright and related rights; and (2) to create a legal framework which promotes the development, in the field of music-making, of multi-territory and multi-repertoire licensing by CMOs.

The explosion in recent years of legal online services for protected material demanded a rapid solution to enable the multi-territorial licensing of copyright and neighboring rights across the European Union. A new framework was needed to ensure that obtaining a license from every CMO in every territory where the work is accessible

1. The creation, at the European level, of a level playing field for CMOs has been an item on the European Commission's agenda at least since the publication of the *Green Paper on Copyright and Related Rights in the Information Society*, COM(95) 382 final, Brussels, Jul. 19, 2005.

2. Directive 2014/26/EC of Feb. 26, 2014 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, 2014/26/EC O.J. L 84/72, 20.03.2014.

would no longer be required in order for a user to avoid liability for copyright infringement in the Member States.³ As a corollary to this, the new framework must also establish a level playing field for CMOs to ensure that both right holders and users would feel confident that CMOs across the EU all abide by comparable rules of transparency and good governance.

This chapter is divided in three sections. Section 2 describes the current legal framework relating to CMOs in Europe, the primary component of which is the new Collective Rights Management Directive (CRMD). Sections 3 and 4 of this chapter provide a deeper analysis of the two main aspects of the CRMD, dealing respectively with the rules on good governance and the cross-border licensing of repertoire. The chapter concludes on the overall state of the law in Europe pertaining to CMOs.

2 LEGAL FRAMEWORK

The current European legal framework developed rapidly in recent years, particularly with the adoption of the CRMD. Before examining the content of this Directive in greater detail in sections three and four below, it is important to set the Directive in its legislative context. This section first introduces the new Directive, by presenting its legislative history and its scope of application. The section goes on to give a brief description of Directive 2006/123/EC on services in the internal market (hereinafter the “Services Directive”) and of the European rules on competition. Admittedly, as shall be seen below, the Services Directive does not play an important role in this framework as a result of a decision of the Court of Justice of the European Union (CJEU). But the interplay between the Services Directive and the CRMD is an issue that may resurface in the future. Similarly, while the European rules on competition have played a major role in the past in providing a legal basis for the control of the activities of CMOs, this set of rules arguably becomes less prominent now that the CRMD lays down a comprehensive framework for the regulation of the CMOs’ activities. The current situation does not exclude the possibility, however, that CMOs could still try to engage in anti-competitive behavior that would justify scrutiny by the competition authorities.

2.1 Collective Rights Management Directive

This subsection draws a brief overview of the legislative history and of the scope of application of the new Directive.

3. See L. Guibault & S. van Gompel, *Collective Rights Management in the European Union*, in *Collective Management of Copyright and Related Rights* 117–152 (D. Gervais ed., 1st edn, Kluwer L. Intl 2006).

2.1.1 Legislative History

Over the past ten years a number of policy documents have paved the way towards the adoption of the CRMD. In January 2004 the European Parliament adopted a Resolution⁴ in which it called for the establishment of minimum standards for organizational structures, transparency, accountability and legal remedies. Furthermore, the European Parliament encouraged the adoption of provisions requiring the publication of tariffs, distribution keys, annual accounts, a listing of appropriate management costs and information on reciprocal representation agreements. The European Commission reacted to the Parliament's Resolution by publishing a Communication in 2004 on the Management of Copyright and Related Rights in the Internal Market, which was a rather technically and legally oriented document.⁵ The European Commission stated that in order to safeguard the functioning of collective rights management throughout the Internal Market and to ensure that it continues to represent a valuable option for the management of rights benefiting right holders and users alike, a legislative approach at Community level was required.

In 2005, the European Commission published a Staff Working Document on the cross-border collective management of copyright.⁶ In this document, the Commission identified the main problem encountered in the cross-border collective management of copyright as flowing from the fact that the core service elements of the "cross-border grant of licenses to commercial users" and "cross-border distribution of royalties" did not function in an optimal manner and hampered the development of an innovative market for the provision of online music services.

Shortly after the publication of the Staff Working Document and at the close of a brief period of consultation with stakeholders, the European Commission issued on October 18, 2005 a Recommendation on collective cross-border management of copyright and related rights for legitimate online music services.⁷ The Recommendation set out a number of principles, including the freedom of right holders to choose their CMO, the equal treatment of categories of right holders and the equitable distribution of royalties. It also called on CMOs to provide users with sufficient information on tariffs and repertoire in advance of the negotiations. Finally, it contained recommendations on accountability, right holder representation in the decision-making bodies of CMOs and dispute resolution. Since the Recommendation was a non-binding instrument addressed to both Member States, CMOs and online

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4. European Parliament, *Resolution on a Community framework for collective management societies in the field of copyright and neighbouring rights (2002/2274(INI))*, P5_TA(2004)0036, Jan. 15, 2004 [Community Framework Resolution].
 5. Commission of the European Communities, *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee - The Management of Copyright and Related Rights in the Internal Market*, COM(2004) 261 final, Brussels, Apr. 16, 2004.
 6. Commission of the European Communities, *Commission Staff Working Document - Study on a Community Initiative on the Cross-Border Collective Management of Copyright*, Brussels, Jul. 7, 2005 [Study on Cross-Border Collective Management of Copyright].
 7. *Commission Recommendation 2005/737/EC on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services*, O.J. L 276/54, 21.10. 2005 [Online Music Recommendation].

music providers, it is not surprising that the norms it contained were never formally implemented in national legislation. Nevertheless, the Recommendation, together with the decision of the European Commission in the CISAC case,⁸ have put the European market for the collective management of rights in turmoil, especially since stakeholders could not fall back on any harmonized rules on good governance of CMOs.

The Proposal for a Directive on the collective management copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market⁹ was presented to the European Parliament on July 11, 2012. Once the Parliamentary Committee on Legal Affairs and others had examined and advised on the Proposal, the European Parliament accepted it in first reading on July 9, 2013. On November 26, 2013 the Legal Affairs committee of the European Parliament approved the compromise text of the proposal for a Directive. Numerous amendments were brought to the text of the Directive to make the measures envisaged better balanced and effective for all stakeholders involved. The final text of the Directive was adopted on February 26, 2014. At the time of writing this chapter, the period for implementation was still running as Member States have until April 10, 2016 to transpose the provisions of the CRMD into national law.

As emphasized in Recital 9, Member States may impose stricter and/or more detailed requirements on CMOs than those foreseen in Title II of the Directive. Accordingly, a key part of the CRMD is intended as a “minimum harmonization” legal instrument. Nevertheless, the competence of the European lawmaker to adopt secondary legislation in this matter was put into question at the start of the legislative process. Let us recall that the European lawmaker only has competence if the proposed measure complies with the principles of conferral, subsidiarity and proportionality.¹⁰ Four Member States questioned the European competence in this matter on the basis of the principle of subsidiarity.¹¹ The Member States essentially argued that on the basis of Article 5 of the Treaty on European Union (TEU) consideration should not only be given to the question whether the objective of the proposed action can be better achieved at Community level, but also whether the intensity of the action undertaken does not go beyond what is necessary to achieve the objective pursued.¹² In the end, the objection filed did not lead to any concrete action other than a tight negotiation in the European Parliament towards the improvement of the text so that it would comply with the principles of the TEU. Indeed major amendments were brought to the Directive between its initial introduction and the final text, which reflect a serious effort

8. See subsection 4.1.2 below.

9. COM/2012/0372 final - 2012/0180 (COD) [Proposal for a CRMD].

10. Guibault & Van Gompel 2006, *supra*, at 140 and ff.

11. These countries are Poland, Sweden, France and Luxembourg. See European Parliament, Legal Affairs Committee, Notice to Members (90/2012) PE 498.070 v01-00, October 24, 2012 (Poland); European Parliament, Legal Affairs Committee, Notice to Members (92/2012) PE 498.125 v01-00, October 26, 2012 (Sweden); European Parliament, Legal Affairs Committee, Notice to Members (93/2012), PE 498.161 v01-00, October 31, 2012 (France); European Parliament, Legal Affairs Committee, Notice to Members (94/2012), PE 500.410 v01-00, November 7, 2012 (Luxembourg).

12. See L. Guibault, *Collective Rights Management Directive*, in *Copyright Law in the European Union* 696–795, at 701 and ff. (I. Stamatoudi & P.L.C. Torremans eds, Edward Elgar 2014).

to establish a balanced and effective framework around the collective management of copyright and related rights.

2.1.2 Scope of Application of the CRMD

Compared to any other European directive in the field of copyright and related rights law, Article 3 CRMD sets out the longest list of definitions. In practice, the scope of application of a specific piece of legislation hinges to a large extent on the way in which the terms are defined therein. The Directive centers on two main notions of “CMO” and “independent management entity”, the main difference between the two lying in the ownership or control structure of each type of organization. Both expressly fall under the scope of application of the Directive, albeit that a much narrower set of rules applies to “independent management entities”. The definition of “*collective management organization*” leaves open whether a CMO has been mandated by law or by right holders directly. Moreover, it ensures that the operation of the Directive extends to a CMO regardless of its legal form. As Recital 14 clarifies:

This Directive does not require collective management organisations to adopt a specific legal form. In practice, those organisations operate in various legal forms such as associations, cooperatives or limited liability companies, which are controlled or owned by holders of copyright and related rights or by entities representing such rightholders. In some exceptional cases, however, due to the legal form of a collective management organisation, the element of ownership or control is not present. This is, for example, the case for foundations, which do not have members. None the less, the provisions of this Directive should also apply to those organisations. Similarly, Member States should take appropriate measures to prevent the circumvention of the obligations under this Directive through the choice of legal form. It should be noted that entities which represent rightholders, and which are members of collective management organisations may be other collective management organisations, associations of rightholders, unions or other organisations.

“*Independent management entities*” represent a new concept in the European copyright *acquis*, which is further explained in a series of recitals. Recital 15 elucidates that these entities are understood as “commercial entities which differ from collective management organisations, *inter alia*, because they are not owned or controlled by rightholders”. No explicit examples of independent management entities are given, but recital 16 clarifies that audiovisual producers, record producers, broadcasters and book, music or newspaper publishers are excluded from the definition, because they license rights that have been transferred to them on the basis of individually negotiated agreements and act in their own interest. The same applies to authors’ and performers’ managers and agents acting as intermediaries and representing right holders in their relations with CMOs, because they do not manage rights in the sense of setting tariffs, granting licenses or collecting money from users. Had “independent management entities” remained outside the scope of the Directive, this would have meant that in certain Member States a (potentially important) number of management entities would have escaped certain key obligations of transparency and accountability laid down

herein leaving right holders and other stakeholders with little recourse in case of sub-optimal performance.¹³

“*Right holder*” must be defined in broad enough terms so as to encompass all categories of members whose rights are managed by any type of CMO, including not only natural persons and legal entities holding a copyright or related right, but also publishers who by virtue of an agreement for the exploitation of rights or by law are entitled to a share of the revenue from the rights managed by CMOs and to collect such income from the CMO. Recital 20 of the Directive specifies that membership of CMOs should be based on objective, transparent and non-discriminatory criteria. Regarding publishers, mentioned in the Directive but not in the Recommendation of 2005, recital 20 reflects industry practice, according to which authors and performers often transfer their rights to a publisher in exchange for his or her commitment to commercially exploit the work or other subject-matter. According to such a contractual arrangement, publishers become entitled to a share of the revenue deriving from collective rights management.

“*User*” is defined as “any natural person or legal entity who is carrying out acts subject to the authorisation of rightholders, the remuneration of rightholders or the payment of compensation to rightholders and who is not acting in the capacity of a consumer”. Here, the term “consumer” should be understood in the same manner as normally recognized in the *acquis communautaire*, namely “any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession”.¹⁴

The CRMD is divided in five Titles dealing respectively with general provisions (Title I), organizational and transparency rules (Title II), multi-territorial licensing (Title III), enforcement measures (Title IV) and final provisions (Title V). All provisions, with the exception of Title III and Articles 36 and 40, apply to all types of CMOs, irrespective of the sector in which the societies are active. According to the Explanatory Memorandum, the rules on the governance and transparency codify, to a large extent, existing case law of the CJEU in the context of decisions of the Commission taken in the area of competition law.¹⁵ Articles 21–33 included in Title III, as well as Articles 36 and 40 of Title IV, which lay down rules pertaining to multi-territorial licensing, only apply to CMOs granting multi-territorial licenses in online rights in musical works. Independent management entities established in the EU are subjected only to the obligation to

13. See F. Trumpke, J. Drexler, R.M. Hilty & S. Nérissou, “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) 372”, *IIC* 2013, 322–351.

14. Article 2(1) Directive 2011/83/EU of the European Parliament and of the Council of Oct. 25, 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, O.J. L 304/64 of 22.11.2011. See also Recital 33 CRMD.

15. CJEU judgment in Case 395/87, *Ministère public v. Tournier*, (1989) I E.C.R. 2521 [*Tournier*]; CJEU judgment in Joint Cases 110/88, 241/88 and 242/88, *Lucazeau v. SACEM*, (1989) I E.C.R. 2811 [*Lucazeau*].

conduct licensing negotiations in good faith (Article 16(1)), a number of transparency rules (Articles 18, 20 and 21(1)(a)-(c) and (e)-(g)), mechanisms for compliance control (Article 36) and rules on the processing of personal data (Article 42).

2.2 Services Directive

Prior and during the legislative process leading to the adoption of the CRMD, the question arose whether Directive 2006/123/EC of the European Parliament and of the Council of December 12, 2006 on services in the internal market, also known as the “Services Directive”, is also applicable to CMOs.¹⁶ Article 16 of the Services Directive establishes the right of providers to provide services in a Member State other than that in which they are established. A Member State in which the service is provided must ensure free access to and free exercise of a service activity within its territory without subjecting access to or exercise of a service activity in its territory to compliance with any requirements that do not respect the principles laid down in the Services Directive. Importantly, pursuant to Article 17(11), the Services Directive does not apply to copyright and neighboring rights. Were the Services Directive to apply to CMOs, this would mean that the CMO of one Member State would be free to offer its services in the territories of all other Member States without being subject to requirements that are contrary to those set in the Services Directive. In the wake of the adoption of the CRMD, the European Commission was very keen to see the application of the Services Directive to the operations of CMOs, with a view to liberalizing the market for the collective management of copyrights and neighboring rights within the European Union.¹⁷

One day after the adoption of the CRMD, however, the CJEU answered the question whether the Services Directive applies to CMOs in the negative.¹⁸ While the Court confirmed in a request for a preliminary ruling that the collective management of rights qualifies as a service under the Services Directive, the Court also came to the conclusion that since Article 16 does not apply to copyright and to neighboring rights, the services of CMOs were indeed also excluded.¹⁹ As Nérison puts it, “if art. 17(11) exempts copyright but not services related to copyright, one may wonder why art. 17(11) exists at all”.²⁰ The ruling expressly refers to the conclusions of A.-G. Sharpston, highlighting that:

16. O.J. L 376/36 of 27.12.2006. See also T. Riis, *Collecting Societies, Competition, and the Services Directive*, 6 J. Intell. Prop. L. & Prac. 482–493 (2011).

17. Proposal for a CRMD, *supra*, at 4–5: “This proposal complements Directive 2006/123/EC of December 12, 2006 on services in the internal market which aims to create a legal framework to ensure the freedom of establishment and the free movement of services between the Member States. Collecting societies are subject to Directive 2006/123/EC as providers of collective management services”.

18. CJEU judgment in Case C-351/12, *OSA v. Czech Republic*, Feb. 27, 2014, <http://curia.europa.eu> [OSA].

19. *Ibid.* at paragraph 65.

20. S. Nérison, Last Year at Marienbad: the ECJ ‘OSA’ Decision – Milestones on the Way to a European Law of Copyright and of its Management, 37 Eur. Intell. Prop. Rev. 388–394, at 392 (2015).

since only services can be excluded from the application of Article 16, Article 17(11) of that directive must be interpreted as excluding the service relating to copyright referred to in paragraph 63 of the present judgment from the scope of Article 16.²¹

The question remains, however, how to best reconcile the principle of free movement of services recognized under Article 56 Treaty for the Functioning of the European Union (TFEU) with the need to protect intellectual property and to provide for effective control of the activities of CMOs.²²

2.3 Competition Law

Before the adoption of the CRMD, the activities of CMOs in the EU Member States were subject to control primarily pursuant to the European and national rules on competition, depending on whether or not the alleged anti-competitive activities had an Internal Market dimension. Most of the rules developed over the years in the case law of the European Commission and the Court of Justice have been codified as principles in the new Directive. Nevertheless, the provisions of this Directive remain without prejudice to the application of rules on competition and any other relevant law in other areas. It is therefore not excluded that in the future, despite a correct national implementation of the norms of the CRMD, certain situations might call for scrutiny under the rules on competition.

Article 101 TFEU prohibits agreements between undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. This can be the case, for example, with price-fixing agreements. Article 102 TFEU prohibits the abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it insofar as it may affect trade between Member States. This can be the case, for example, where an undertaking imposes unfair trading conditions or where it applies dissimilar conditions to equivalent transactions with other trading parties.

CMOs are likely to occupy a dominant market position in at least two respects: first, towards users of protected works who may have just one legitimate supplier of licenses and, second, towards individual right owners of protected works who may have no alternative provider of a rights administration infrastructure. Furthermore, CMOs may be engaging in practices in restraint of trade, contrary to Article 101 TFEU, by reinforcing their competitive position on the national market through reciprocal representation agreements for the exploitation of their respective repertoires.

European case law has constantly held that Articles 101 and 102 TFEU are applicable to CMOs. First, these organizations constitute “undertakings” within the

21. *OSA*, *supra*, at paragraph 65.

22. J. Drexler, *Collective Management of Copyrights and the EU Principle of Free Movement of Services after the OSA Judgment – In Favour of a More Balanced Approach*, in *Varieties of European Economic Law and Regulation – Liber Amicorum for Hans Micklitz* 459–487 (K. Purnhagen & P. Rott Springer 2014).

meaning of these provisions. By acting as agencies entrusted with the safeguard of the rights of copyright owners, they participate in the commercial exchange of services and are therefore engaged in the exercise of economic activities,²³ irrelevant of whether they make profit or not.²⁴ Second, as CMOs enjoy a (quasi)-monopoly in their field, they are deemed to have a “dominant position” in the meaning of Article 102 TFEU.²⁵ Note that whether undertakings occupy a dominant position is not a relevant factor for consideration of a complaint under Article 101 TFEU. Undertakings are prohibited from setting up agreements and engaging in concerted practices irrespective of whether or not they enjoy a dominant position.²⁶

An exhaustive account of the European case law on the subject of CMOs would go far beyond the objectives of this chapter.²⁷ The intervention of the CJEU and of the European Commission has traditionally addressed three broad issues: (1) the relationship between CMOs and their members; (2) the relationship between CMOs and users; and (3) the reciprocal relationship between different CMOs. The most important decisions are discussed in the sections below, since they have served as guidelines for the adoption of the provisions of the new Directive. This is the case in particular of the principles laid down regarding the relationship between CMOs and their members, the relationship with users, as well as the multi-territorial licensing of works.

3 RULES ON GOOD GOVERNANCE

The Recommendation of 2005 on collective cross-border management of copyright and related rights for legitimate online music services set out principles with respect to the good governance of CMOs, such as equal treatment of categories of right holders, non-discrimination in the grant of licenses to commercial users and equitable distribution of royalties. It called on CMOs to inform right holders and commercial users about the repertoire they represent, any existing reciprocal representation agreements,

23. See *Commission Decision of 8 October 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/C2/38.014 - IFPI “Simulcasting”)*, O.J. L. 107/58 of 30.04. 2003 [*IFPI Simulcasting decision*], at paragraph 59, with reference to, *inter alia*, the CJEU judgments in Case 127/73, *Belgische Radio en Televisie (BRT) v. SABAM*, (1974) I E.C.R. 51 and 313 [*BRT v. SABAM*]; Joined Cases 55/80 and 57/80, *Musik-Vertrieb Membran GmbH v. GEMA*, (1981) I E.C.R. 147; and Case 7/82, *GVL v. Commission*, (1983) I E.C.R. 483 [*GVL v. Commission*].

24. See *Commission Decision 81/1030/EEC of 29 October 1981 relating to a proceeding under Article 86 of the EEC Treaty (IV/29.839 - GVL)*, O.J. L. 370/49 of 28.12.1981 [*GVL decision*], at paragraph 44.

25. *GVL v. Commission*, *supra*, At paragraphs 41–45.

26. P. Sean Morris, *The Reform of Article 82 And The Operation Of Competition Principles upon the Normal Trading Functions of Copyright Collecting Societies*, 4 J. Intell. Prop. L. & Prac. 566–572, at 569 (2009).

27. For further reading, see I. Govaere, *The Use and Abuse of Intellectual Property Rights in E.C. Law* 337 and ff. (Sweet & Maxwell 1996); D.G. Goyder, *EC Competition Law* 660 and ff. (4th ed. Oxford U. Press 2003); F.L. Fine, *The Impact of EEC Competition Law on the Music Industry*, 3 Ent. L. Rev. 6–17 (1992); E. Lui, *The Eurovision Song Contest: A Proposal for Reconciling the National Regulation of Music Collecting Societies and the Single European Market*, 14 Ent. L. Rev. 67–84, at 73 and ff. (2003); and K.J. Koelman, “Collectieve rechtenorganisaties en mededinging – deel I”, *AMI* no. 2 (2004): 45–50.

the territorial scope of their mandates for that repertoire, the applicable tariffs and any changes to these. It also urged CMOs to regularly inform represented right holders about any licenses granted, royalties collected and distributed and deductions made for purposes other than management services provided. It further contained recommendations on accountability, representation of right holders in the decision-making bodies of CMOs and dispute resolution.²⁸

Ten years after the publication of the Recommendation, however, significant differences still existed in the national rules governing the functioning of CMOs, particularly with respect to their transparency and accountability to members and right holders. Beyond the difficulties faced by non-domestic right holders when they sought to exercise their rights and the poor financial management of the revenues collected, problems with the functioning of CMOs led to inefficiencies in the exploitation of copyright and related rights across the internal market to the detriment of members of the CMOs and users alike. This situation has been addressed in Titles II and IV of the CRMD, which lay down requirements applicable to CMOs, in order to ensure a high standard of governance, financial management, transparency and reporting. Three aspects of the rules on good governance in the Directive are explained in greater detail below: the rules pertaining to the CMOs' relationship with their members, the rules pertaining to the CMOs' relationship with users and the rules on the supervision of CMOs.

3.1 Relationship with Members

Article 4 CRMD poses as a fundamental principle the need to ensure that CMOs act in the best interests of the right holders whose rights they manage and that they do not impose on them any obligations which are not objectively necessary for the protection of their rights and interests or for the effective management of their rights. Recital 22 gives some indication of what the lawmakers perceive as being in the best collective interests of the right holders they represent, e.g., to provide for systems that enable members of CMOs to exercise their membership rights by participating in the societies' decision-making process. The representation of the different categories of members in the decision-making process should be fair and balanced. According to the same Recital, the effectiveness of the rules on the general meeting of members of CMOs could be undermined if no provisions governed the conduct of the general assembly. Article 7 is therefore meant to ensure that the general assembly is convened regularly, and at least annually, and that the most important decisions in the CMO are taken by the general assembly.

The obligation to act in the best interests of the members and to impose only those obligations that are necessary for the protection of those interests flows from the case law of the CJEU and the European Commission. In the *GEMA I* case,²⁹ the Commission examined four points in the light of Article 102 TFEU: (1) the scope of the

28. Articles 6–15 Online Music Recommendation.

29. *Commission Decision 71/224/EEC of 2 June 1971 relating to a proceeding under Article 86 of the EEC Treaty (IV/26 760 - GEMA)*, O.J. L 134/15 of 20.6.1971 [*GEMA I* decision].

assignment of rights in favor of the CMOs, (2) the distribution of income, (3) the membership of non-domestic right holders and (4) the member's ability to have recourse to courts to decide on disputes with the CMOs. The obligation set by a CMO requiring its members to assign unduly broad (categories of) rights was construed by the European Commission as a (potential) abuse of a dominant position.

Article 5 CRMD sets out a number of key principles: (1) the right of right holders to authorize the CMO of their choice, throughout the EU; (2) the choice to grant a CMO the authorization to manage certain categories of rights or certain types of works; and (3) the right to terminate the authorization to manage or to withdraw any right, category of rights or types of works of their choice from a CMO. This provision echoes the European Parliament's recognition of the need to safeguard by legislation the freedom of creators to decide for themselves which rights they wish to confer on CMOs and which rights they wish to manage individually.³⁰

The principle of non-discrimination flows, of course, from Article 18 TFEU, as well as from the case law of the CJEU and the European Commission. Early on, in the *GEMA I* case, the European Commission stressed that CMOs may not discriminate among members as regards the distribution of income.³¹ The Commission held that GEMA had abused its dominant position by paying supplementary fees, from revenue collected from the membership as a whole, only to those members who had been ordinary members for at least three years. Also, the Commission ruled that CMOs may not refuse nationals of other EU Member States as members, nor impose discriminatory terms concerning their membership rights, e.g., by preventing a foreign right holder becoming an ordinary or extraordinary member (a voting member).³² According to the Commission, such practices must automatically be regarded as an infringement of Article 102 TFEU, as they run counter to the principle of equal treatment resulting from the prohibition of "any discrimination on grounds of nationality" in Article 18 TFEU. Moreover, the refusal to accept the membership of nationals of other Member States falls directly under the special prohibition of discrimination under Community competition law, as contained in Article 102(c) TFEU. In this respect, the CJEU confirmed, in the *Phil Collins* case,³³ that domestic provisions containing reciprocity clauses cannot be relied upon in order to deny nationals of other EU Member States rights conferred on national authors.

The Directive's recognition of the right holder's choice to confer to a CMO the management of only certain (categories of) rights or certain works also derives from the case law of the CJEU and the European Commission. In the *Daft Punk* decision,³⁴ the Commission ruled that a CMO may be abusing its dominant position where its statutes contain a mandatory requirement according to which all rights of an author must be

30. Community Framework Resolution, *supra*, at 5 (paragraph 32).

31. *GEMA I* decision, *supra*.

32. *GVL v. Commission*, *supra*, See also CJEU judgment in Case 402/85, *Basset v. SACEM* (1987) I E.C.R. 1747, paragraph 11.

33. CJEU judgment in Joined Cases C-92/92 and C-326/92, *Phil Collins and Patricia Im- und Export v. Imtrat and EMI Electrola*, (1993) I E.C.R. 5145.

34. *Commission Decision of 06.08.2002 in case COMP/C2/37.219 Banghalter/Homem Christo (Daft Punk) v. SACEM* [*Daft Punk* decision].

assigned without distinction, given that such practice corresponds to the imposition of an unfair trading condition. In this case, the two *Daft Punk* members wished to individually manage their rights for exploitation on the internet, CD-ROM, DVD, etc. The French SACEM refused membership, arguing that it protected authors from unreasonable demands of the record industry and prevented a cherry picking of the most valuable rights. The Commission held this refusal to be a disproportionate curtailment of individual management of rights contrary to Article 102 TFEU.³⁵

Recital 19 clarifies that the right holders' freedom of choice regarding: (i) the CMO that will manage their rights, (ii) the territories for which the management of rights are entrusted, and (iii) the extent of the rights entrusted, whether those rights are rights of communication to the public or reproduction rights, or categories of rights related to forms of exploitation (such as broadcasting, theatrical exhibition or reproduction for online distribution) should be exercisable irrespective of the Member State of nationality, residence or establishment of either the CMO or the right holder. The sole condition set is that the CMO that the right holder wishes to appoint already manages such rights or categories of rights.

Recital 19 points out that the rights, categories of rights or types of works and other subject-matter managed by the CMO should be determined by the general assembly of members of that organization if they are not already determined in its statute or prescribed by law. The Recital stresses the importance of making such a determination:

in a manner that maintains a balance between the freedom of rightholders to dispose of their works and other subject-matter and the ability of the organisation to manage the rights effectively, taking into account in particular the category of rights managed by the organisation and the creative sector in which it operates. Taking due account of that balance, rightholders should be able easily to withdraw such rights or categories of rights from a collective management organisation and to manage those rights individually or to entrust or transfer the management of all or part of them to another collective management organisation or another entity, irrespective of the Member State of nationality, residence or establishment of the collective management organisation, the other entity or the rightholder.

However, it is also specified that:

[w]here a Member State, in compliance with Union law and the international obligations of the Union and its Member States, provides for mandatory collective management of rights, rightholders' choice would be limited to other collective management organisations.

Article 5 provides a clear response to the need for flexibility as regards the management of copyright and related rights. In addition to the possibility offered to right holders under Article 5(2) to choose the organization that will manage their rights, categories of right or types of works and other subject-matter, the legislator clearly goes one step further in allowing, on the basis of Article 5(3), right holders to

35. S. Nérison, *La gestion collective des droits des auteurs en France et en Allemagne: quelle légitimité?*, Institut de recherche juridique de la Sorbonne, Tome 49 (Paris: Bibliothèque André Tunc, 2013), at 239.

exercise the right to grant licenses for non-commercial uses. This will hopefully bring significant changes in the manner in which CMO will go about with requests from right holders to apply one of the three non-commercial variations of the Creative Commons licenses to their works. Note, however, that non-commercial licenses can therefore be granted regarding the use of any rights, categories of rights or types of works and other subject-matter, but not regarding individual works.

Pursuant to Article 5(8), CMOs should inform right holders of their choices and allow them to exercise the rights related to those choices as easily as possible. Right holders who have already authorized the CMO may be informed via the CMO's website.

The CRMD offers right holders the possibility to manage their rights individually, including for non-commercial uses, and to terminate or withdraw rights, categories of rights or types of works or other subject-matter from a CMO. It must be underlined that the freedom to grant or withdraw rights management authorization, subject to reasonable notice, is an important principle that strengthens the position of right holders. Yet, in order to protect all creators, it is necessary to avoid a situation in which well-known artists withdraw authorization where rights management costs are lower, while continuing to authorize the management of rights only where it presents greater difficulties, as this could undermine the effectiveness of CMOs. Indeed, additional rights fragmentation would make multi-territorial and multi-repertoire licensing more difficult. A balance should be struck between the various objectives.³⁶

Article 5(7) requires that a right holder gives "consent" specifically for each right or category of rights or type of works, which the CMO is authorized to manage. The author's contract law of a number of Member States, including France and Belgium, requires that contracts set out specifically what rights or categories of rights are transferred by means of an exploitation contract. In most countries, these obligations are deemed not to apply to the relationship between CMOs and their members, in view of the fact that CMOs are presumed to operate in their members' best interest and that a complete and broad transfer of exploitation rights strengthens their bargaining position against powerful users, like radio and television broadcasters.³⁷ Since the European Commission's *GEMA* decisions, which listed the most common categories of rights managed collectively, the exploitation contracts of most CMOs today enumerate the categories of rights transferred in their favor. Some CMOs are resisting however and still ask for a complete, unspecified transfer of rights.³⁸ If correctly implemented, this provision of the Directive would most likely put an end to this practice. Note moreover that Recital 19 further specifies:

36. *Working Document 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)0372 – C7-0183/2012 – 2012/0180(COD))*, PE502.061v01-00, Committee on Legal Affairs, Rapporteur: Marielle Gallo, March 4, 2013 [Gallo report].

37. See P.B. Hugenholtz & L. Guibault (with the collaboration of M.A.R. Vermunt & M. Berghuis), "Study on the conditions applicable to contracts relating to intellectual property in the European Union", final report, study commissioned by the European Commission, IViR, May 2002.

38. L. Guibault, "Halleluja: Buma's aansluitvoorwaarden krijgen zegen van NMa!", *AMI* no. 4 (2008): 85–93.

A requirement for the consent of rightholders in the authorisation to the management of each right, category of rights or type of works and other subject-matter should not prevent the rightholders from accepting proposed subsequent amendments to that authorisation by tacit agreement in accordance with the conditions set out in national law. Neither contractual arrangements according to which a termination or withdrawal by rightholders has an immediate effect on licences granted prior to such termination or withdrawal, nor contractual arrangements according to which such licences remain unaffected for a certain period of time after such termination or withdrawal, are, as such, precluded by this Directive. Such arrangements should not, however, create an obstacle to the full application of this Directive.

While such a specification may encourage right holders to withdraw some of their rights (e.g., for individual management or for management by another CMO), with the consequence of fragmenting the CMO's repertoire, it would facilitate the exercise of the right holder's choice.

A problem arises, however, when a CMO is competent to manage the rights of outsiders: non-members are not in a position to give their express consent. In view of that, clear membership rules that take account of the different interests of the various categories of right holders are essential, especially where national laws allow the CMO to collect and administer revenues on behalf of non-members, like in the case of extended collective licensing regimes. The Max Planck Institute drew attention to the importance of guaranteeing that the CMO's membership structure addresses the need to differentiate between categories of members, making their respective rights and obligations explicit within the decision-making instances.³⁹

Solid rules on the collection, administration and distribution of revenue generated by the exploitation of rights on the works in the repertoire managed by CMOs are the cornerstone of an efficient collective management system for all parties concerned. By setting out clear rules on the financial management of rights revenue and by putting an obligation on the Member States to ensure that CMOs comply with these rules in Articles 11–13 CRMD, the European Commission hopes to avoid any form of abuse or mismanagement.

In support of Article 11 on the collection and use of rights revenue, Recital 26 emphasizes that the revenue collected, managed and distributed from the exploitation of the rights entrusted to them by right holders is ultimately due to the right holders, whether the right holders have a direct legal relationship with the organization, or are represented via an entity which is a member of the CMO or via a representation agreement. CMOs should therefore exercise the utmost diligence in collecting, managing and distributing that revenue. Recital 26 goes on to state that accurate distribution is only possible where the CMO maintains proper records of membership, licenses and use of works and other subject-matter. Relevant data that are required for the efficient collective management of rights should also be provided by right holders and users and verified by the CMO. The bookkeeping of certain CMOs in Europe did leave something to be desired and the new rules are not superfluous. In its *IFPI Simulcasting* decision,⁴⁰

39. Trumpke, Drexl, Hilty & Nérison, *supra*.

40. *IFPI Simulcasting* decision, *supra*.

the European Commission had for example ordered the parties to increase transparency as regards the payment charged, by separating the tariff, which covered the royalty proper from the fee meant to cover the administration costs.⁴¹ This transparency in pricing would, according to the Commission, enable users to recognize the most efficient CMOs and to seek their licenses from the society that provides them at the lower cost.

Both Article 11(3) and Recital 27 require that amounts collected and due to right holders be kept separately in the accounts from any own assets the organization may have. In order to maintain a high level of protection of the rights of right holders and to ensure that any income that may arise from the exploitation of such rights accrues to their benefit, the investments made and held by the CMO should be managed in accordance with criteria which would oblige the organization to act prudently, while allowing it to decide on the most secure and efficient investment policy. This should allow the CMO to opt for an asset allocation that suits the precise nature and duration of any exposure to risk of any rights revenue invested and does not unduly prejudice any rights revenue owed to right holders.

Article 12 deals with deductions granted by a CMO. The term “deduction” is not defined in the Directive and is probably to be understood in relation to the expression “management fees”, defined in Article 3(i) as “the amounts charged, deducted or offset by a CMO from rights revenue or from any income arising from the investment of rights revenue in order to cover the costs of its management of copyright or related rights”. Pursuant to Article 12(1), CMOs must inform right holders about “management fees and other deductions from the rights revenue and from any income arising from the investment of rights revenue”. Recital 28 stresses the need for management fees not to exceed justified costs of the management of the rights and for any deduction other than in respect of management fees, for example a deduction for social, cultural or educational purposes, to be decided by the members of the CMO. Transparency towards right holders regarding the rules governing such deductions is paramount. The same requirements should apply to any decision to use the rights revenue for collective distribution, such as scholarships. Right holders should have access, on a non-discriminatory basis, to any social, cultural or educational service funded through such deductions. Deductions under national law, such as deductions for the provision of social services by CMOs to right holders, remain unaffected as regards any aspects that are not regulated by the Directive, provided that they are in compliance with EU law. The validity of statutory deductions systems was recognized by the CJEU in the *Amazon* decision.⁴²

3.2 Relationship with Users

Article 16, together with Recital 31, on the relationship between CMOs and users focuses on two principles: (1) that CMOs and users conduct licensing negotiations in

41. See Guibault & Van Gompel 2006, *supra*, at 136 and ff.

42. CJEU judgment in Case C-521/11, *Amazon v. Austro-Mechana*, July 11, 2013, <http://curia.europa.eu>, paragraph 55.

good faith; and (2) that CMOs apply tariffs that are determined on the basis of objective criteria. The obligation to negotiate in good faith is essential, but it does not necessarily guarantee that negotiations will run smoothly and that the outcome will be satisfactory to all parties, especially when the CMO enjoys a strong bargaining position compared to that of the user.

The requirement that the tariffs be determined on the basis of objective criteria is not an easy one to fulfill. This may explain why the Directive refers to the notion of “economic value in trade”, which came under review in the *STIM v. Kanal 5* and *TV4* case. In this case, the CJEU considered:

whether the royalties levied by STIM are reasonable in relation to the economic value of the service provided by that organisation, which consists in making the repertoire of music protected by copyright that it manages available to the broadcasting companies which have concluded licensing agreements with it.⁴³

The royalties representing the consideration paid for the use of musical works protected by copyright for the purposes of television broadcast must, in particular, be analyzed with respect to the value of that use in trade. Insofar as such royalties are calculated on the basis of the revenue of the television broadcasters, the CJEU held that they are, in principle, to be considered reasonable in relation to the economic value of the service provided by STIM.

In the end, the CJEU ruled that there is no abuse of a dominant position where, with respect to remuneration paid for the television broadcast of musical works protected by copyright, it applies to commercial television channels a remuneration model according to which the amount of the royalties corresponds partly to the revenue of those channels, if that part of the remuneration model is proportionate overall to the quantity of musical works protected by copyright actually broadcast or likely to be broadcast. An exception to this rule is permissible if another method enables the use of those works and the audience to be identified more precisely without, however, resulting in a disproportionate increase in the costs incurred for the management of contracts and the supervision of the use of those works. By contrast, the CJEU considered that by calculating the royalties with respect to remuneration paid for the broadcast of musical works in a different manner according to whether a user is a commercial company or a public service undertaking, a CMO is likely to abuse its dominant position if it applies dissimilar conditions to equivalent services, thus placing particular companies at a competitive disadvantage, unless such a practice may be objectively justified.⁴⁴

Discrimination in tariffs between users of different categories or origin has been judged in the past to constitute an abuse of dominant position. For example, the *Lucazeau* and *Tournier* cases have established that where the royalties charged by CMOs to discothèques are appreciably higher than those charged in other Member States – the rates being compared on a consistent basis – these constitute an abuse of

43. CJEU judgment in Case C 52/07, *Kanal 5 Ltd, TV 4 AB v. STIM*, (2008) I E.C.R. 9275, paragraph 29.

44. *Ibid.* at paragraph 48.

dominant position. This would not be the case if the CMO in question were able to justify such a difference by reference to objective and relevant dissimilarities between copyright management in the Member State concerned and copyright management in the other Member States.⁴⁵

Article 16(2) CRMD requires that licensing terms be set following objective and non-discriminatory criteria. In relation to this, the amendments brought to the text of the Directive operated a shuffle in the provisions, bringing Article 32 of the Proposal into Article 16(2) of the final text. This provision received its share of comments as being too vague. Recital 32 sheds some light on the somewhat obscure wording of this provision. It states that:

In the digital environment, collective management organisations are regularly required to license their repertoire for totally new forms of exploitation and business models. In such cases, and in order to foster an environment conducive to the development of such licences, without prejudice to the application of competition law rules, collective management organisations should have the flexibility required to provide, as swiftly as possible, individualised licences for innovative online services, without the risk that the terms of those licences could be used as a precedent for determining the terms for other licences.

In its comment on the Proposal, the Max Planck Institute had strongly recommended that the Commission introduce an obligation to contract with users, as such obligation exists in the laws of Austria, Germany, Greece, Poland and Spain.⁴⁶ The final text of the Directive went a long way in this direction. Article 16(3) now requires CMOs to “reply without undue delay to requests from users, indicating *inter alia* the information needed in order for the collective management organisation to offer a licence.” Thus, upon receipt of all relevant information, a CMO must, without undue delay, either offer a license or motivate a refusal.

Article 17 of the Directive is an absolute novelty in the copyright *acquis* for it expressly puts an obligation on users to report relevant information on the use of the rights managed by the CMOs. Users must provide information within an agreed or pre-established time and format that is necessary for the collection of rights revenue and for the distribution and payment of amounts due to right holders. When deciding on the format for the provision of such information, CMOs and users shall take into account, as far as possible, voluntary industry standards. Natural persons are not covered by this obligation. Moreover, the information required by CMOs should be limited to what is reasonable, necessary and at the users’ disposal in order to enable CMOs to perform their functions, taking into account the specific situation of small and medium-sized enterprises. That obligation could be included in an agreement between a CMO and a user, without prejudice to the existence of national statutory rights to information. The deadlines applicable to the provision of information by users should be such as to allow CMOs to meet the deadlines set for the distribution of amounts due to right holders. Recital 33 states that the Directive is without prejudice to the

45. *Tournier, supra, Lucazeau, supra.*

46. *Trumpke, Drexler, Hilty & Nérissou, supra.*

possibility for Member States to require CMOs established in their territory to issue joint invoices.

3.3 Supervision

As with the governance structure of CMOs, the CRMD introduced in Articles 18–22 very detailed rules on the information that CMOs must provide to right holders on the management of their rights, to other CMOs on the management of rights under representation agreements, and to right holders, members, other CMOs and users on request, as well as on the disclosure of information to the public and the publication of an annual transparency report, respectively. The current copyright *acquis* contains no similar rules on transparency; these are unique to the regime governing CMOs.

The new regime sets different information obligations on CMOs according to the categories of recipients of this information, e.g., right holders, other CMOs, users and the general public. The group of recipients entitled to the least information, according to this section, is the general public. Remarkably, one element of information that should be most readily available to all is the repertoire and rights that a CMO manages, together with the territorial coverage, as provided for in Article 20 in respect of all categories of recipients except the general public. In practice, the group that stands to benefit from access to this information is much broader than that listed in Article 20. It includes anyone wishing to provide services or to use material protected by copyright or related rights. Among them are developers of new content delivery platforms and services, and cultural heritage institutions. Because these (potential) services do not entertain a business relationship with the CMOs, it is questionable whether they qualify or disqualify as potential recipients of this information.⁴⁷

Articles 33–35 CRMD contain a series of provisions setting out a complaint procedure and a dispute resolution mechanism. These provisions have been thoroughly revised and amended compared to the text of the Proposal and also go further than the Recommendation of 2005, which merely invited Member States to provide for “effective dispute resolution mechanisms, in particular in relation to tariffs, licensing conditions, entrustment of online rights for management and withdrawal of online rights”. Recital 49 stresses the importance of creating a proper dispute resolution mechanism, which ensures a rapid, independent and impartial out-of-court procedure for resolving conflicts between CMOs, their members, right holders or users regarding the provisions of national law adopted pursuant to the Directive.

Article 33 CRMD requires Member States to ensure that CMOs make a complaint procedure available to their members and to mandating CMOs. The procedure must, at least, be able to address complaints involving authorization to manage rights, the termination or withdrawal of rights, membership terms, the collection of amounts due, deductions and distributions. Article 34, in turn, deals with alternative dispute resolution mechanisms between CMOs or between a CMO and its members, right

47. Cf. Guibault 2014, *supra*, at 761 and ff. and S. van Gompel, *Collective Rights Management Directive*, in *Concise European Copyright Law* (T. Dreier & P.B. Hugenholtz eds, 2d edn, Kluwer L. Intl. 2015), Article 20.

holders or users. Such procedure is without prejudice to judicial action. Article 35 governs the resolution of disputes between CMOs and users on existing and proposed licensing conditions or a breach of contract, in particular. Most importantly, parties involved in a dispute should have the possibility of easily accessible, efficient and impartial out-of-court procedures, such as mediation or arbitration, for resolving conflicts.

Together with the duties that Articles 37 and 38 impose on national competent authorities to report matters relevant to the application of the CRMD, Article 36 is a major step towards the real implementation in practice of the principles laid down in the Directive. Article 36(3) in particular gives teeth to the system put in place by requiring Member States to ensure that the competent authorities have the power to impose appropriate sanctions and measures to ensure compliance by CMOs with the national implementation of the norms in this Directive.

Recital 50 specifies that Member States are not obliged to set up new competent authorities, but they must ensure that members of a CMO, rightholders, users, CMOs and other interested parties are able to notify a competent authority in respect of activities or circumstances which, in their opinion, constitute a breach of law by CMOs and, where relevant, users. In practice, Member States follow vastly diverging routes in respect of the supervision of the CMOs that are active on their territory, ranging from a strict supervisory regime to a “*de minimis*” type of control system.⁴⁸ While Member States are under no obligation to set up a new competent authority, they should at least make sure that there is one qualified body entrusted with this task. Otherwise, they fail to meet the obligation to enable interested parties to file a complaint for failure for a CMO to comply with the provisions flowing from the Directive.

Recital 50 further specifies that competent authorities should be given the power to impose sanctions or measures where provisions of national law implementing the CRMD are not complied with. Just as no specific requirements are imposed regarding the establishment of a competent authority, no specific rules are set regarding the specific types of sanctions or measures to be adopted, provided that they are effective, proportionate and dissuasive. Such sanctions or measures may include orders to dismiss directors who have acted negligently, inspections at the premises of a CMO or, in cases where an authorization is issued for a CMO to operate, the withdrawal of such authorization. Moreover, the Directive is neutral as regards the prior authorization and supervision regimes in the Member States, including a requirement for the representativeness of the CMO, insofar as those regimes are compatible with EU law and do not create an obstacle to the full application of the CRMD. This last remark relating to the requirements of prior approval and supervision regimes may perhaps be explained by the need to observe the prescriptions of the Services Directive.

Contrary to other directives in the field of copyright and related rights, the CRMD is the first one to mandate the creation of an expert group to assess the impact of this Directive on the development of cross-border services, cultural diversity, the relations between CMOs and users, the operation in the EU of CMOs established outside the

48. Guibault & Van Gompel 2006, *supra*, at 125 and ff.

Union, and, if necessary, the need for a review. This is useful feature of the Directive for it ensures that when time comes, the people most knowledgeable in the area will be called upon to participate in the review process.⁴⁹

4 CROSS-BORDER LICENSING OF REPERTOIRE

The cross-border rights clearance for the exploitation of works occurs either via a network of reciprocal representation arrangements between CMOs, enabling one CMO to grant licenses in non-domestic repertoire for the entire territory of the EU, or via a new mechanism created under the Directive known as the passport construction. Let us examine each system in turn.

4.1 Reciprocal Agreements between CMOs

The rights clearance for the exploitation of non-domestic repertoire traditionally occurs on the basis of a network of reciprocal representation arrangements between CMOs. The CRMD supports this system of reciprocal agreements.⁵⁰ Through reciprocal agreements, CMOs give each other the right, on a non-exclusive basis, to exploit the copyrights on their respective repertoire in their respective territories. As the CJEU held in the *Tournier* and *Lucazeau* cases, the advantage of a system of reciprocal agreements is that it:

enables 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.⁵¹

In addition to these traditional reciprocal agreements, new forms of reciprocal arrangements have been developed whereby CMOs grant each other the right to issue multi-territorial licenses to exploit the rights on their respective repertoire for online use.

To protect the interests of right holders whose rights are managed pursuant to representation agreements, the CRMD provides rules on equal treatment and due diligence with respect to the distribution and payment of amounts due to other CMOs. Article 14 prohibits CMOs from discriminating against any right holder whose rights are administered under a representation agreement. In particular, CMOs must apply the same tariffs, management fees and conditions for the collection and distribution of rights revenue to right holders of other CMOs as those applicable to their own members. This non-discrimination rule follows from Article 18 TFEU and the case law of the CJEU and the Commission, as discussed above.⁵² Article 15 further requires

49. Guibault 2014, *supra*, at 790 and ff.

50. See Recitals 11 and 30 CRMD.

51. *Tournier*, *supra*, at paragraph 19; *Lucazeau*, *supra*, at paragraph 13.

52. See the case law discussed above in relation to Article 5(2), *supra* s.3.1.

CMOs to regularly, diligently and accurately distribute and pay amounts due to other CMOs. Other than in respect of management fees, no deductions may be made from rights revenue collected on behalf of another CMO (e.g., for social, cultural or educational purposes), unless that other CMO expressly consents to such deductions. CMOs must distribute and pay the amounts due to other CMOs no later than when they distribute and make payments to their own members. Additionally, Article 19 requires CMOs to provide sufficient information, including financial information, to other CMOs whose rights they manage.

Other than the rules laid down in the CRMD, CMOs which conclude reciprocal representation agreements must abide by competition rules.⁵³ To the extent that CMOs are or become actual or potential competitors in respect to their services, the agreements between them could lead to a restriction of competition, contrary to Article 101 TFEU. According to settled case law, concerted action by national CMOs 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.⁵⁴ In the *Tournier* and *Lucazeau* cases, the CJEU addressed the reciprocal relationship between CMOs and concluded that, provided that no concerted action was demonstrated, such reciprocal agreements did not, as such, restrict competition under Article 101(1) TFEU.⁵⁵ Reciprocal representation agreements appeared in those days to be economically justified in a context in which physical monitoring of copyright usage was required.⁵⁶

With the advent of the digital network environment, the exploitation of copyright-protected works has taken a new turn, one that can simultaneously reach the entire world and be monitored at a distance. As discussed in the following sections on the *IFPI Simulcasting* decision and *CISAC* case, these technological developments emphasize the need for multi-repertoire/multi-territory licenses, or in absence of such broad licenses, for a solid and transparent network of reciprocal agreements between CMOs.

4.1.1 *IFPI Simulcasting Decision*

The *IFPI Simulcasting* decision involved the licensing of neighboring rights for the “simulcasting” of phonograms, i.e., the simultaneous online transmission by radio and TV stations of sound recordings included in their radio and/or TV broadcasts. The right to license simulcast rights on the Internet, given that simulcasting necessarily involves the transmission of signals into several territories at the same time, was not covered by the mono-territory inter-society mandates resulting from existing reciprocal representation agreements. The *IFPI Simulcasting* agreement, which was signed on an experimental basis until the end of 2004, permitted each of the participating CMOs to issue multi-territorial licenses for the online use of the repertoires of these societies only to

53. Recital 11 CRMD.

54. *Tournier*, *supra*, at paragraph 23; *Lucazeau*, *supra*, at paragraph 17.

55. *Tournier*, *supra*, at paragraph 20; *Lucazeau*, *supra*, at paragraph 14.

56. *Tournier*, *supra*, at paragraphs 34–46; *Lucazeau*, *supra*, at paragraphs 21–33.

online users established in their own territory.⁵⁷ Following statements of objection against two similar constructs, known as the Santiago⁵⁸ and BIEM-Barcelona agreements,⁵⁹ the European Commission issued a statement of objection against the IFPI Simulcasting agreement and put its terms to the test of the provisions of Article 101 TFEU.

Referring to the *Tournier* and *Lucazeau* cases, the European Commission considered that the monitoring task of CMOs in the online environment could easily be carried out directly on the Internet and could therefore take place from a distance, which meant that the traditional economic justification for CMOs not to compete in cross-border provision of services no longer applied in this context.⁶⁰ Moreover, it required the parties in this case to undertake to increase transparency in regard to the payment charged to the users of phonograms in their repertoire, by separating the tariff that covers the royalty proper from the fee meant to cover the administration costs.⁶¹ Without such a split, the fees that each contracting party could charge users under the IFPI Simulcasting agreement were to a large extent pre-determined, thus significantly reducing competition between CMOs in terms of price.⁶² An increased transparency in pricing would enable users (as well as members of CMOs) to better assess the efficiency of each of the societies and have a better understanding of their management costs.

The Commission also tested whether the agreement could be exempted under Article 101(3) TFEU.⁶³ As the Commission previously stated, in certain circumstances cooperation may be justified and can lead to substantial economic benefits, namely where companies need to respond to increasing competitive pressure and to a changing market driven by globalization, the speed of technological progress and the generally more dynamic nature of markets. The Commission noted that the IFPI Simulcasting

57. See L. Guibault, "A quand l'octroi de licences transfrontières pour l'utilisation de droits d'auteur et de droits voisins en Europe?", *Les Cahiers de Propriété Intellectuelle*, vol. 16, 2004-HS (Hors série): 189–208, for more details about the competition aspects and the Commission's viewpoints of these agreements.

58. Notification of cooperation agreements (Case COMP/C2/38.126 – BUMA, GEMA, PRS, SACEM), O.J. C. 145/2 of 17.05.2001.

59. Notification of cooperation agreements (Case COMP/C-2/38.377 – BIEM Barcelona Agreements), O.J. C. 132/18 of 4.06.2002.

60. *IFPI Simulcasting* decision, *supra*, paragraph 61.

61. *Ibid.* at paragraph 103.

62. *Ibid.* at paragraphs 62–78.

63. Article 101(3) TFEU reads as follows:

The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

agreement gave rise to a new product: a multi-territory/multi-repertoire simulcasting license covering the repertoires of multiple CMOs, enabling a simulcaster to obtain a single license from a single CMO for its simulcast that is accessible from virtually anywhere in the world via the Internet. Second, under the reciprocal simulcasting licenses system, broadcasters would benefit from the fact that by obtaining one simulcast license from a single CMO, they would be able to simulcast in any participating territory without fear of being sued for infringement of the relevant rights. Third, the system put in place by the IFPI Simulcasting agreement would also benefit consumers, as it provides them with easier and wider access to a range of music by means of available simulcasts.

The only point raising concerns in the eyes of the Commission was the manner in which, pursuant to the agreement, the royalty element of the license tariffs remained pre-determined and unchangeable by the CMO granting a simulcasting license. After thorough consideration of the tariffs structure, however, the Commission concluded that the pre-determination of royalty levels represented in the circumstances a guarantee without which the participating societies would not contribute with their individual inputs so as to create and distribute a multi-territory/multi-repertoire simulcasting license. Therefore, the Commission considered such restriction to be indispensable within the meaning of Article 101(3)(a) TFEU and granted an individual exemption until the end of 2004 when the agreement expired.⁶⁴

4.1.2 CISAC Case

The model reciprocal agreement drawn up by the *Confédération Internationale des Auteurs et Compositeurs* (CISAC) became the object of a comparable inquiry under Article 101 TFEU, as a result of two separate complaints from the radio broadcasting group RTL and Music Choice, an online music supplier in the United Kingdom. In 2006, the European Commission issued a statement of objection against the CISAC model contract and its bilateral implementation between CMOs of the European Economic Area (EEA).⁶⁵ The model contract at issue and the agreements deriving from it at bilateral level form the basis of collective licensing for all modes of performance of copyright-protected music to the public. The complaints related only to the exploitation of musical works on modern platforms, such as the Internet, satellite and cable and were primarily directed at restrictions in the CISAC model contract which allegedly created obstacles to obtaining a multi-territory/multi-repertoire license for the online use of musical works.⁶⁶

The Commission identified three potentially restrictive clauses in the CISAC model contract and the reciprocal agreements concluded on its basis by European CMOs. First, the membership restriction clause (Article 11(II) CISAC model contract), according to which neither of the contracting CMOs could, without the consent of the

64. IFPI *Simulcasting* decision, *supra*, paragraph 115. See also C. Stothers, *Copyright and the EC Treaty: Music, Films and Football*, 31 Eur. Intell. Prop. Rev. 272–282, at 280 (2009).

65. The EEA includes all Member States of the EU plus Iceland, Norway and Lichtenstein.

66. Sean Morris 2009, *supra*, at 566.

other, accept as a member any member of another contracting CMO or any person with the nationality of one of the countries in which another contracting CMO operates. Second, the exclusivity clause (Article 1(I) and (II) old CISAC model contract), according to which contracting CMOs would grant each other reciprocally the exclusive right to grant authorizations for all public performances on their respective territories of operation. Third, the non-intervention clause (Article 6(II) CISAC model contract), according to which contracting CMOs must refrain from intervening within the territory of another contracting CMO in the latter's exercise of the mandate conferred by the CISAC model contract. Together, the exclusivity clause and the non-intervention clause were said to result into a national territorial delineation of each CMO's licenses to its own domestic territory.⁶⁷

Taken individually, such restrictions had already given rise to investigations by competition authorities, leading, for example, to the *GEMA I* decision⁶⁸ and the *GVL* case,⁶⁹ regarding membership discrimination clauses, and to the *Tournier* decision,⁷⁰ regarding restrictions in the grant of licenses to users located in another country. It is therefore no surprise that the Commission, in its decision of July 16, 2008, declared the practices of the 24 EEA CISAC members contrary to Article 101 TFEU.⁷¹

With respect to the licensing of public performance rights for satellite, cable and Internet transmissions to commercial users under the model contract, the Commission noted that, contrary to the *Tournier* and *Lucazeau* cases, a local presence is no longer required to monitor the use of licenses for Internet, satellite and cable broadcasts.⁷² As a consequence, CMOs have the technical capacity to issue multi-territory/multi-repertoire licenses, but the uniform and systematic territorial delineation precludes them from offering such licenses to commercial users.⁷³ Conversely, the geographical market for the provision of copyright administration services to right holders remains national.⁷⁴

Putting the CISAC model contract to the test of Article 101 TFEU, the Commission found that the contested clauses affected competition between CMOs within the EEA in different ways. First, it considered that the membership restrictions in the model contract impeded the ability of an author from becoming a member of the CMO of his choice or to be simultaneously a member of different EEA societies in different EEA territories.⁷⁵ The Commission contended that the membership restrictions resulted in clearly separated national repertoires and that removing them would potentially render

67. Commission Decision of 16 July 2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/C2/38.698 – CISAC), C (2008) 3435 final, Brussels, Jul. 16, 2008, also reported in: [2009] 4 *Common Market Law Reports* 12 [CISAC decision], paragraphs 18–40.

68. *GEMA I* decision, *supra*.

69. See *GVL* decision, *supra*, and *GVL v. Commission*, *supra*.

70. *Tournier*, *supra*, paragraph 19.

71. CISAC decision, *supra*.

72. *Ibid.* paragraphs 63–64.

73. M.M. Frabboni, *Old Monopolies Versus New Technologies – The Cisac Decision In Context*, 20 *Ent. L. Rev.* 76–81, at 79 (2009).

74. CISAC decision, *supra*, paragraph 58.

75. *Ibid.* paragraph 125.

the repertoires more homogeneous in the long term. It concluded that the membership rules not only restricted competition between CMOs on the market for the provision of services to right holders, but indirectly also on the market for the licensing of rights to commercial users.⁷⁶

Second, the Commission found that the exclusivity clause restricted competition on the licensing market and on the market for administration services granted to other CMOs. The exclusivity clause assured each CMO that no other CMO could grant licenses for exploitation in its territory. As a consequence, users engaged in cross-border exploitation had no choice but to obtain a mono-territorial license from a monopolistic CMO in each country where the use took place. The exclusivity clause further prevented CMOs from competing against each other on the basis of the same foreign repertoire.⁷⁷

Third, the Commission held that the restrictions resulting from the non-intervention clause were not explained by the territorial nature of copyright and that the need for a local presence did not justify the systematic delineation of the territory as the territory of the country where the CMO is established. The Commission found that such a territorial delineation “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”,⁷⁸ thus restricting competition on the market for administration services which CMOs provide to each other and on the licensing market. It further argued that, due to the mutually guaranteed territorial monopolies for the licensing of public performance rights, each CMO can charge administration costs for the management of rights and the delivery of licenses without facing competitive pressure on these fees from other CMOs.⁷⁹

The Commission concluded that, on the basis of the evidence presented, the territorial delineation resulting from the exclusivity and non-intervention clauses could not be objectively explained and was not necessary for ensuring that EEA CISAC members grant each other reciprocal mandates. The CISAC model contract therefore amounted to a concerted practice in restraint of competition contrary to Article 101 TFEU.⁸⁰ Further, the Commission considered that the EEA CISAC members had acted in a concerted way to prevent any competition between themselves regarding the management of music distribution rights by Internet, cable and satellite and that these practices, by permitting the maintenance of national monopolies, were preventing the issue of pan-European licenses.⁸¹ The EEA CISAC members were given 120 days from the date of the decision to submit revised bilateral agreements to the European Commission.

76. *Ibid.* paragraph 126.

77. *Ibid.* paragraphs 140–141.

78. *Ibid.* paragraph 207.

79. *Ibid.* paragraph 210.

80. *Ibid.* paragraphs 222–223. The Commission was of the view that the model contract and its implementation by the EEA CISAC members did not meet any of the four cumulative conditions of Article 101(3) TFEU so as to justify an exemption. *Ibid.* paragraphs 229–255.

81. Frabboni 2009, *supra*.

In 2008, the EEA CISAC members adjusted their reciprocal representation agreements to address the concerns raised in relation to the membership and exclusivity clauses, but they contended that the parallel territorial delineation resulting from the exclusivity and non-intervention clauses in the reciprocal agreements was not the product of a concerted practice to restrict competition. Therefore, CISAC appealed the Commission's decision before the CJEU. The appeal was successful.⁸² In 2013, the CJEU ruled in favor of CISAC, holding that the Commission had failed to provide sufficient legal evidence to establish the existence of a concerted practice between the CMOs to fix the national territorial limitations. It annulled the Commission's decision insofar as the prohibition of national territorial limitations was concerned.⁸³ Such limitations therefore seem to be permitted as long as they do not result into a concerted practice between CMOs.

4.2 Multi-territorial Licensing of Online Rights in Musical Works

In view of the increased legal and political importance recently taken by the issue of the multi-territorial licensing of online rights in musical works and in view of the impact it has on the Internal Market, a key part of the CRMD is devoted to it. Indeed, one of the core objectives of the Directive is to facilitate the multi-territorial licensing by CMOs of authors' rights in musical works for the provision of online services.⁸⁴ After a discussion of the background of the rules on multi-territorial licensing of online rights in musical works, which is clearly situated in the Online Music Recommendation of 2005, this section will explore the main features of the harmonized legal framework introduced by the CRMD.

4.2.1 Online Music Recommendation

On October 18, 2005, the European Commission issued a Recommendation on collective cross-border management of copyright and related rights for legitimate online music services,⁸⁵ a non-binding legal instrument that was aimed to create competition between CMOs engaged in cross-border licensing of online rights in musical works.

The Recommendation gave right holders the choice, with respect to multi-territorial licensing of rights, to authorize a CMO of their choice to manage their works across the entire EU.⁸⁶ Right holders should also, upon reasonable notice of their intention to do so, have the right to withdraw any of the online rights and transfer the multi-territorial management of those rights to another CMO, irrespective of the

82. See J.P. Quintais, *The Empire Strikes Back: CISAC Beats Commission in General Court*, 8 J. Intell. Prop. L. & Prac. 680–683 (2013).

83. CJEU judgment in Case T-442/08, *CISAC v. European Commission*, O.J. C. 156/37 of 1.06.2013.

84. Proposal for a CRMD, *supra*, at 3.

85. Online Music Recommendation, *supra*.

86. *Ibid.* Article 3.

Member State of residence or the nationality of either the CMO or the right holder.⁸⁷ This principle directly addressed the situation encountered in the *Daft Punk* decision, in which the authors wanted to withdraw their online rights from SACEM's management to exercise them individually.⁸⁸ Accordingly, the Recommendation introduced competition among CMOs at the level of right holders, since they were no longer compelled to join exclusively the CMO in their country of residence.

The Recommendation met with fierce criticism from the European Parliament,⁸⁹ which argued, *inter alia*, that the measure goes further than merely interpreting or supplementing existing rules. It further expressed concerns about the legal uncertainty for right holders and users resulting from the non-binding legal nature of the measure and the potentially negative implications on local repertoires and cultural diversity resulting from the increased concentration of rights in a few larger CMOs. In its opinion, any initiative for the introduction of competition between CMOs in attracting the most profitable right holders must be examined and weighed against the adverse effects of such an approach on smaller right holders, small and medium-sized CMOs and cultural diversity. The Parliament therefore urged the Commission to start a genuine legislative procedure and to launch a proposal for a directive to regulate collective rights management in the online music sector, taking account of the special features of the digital era while safeguarding European cultural diversity.

Similar points of criticism were voiced by legal commentators, who disputed whether the liberalization of the market that the Recommendation intended to achieve was indeed the best solution to the problems of cross-border licensing of copyright-protected works.⁹⁰ Among the biggest concerns was the fear that the implementation of the Recommendation would lead to the emergence of monopolies or regional oligopolies for the management of online music rights, which could have unfavorable effects on cultural diversity.⁹¹ Allowing right holders to assign their online rights to the CMO of their choice could cause a segmentation of the market. It was feared that CMOs would tend to build up a repertoire containing only the most popular works among

87. *Ibid.* Article 5(c).

88. *Daft Punk* decision, *supra*.

89. See European Parliament, *Resolution of 13 March 2007 on the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC)*, P6_TA(2007)0064, Strasbourg, Mar. 13, 2007; and European Parliament, *Resolution of 25 September 2008 on collective cross-border management of copyright and related rights for legitimate online music services*, P6_TA(2008)0462, Brussels, Sep. 25, 2008.

90. See L. Guibault & S. van Gompel, *Collective Management in the European Union*, in *Collective Management of Copyright and Related Rights* 135–167, at 155–165 (D. Gervais ed., 2d edn, Kluwer L. International 2010), and the references contained therein. See also M.M. Frabboni, *Online Music Licensing: The Calm after the Storm*, 17 Ent. L. Rev. 65–69 (2006).

91. See, e.g., Frabboni 2009, *supra*, at 81; P. Tuma, *Pitfalls and Challenges of the EC Directive on the Collective Management of Copyright and Related Rights*, 28 Eur. Intell. Prop. Rev. 220–229, at 228 (2006); and M. Ricolfi, *Individual and Collective Management of Copyright in a Digital Environment*, in *Copyright Law: A Handbook of Contemporary Research*, 283–314, at 297 (P. Torremans ed., Edward Elgar Publishing 2007).

online users.⁹² This would put authors of less popular works at a disadvantage if, in the absence of an obligation on CMOs to accept them as members, they could only assign their rights to one CMO active in a niche market for a specialized music genre.⁹³

Moreover, the Recommendation would create competition between CMOs with substitutable repertoires only.⁹⁴ It would still require users who wished to obtain a blanket EU-wide license covering the entire music repertoire to acquire licenses from all the European CMOs offering such licenses (unless they would again conclude representation agreements among themselves, which was not anticipated). It was feared that users would find this too burdensome and that they would rather choose to obtain licenses from CMOs in which the popular repertoire was concentrated than from CMOs that merely represented local repertoire.⁹⁵

In practice, since the Recommendation was adopted, the repertoire of right holders for which online users may seek a multi-territorial license indeed got dispersed among different CMOs. Despite the Commission's hope that the repertoire would be split among a small number of CMOs,⁹⁶ the number of entities offering EU-wide licenses has increased.⁹⁷ A significant part of the local repertoire continued to be administered by the existing national CMOs (which is understandable, given the local differences in Europe), while the management of specific repertoire, most notably the popular (Anglo-American) repertoire of large music publishers, got concentrated in a few newly established entities that dominate the market of cross-border collective management of copyright.⁹⁸

The Recommendation therefore did not have the desired outcome for online users. They no longer need to seek licenses from the CMOs in the twenty-eight EU Member States to cover the entirety of the EU territory, but they must still obtain

92. The Commission, by contrast, expected CMOs "to build up attractive genre-specific repertoires ... and compete for right-holders that complement their existing genre repertoires". See Study on Cross-Border Collective Management of Copyright, *supra*, at 36.

93. See Guibault & Van Gompel 2010, *supra*, at 160–161, suggesting that such a scenario would not be unlikely, because without an obligation to contract with right holders, requests by authors to accept them as members can simply be ignored by CMOs administering popular repertoire who find their repertoire too unprofitable to be administered. This may especially be so if CMOs start collaborating with large music publishers to offer EU-wide licenses for online use that exclusively apply to their repertoire.

94. J. Drexler, "Le droit de la gestion collective en Allemagne après la recommandation européenne sur la gestion collective des droits en ligne dans le domaine musical", in *Impulse für eine europäische Harmonisierung des Urheberrechts: Urheberrecht im deutsch-französischen Dialog*, ed. R.M. Hilty, C. Geiger & V.-L. Benabou (Berlin: Springer, 2007), 399–430, at 417.

95. C.B. Graber, *Collective Rights Management, Competition Policy and Cultural Diversity: EU Lawmaking at a Crossroads*, 4 WIPO J. 35–43, at 39–40 (2012).

96. Study on Cross-Border Collective Management of Copyright, *supra*, at 41.

97. In addition to the CMOs established in each of the twenty-eight EU Member States, which typically have a mandate to grant worldwide licenses in their own repertoire, the licensing of online rights for musical works is now increasingly also exercised by large pan-European consortia of CMOs, such as ARMONIA, or of music publishers and CMOs, such as CELAS, DEAL, PEDL, PEACOL, JOL and SOLAR.

98. See European Commission, *Monitoring of the 2005 Music Online Recommendation*, Brussels, Feb. 7, 2008 [Online Music Recommendation Monitoring Report], at 5–7, reporting on the appearance of a number of initiatives where major music publishers together with selected CMOs are bundling their efforts to act as a one-stop shop for the licensing of online rights in musical works.

licenses from a variety of CMOs to cover the breadth of the repertoire they wish to use.⁹⁹ On top of that, CMOs also got engaged in litigation against each other.¹⁰⁰ They could not agree on the preferred licensing model and, in some instances, questioned other CMOs' mandate to license their repertoire on an EU-wide basis.¹⁰¹ This shows that, despite the good intentions of the Recommendation, it did not really pave the way for multi-territorial licensing in Europe. On the contrary, because stakeholders could not fall back on any harmonized rules on good governance of CMOs, it has put the European market for collective rights management in turmoil.

4.2.2 *The Harmonized Legal Framework*

Ten years later, the Commission acknowledged that the Recommendation of 2005 has insufficiently addressed the specific demands of multi-territorial licensing of online rights in musical works.¹⁰² In particular, it lamented the fact that competition has evolved among a limited number of platforms that aggregate the repertoires of the cooperating partners only,¹⁰³ which clearly operates to the detriment of right holders, smaller CMOs, and users.¹⁰⁴ To cure the uncertainty that the Recommendation has brought about since 2005 in the market for cross-border licensing for online uses of musical works, Title III of the CRMD sets out a legal framework promoting the development of multi-territory and multi-repertoire licensing by CMOs in the field of musical works. By so doing, it aims to support the creation of a single European digital market for online music services, which should respond to the rapidly growing demand by consumers for access to digital content and contribute to the fight against online infringements of copyright.¹⁰⁵

4.2.2.1 *Requirements for CMOs Offering Multi-territorial Licenses*

Title III of the Directive, which applies only to authors' rights in musical works,¹⁰⁶ lays down minimum principles to make an effective and modern licensing system workable in the digital era and to guarantee repertoire aggregation, including of niche and less-known musical works.¹⁰⁷ Appropriate safeguards are provided in this regard. A

99. A. Porcin, "The quest for pan-European Copyright Licensing Solutions: A Series of Unfortunate Events", *Concurrences* 4-(2009): 57–64, at 61.

100. See Guibault & Van Gompel 2010, *supra*, at 162–165.

101. Online Music Recommendation Monitoring Report, *supra*, at 7.

102. Recital 39 CRMD.

103. See Proposal for a CRMD, *supra*, at 6, pointing at "the lack of preparedness" of certain CMOs to grant multi-territorial licenses of online rights in musical works.

104. J. Drexl, *Competition in the Field of Collective Management: Preferring "Creative Competition" to Allocative Efficiency in European Copyright Law*, in *Copyright Law: A Handbook of Contemporary Research*, 255–282, at 277 (L.C. Torremans ED., Edward Elgar 2007).

105. Recitals 38 and 40 CRMD.

106. See Proposal for a CRMD, *supra*, at 3, explaining that in areas other than the collective management of authors' rights in musical works, multi-territorial licensing has not given rise to any difficulties that need to be addressed.

107. *Ibid.* at 8.

CMO will have the choice as to whether to carry out the multi-territorial licensing of its repertoire itself or to entrust other CMOs with it.¹⁰⁸ Also, an author will not be locked into a CMO which is unwilling either to grant multi-territorial licenses directly or to allow another CMO to do so on its behalf.¹⁰⁹ The CRMD further sets out functional, technical and operational requirements and additional standards of good governance with which CMOs granting multi-territorial licenses for online rights in musical works must comply.

Articles 24–28 set out the conditions under which CMOs may engage in multi-territorial licensing services. These provisions aim to ensure the necessary minimum quality of cross-border licensing by CMOs in terms of their capacity to process multi-territorial licenses, the transparency of the repertoire they represent and the accuracy of financial flows related to the use of online rights.¹¹⁰ Only CMOs that have sufficient capacity to electronically process data needed for the administration of multi-territorial licenses for online rights in musical works are entitled to engage in such services. CMOs must be able to process such data quickly, accurately and in an efficient and transparent manner, using unique identifiers and adequate rights management databases that should continually and without delay be updated and aligned to databases of other CMOs granting multi-territorial licenses.¹¹¹ CMOs must also provide up-to-date information on the online music repertoire they represent in response to a duly justified request by online service providers, right holders whose rights they represent and other CMOs.¹¹² The CRMD further stresses the importance of information automation for the fast and effective processing of data and the need for CMOs to put in place arrangements for right holders to make requests for the correction of relevant data.¹¹³

In addition, CMOs offering multi-territorial licenses for online rights in musical works are bound to monitor the use of rights and to offer online service providers the possibility to report actual use of musical works by electronic means. Online service providers must be invoiced accurately and without delay after they have reported on their actual use of works. They must be given the opportunity to challenge the accuracy of invoices, such as invoices received from one or more CMOs for the same online rights in the same musical work.¹¹⁴ CMOs are also obliged to distribute amounts due to right holders accruing from multi-territorial licenses for online rights in musical works accurately and without delay after the actual use of works has been reported. With

108. Articles 29 and 30 CRMD.

109. Article 31 CRMD.

110. Recital 40 CRMD. This responds to the concern of the EESC, which questioned the technical capability of many CMOs currently operating in the EU to take on the management of multi-territorial licensing without difficulty. See Opinion of the European Economic and Social Committee 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) 372 final – 2012/0180 (COD)), *O.J. C* 44/104, 15.02.2013 [Opinion of the EESC], at paragraph 3.14.

111. Article 24 and recital 41 CRMD.

112. Article 25 CRMD.

113. Article 26 and recital 42 CRMD.

114. Article 27 and recital 43 CRMD.

each payment, CMOs must specify the period and territories of use to which the payment pertains and the amounts collected, deductions made and amounts distributed in respect of each online service provider and for each online right in any musical work which they represent.¹¹⁵

4.2.2.2 *The Passport Construction*

Probably the most innovative feature of the CRMD is the “passport” regime set out in Articles 29–31,¹¹⁶ which enables any CMO that is not willing or not able to grant multi-territorial licenses directly in its own music repertoire to request another CMO to represent its repertoire on a multi-territorial basis.¹¹⁷ This legal regime has been introduced to reduce the number of licenses that an online music provider needs to operate a multi-territory/multi-repertoire music service.¹¹⁸ By facilitating the voluntary aggregation of music repertoire and rights that online music providers require, the passport system aims to foster the development of new online services and reduce the transaction costs that ultimately may be passed on to consumers.¹¹⁹

The passport construction consists in one CMO granting a non-exclusive mandate of representation to another CMO that is indeed capable of fulfilling the criteria for CMOs offering multi-territorial licenses.¹²⁰ This non-exclusive mandate should ensure that CMOs can join different hubs for the multi-territorial licensing of their repertoire and that users seeking multi-territorial licenses have the choice to obtain licenses from several licensing hubs.¹²¹ Any CMO that has mandated another CMO to grant multi-territorial licenses is explicitly allowed to continue to grant licenses in its own music repertoire and in any other music repertoire which it is authorized to represent in its own territory.¹²²

According to the Commission, the passport regime would confer more protection to small and medium-sized CMOs by guaranteeing the inclusion of their repertoires within the scope of the multi-territorial licenses issued by the mandated CMOs.¹²³ The regime requires CMOs to accept the mandate of any CMO requesting to represent its

115. Article 28 CRMD.

116. See J.P. Quintais, *Proposal for a Directive on Collective Rights Management and (some) Multi-territorial Licensing*, 35 Eur. Intell. Prop. Rev. 65–73, at 70 (2013) observing that no Member State has implemented any comparable system.

117. Articles 29 and 30 CRMD.

118. This meets the concern of the European Parliament’s Committee on Legal Affairs, which considered that the greatest challenge in the licensing of online uses of musical works is not so much the multi-territorial aspect of the licensing but the aggregation of a global repertoire that online music services can use. See Gallo report, *supra*.

119. Recital 44 CRMD.

120. Article 29(1) CRMD.

121. Recital 44 CRMD.

122. Recital 46 CRMD.

123. Commission Staff Working Document, *Impact Assessment Accompanying 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*, Brussels, July 11, 2012, SWD(2012) 204 final [Impact Assessment], at 165 (paragraph 24.4.6).

repertoire for multi-territorial licensing.¹²⁴ This requirement is not absolute, but restricted in three ways.¹²⁵ First, the requested CMO is only required to accept representation if the request is limited to (categories of) online rights that it represents itself. Second, the requirement only applies to CMOs aggregating repertoire and not to CMOs providing multi-territorial licenses for their own repertoire only. Third, the requirement does not apply to CMOs aggregating rights in the same works for the purpose of being able to license jointly the rights of reproduction and of communication to the public in respect of such works.¹²⁶

The CRMD further requires a mandated CMO to effectively include and cover the repertoire of a mandating CMO in all multi-territorial licenses that it grants to users and to apply to this repertoire the same conditions that apply to its own repertoire.¹²⁷ This is different only where a mandating CMO has given insufficient or inadequate information about its music repertoire to the CMO which it has requested to grant multi-territorial licenses on its behalf. In such a case, the mandated CMO may charge reasonable costs for obtaining the necessary information or making it usable and, if that is impossible, exclude the works for which the information provided is insufficient or unusable from the multi-territorial licenses it grants with respect to online use of musical works.¹²⁸

The CRMD also stipulates that the management fee charged by the mandated CMO for the service that it provides to the mandating CMO may not exceed the necessary and reasonable investments incurred.¹²⁹ A mandated CMO must further inform the mandating CMO of the main terms according to which it will license the online rights on a multi-territorial basis, including information on the nature of the exploitation, all provisions that relate to or affect the license fee, the duration of the license, the accounting periods and the territories covered.¹³⁰ A mandating CMO must share this information with its member and the right holders it represents.¹³¹ This should protect the interests of right holders of the mandating CMO and ensure that the mandating CMO is fully aware of the conditions pursuant to which its repertoire will be licensed by the mandated CMO.¹³²

A further safeguard is provided by Article 31, which contemplates the situation where right holders have authorized a CMO to represent their online rights in musical works but that CMO does not (offer to) grant multi-territorial licenses or has not mandated another CMO to do so by April 10, 2017. In such circumstances the objectives and effectiveness of the rules on multi-territorial licensing by CMOs would be significantly jeopardized if right holders were not able to exercise such rights in

124. Article 30(1) CRMD.

125. Van Gompel 2015, *supra*, Article 30.

126. Recital 46 CRMD, explaining that these limitations are meant to ensure that the requirement is not disproportionate and does not go beyond what is necessary.

127. Articles 29(1), 30(3) and 30(4) CRMD.

128. Article 30(6) CRMD.

129. Article 30(5) and recital 46 CRMD.

130. Article 29(3) CRMD.

131. Article 29(2) in conjunction with Article 7(1) CRMD.

132. See Guibault 2014, *supra*, at 774.

respect of multi-territorial licenses themselves.¹³³ Article 31 therefore allows right holders in such circumstances to withdraw from the CMO their online rights in musical works for the purposes of multi-territorial licensing in respect of all territories while leaving the same rights with that CMO for the purposes of mono-territorial licensing. This would enable right holders to grant multi-territorial licenses for online rights in musical works themselves, through another party they authorize or through any CMO complying with the provisions of Title III.

While the Commission anticipates that the passport regime “would create competitive pressure on societies to develop more efficient licensing practices”,¹³⁴ legal commentators have pointed out that the system “does not remedy the fragmentation of repertoires which has been triggered by the Recommendation of 2005”.¹³⁵ Indeed, seeing that Title III of the CRMD builds further on the 2005 Online Music Recommendation, many concerns that were expressed in relation to that Recommendation still hold. In particular, it is debatable whether the Directive, by facilitating access to the system of multi-territorial licensing for right holders and by enhancing transparency of the music repertoire that is licensed on a multi-territorial basis, provides sufficient guarantees that users can easily obtain licenses for all music repertoire that they need for offering online services.¹³⁶ As the Max Planck Institute report recalls:

the emergence of competing societies with unstable repertoires – due to the freedom given to rightholders to entrust and withdraw the rights, categories of rights or types of works of their choice – constitutes a severe obstacle to the emergence of a sustainable system of multi-territorial licensing within the EU.¹³⁷

Hence, it is uncertain whether the Directive will take away the concerns that have arisen in relation to cultural diversity and access for consumers to wide offers of online music services.¹³⁸

The main achievement of the CRMD is that it lays down binding common rules for entities engaged in multi-territorial licensing services for music. To a certain degree, these rules may mitigate the adverse effects of the competition-enhancing approach taken by the Directive,¹³⁹ although it still needs to be seen how the rules work out in practice. The obligation of Article 30(1) to accept the mandate of any CMO requesting to represent its repertoire for multi-territorial licensing, for example, intends to ensure

133. Recital 47 CRMD.

134. Proposal for a CRMD, *supra*, at 6.

135. Trumpke, Drexl, Hilty & Nérison, *supra*, at 347 (paragraph 62).

136. *Ibid.* at 342 (paragraph 47).

137. *Ibid.* at 347 (paragraph 63).

138. *Ibid.* at 347 (paragraph 62). See also Opinion of the EESC, *supra*, at paragraph 4.10, which noted a risk of market concentration in the Commission’s initial proposal which could distort competition to the detriment of smaller CMOs, whose contribution to Europe’s cultures might call for specific support measures so that they can participate in the European licensing market.

139. Cf. European Parliament, Committee on Legal Affairs and the Internal Market, *Report on a Community framework for collecting societies for authors’ rights* (2002/2274(INI)), Rapporteur: Raina A. Mercedes Echerer, A5-0478/2003 (final), December 11, 2003, at 16, which already forewarned that a “misguided insistence on competition would also lead to further fragmentation of the markets, chaos in the clarification of rights and dumping tariffs”.

that CMOs managing rights of smaller repertoires also have access to the multi-territorial licensing market. However, as observed above, this obligation is not absolute. Whether smaller CMOs will be able to enter the multi-territorial licensing market via the passport route will therefore ultimately depend on how the market develops and which licensing hubs actually emerge.¹⁴⁰ Furthermore, to ensure that a mandated CMO can effectively offer multi-territorial licenses for online rights in musical works for a mandating CMO, it seems elementary that Article 30(6) requires the latter CMO to make adequate and usable information relating to its own music repertoire available to the mandated CMO. For all practical purposes, however, it is questionable whether the cost for a mandating CMO to generate this information and make it usable for multi-territorial licensing together with the fee that the mandated CMO will charge for its services would outweigh the cost of providing multi-territorial licenses by itself. In the end, therefore, it is uncertain whether the passport construction will function as the Commission has envisaged.¹⁴¹

In view of these uncertainties, the CRMD requires all national competent supervisory authorities to issue a report on the situation and development of multi-territorial licensing in their territory to the Commission by October 10, 2017.¹⁴² This enables the Commission to assess the application of Title III of the CRMD before the general assessment of the application of the Directive, which is scheduled to take place by April 10, 2021.¹⁴³

4.2.2.3 *Derogation from the Passport Construction*

Article 32 of the Directive provides that the requirements of Title III do not apply to the voluntary aggregation of online rights in musical works by CMOs for the purpose of granting multi-territorial licenses to broadcasters for the purposes of certain acts of communication or making available to the public of their radio or television programs. The derogation is limited to broadcasting activities providing online access to television or radio programs simultaneously with or after their initial broadcast (e.g., simulcasting and catch-up television) and online material produced by or for broadcasters which is ancillary to the initial broadcast of their radio or television programs (e.g., online previews, supplements or reviews of the programs concerned).

The derogation permitted under Article 32 was introduced to prevent that broadcasters would have to acquire licenses necessary for offering the above-mentioned services from several passport entities, which the Commission believed

140. Trumpke, Drexler, Hilty & Nérison, *supra*, at 345 (paragraph 56), rightly note that “the system of passport entities rests on the assumption that there will be a number of such entities competing for rightholders”, but that is still uncertain whether such entities will arise and how many in the end will compete with each other.

141. *Ibid.* at 342–348 (paragraphs 46–65), with further points of criticism on the passport system. In general, the report raises serious doubts as to the viability and desirability of the system, above other available options.

142. Article 38 CRMD.

143. Article 40 CRMD.

would make the provision of these services more cumbersome.¹⁴⁴ Because of this derogation, CMOs may continue to license online rights in musical works to broadcasters directly and not through passport entities.¹⁴⁵ Arguably, this derogation provides leeway to voluntary agreements of CMOs creating a one-stop shop for the multi-territorial licensing of online rights for specific uses, such as the IFPI Simulcasting agreement (for simulcasting), the Santiago agreement (for public performance of music on the internet) and the BIEM-Barcelona agreement (for the mechanical reproduction of music on the internet).¹⁴⁶ Such agreements have the benefit that broadcasters do not have to contract with a multitude of licensing hubs to acquire the necessary licenses required for their online uses, but can obtain a license for such uses from a single CMO. Such agreements must comply with the competition rules under Articles 101 and 102 TFEU¹⁴⁷ and may not lead to restrictive practices, such as market or customer sharing, or distorted competition with other services providing consumers access to individual musical or audiovisual works online.¹⁴⁸

The Directive does not explicate why a special exemption is warranted for facilitating the licensing of online rights in musical works for certain online activities of broadcasters but not for online activities of other music services. It merely assumes that broadcasters require such a derogation.¹⁴⁹ However, since the rules of Title III apply only in relation to author's rights in musical works, the CRMD leaves quite some flexibility to introduce multi-territorial licensing regimes in other areas. In fact, it is explicitly stated that the CRMD should not preclude CMOs from concluding representation agreements with other CMOs in the area of rights management in order to facilitate, improve and simplify the procedures for granting licenses to users and to offer multi-territorial licenses also in areas other than those referred to in Title III.¹⁵⁰ Such licensing regimes could for example be introduced in relation to related rights for performers and phonogram producers or to enable the multi-territorial licensing of online rights in e-books or images.

5 CONCLUSION

After years of chaos in the collective management of online rights, following the adoption of the Recommendation of 2005 on collective cross-border management of copyright and related rights for legitimate online music services, the European legislator finally took action and regulated the activities of CMOs through the new Directive.

144. Impact Assessment, *supra*, at 163 (paragraph 24.4.2).

145. *Ibid.* at 164 (paragraph 24.4.5).

146. Van Gompel 2015, *supra*, Article 32.

147. To understand what this requires, recourse can be made to the *IFPI Simulcasting* and *CISAC* cases, *supra*, which offer guidance on how representation agreements between CMOs for the voluntary aggregation of rights can be brought into conformity with Community competition law, *supra* sections 4.1.1 and 4.1.2.

148. Recital 48 CRMD.

149. *Ibid.*

150. Recital 11 CRMD.

This Directive contains an extensive set of rules on good governance and multi-territorial licensing which, if implemented correctly, should iron out the main disparities in the functioning of CMOs across the EU. But the Directive will probably not solve all issues, such as the fragmentation of repertoires, as these are left to market forces.