



Conference on the Collective Management of Copyright and Related Rights in South-East Asia

Authorisation and supervision of Collective Management Organizations (CMOs)

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Compliance of CMOs with the requirements of the Directive (Art. 36)

- No prior authorisation or licensing system for CMO required to Member States
- Member States would appoint relevant **competent authorities** to continuously monitor compliance with the requirements of the Directive by CMOs established in their territory
- National competent authorities shall be **empowered to administer complaints, procedures, and effective, proportionate and dissuasive sanctions**

*Directive
2014/26/EU of 26
February 2014 on
collective rights
management
and multi-
territorial licensing
of rights in
musical works for
online uses.*



Status of CMOs and provisions of competition law



CMOs can be constituted under different legal forms, such as associations, public organisations or private companies.



They must be not-for-profit organisations. Before EU Directive there was no such requirement in Belgium, Denmark, Finland, Greece, Ireland, Italy (for other than SIAE CMOs), Malta, the Netherlands and UK.



CMOs' de jure monopoly position in 8 EU MS (Austria, Belgium, Czech Republic, Denmark, Hungary, Latvia and the Netherlands); designation by the State for the management of the same category of rights and the same group of right holders.



In practice, in all EU MS apart from Spain, authors' societies generally benefit from a **de facto monopoly** on the national territory irrespective of the monopolistic status granted by the legislation. Competition between CMOs in practice more common for performers and producers CMOs.



In all EU MS CMOs subject to the jurisdiction of the competent antitrust authority as regards the possible infringement of competition rules, in particular for cases of abuse of dominant position.



Supervision/Monitoring

Rectangular Ship

Authorisation. In order to start functioning, CMOs sometimes need authorisation from a national public authority, usually a ministry, but also a communication authority, copyright board or national IP Office. There is a regime of prior authorisation to exercise operations in 19 EU MS.



Ireland and Portugal operate a system whereby CMOs must enter into a Register.



In 3 EU MS only certain CMOs need an authorisation linked to the nature of the rights administered:

- Denmark (Ministry of Culture) and Finland (Ministry of Education) in relation to the management of the rights for works of art, private copying or broadcasting and public performance of phonograms
- France (Ministry of Culture) for those cases where collective administration is compulsory, notably for reprography and cable retransmission



Supervision of operations. In most EU MS, CMOs subject to supervision from public authorities or publicly appointed bodies with regard to the management of their operations. The scale of powers of the supervisory authority varies across different Member States.



Justification of government's supervision of CMOs

CMOs in a *de facto* or *de jure* **monopoly position** vis-à-vis right owners and users. Without appropriate guarantees, abuse of such monopoly position is not excluded.

Guarantees shall exist in respect of both the establishment and operation of CMOs and the relationship with the users.



Supervision of CMOs as a competence of Copyright office

- The supervision of CMOs is one of the competencies of the Office of Copyright.
Example: Greece
- The supervision of collecting societies implies the control of CMOs *a priori* at the stage of constitution and *a posteriori*, at the stage of functioning.
- The administrative control of the operations of CMOs is justified by the protection of **general interest**.



Guarantees at the stage of establishment and operation of CMOs



In practice right holders do not have any other choice than entrusting the management of their rights to CMOs. If CMOs do not operate properly, rights are neglected and restricted in practice.



It is justified to introduce legal provisions that ensure the proper operation of CMOs.



Some countries legislated on the conditions of establishment of CMOs; in other countries general provisions of civil and administrative law apply. In other countries mere registration is sufficient.



In Greece establishment of CMOs is subject to the approval of the Ministry of Culture (art. 54 par. 4 of the Hellenic Copyright Law).



Factors in deciding the approval of the establishment of CMOs

Legal form.

Suitability of the statutes of the CMO to ensure appropriate management.

Reliability of the persons entitled to represent the CMO.

Availability of the necessary repertoire and of financial resources.

Representativity of the right-holders.



Regular supervision of key elements

- A check before the approval is not a sufficient guarantee.
- Competent authorities shall not interfere unnecessarily with management of the rights but should regularly supervise certain key elements.
- Key elements of supervision:
 - Whether the activities correspond to the approved statutes.
 - Whether fair rules of collection and distribution of royalties exist. Whether distribution in fact takes place as prescribed.
 - Whether the administrative costs of management of the rights are reasonable.
 - Several laws prescribe that CMOs shall be subject to independent financial auditing.
- Example: Article 54 par. 5 of the HCL : The Ministry of Culture shall monitor the operations of collecting societies to ensure that they comply with the provisions of this Law and with their rules. Each collecting society shall, when requested, surrender its accounts to the competent department of the Ministry of Culture for inspection and submit any other information that is necessary for the effective monitoring of its operations. Except when a collecting society is a non profit organization, its accounts shall be subject to inspection by sworn auditors regardless of its company status.



Guarantees of the supervision

- Availability of the system for all right holders.
- Reasonable terms of membership.
- Appropriate role for right holders in decision making.
- Correct monitoring, collection and distribution systems that do not discriminate between right holders, members or non-members, nationals or foreigners.
- Availability of concrete and detailed information about data on the management of the rights.
- If a CMO no longer complies with the conditions fixed when authorisation is granted, the competent authority should apply appropriate measures and, as a last resort, the authorisation shall be revoked.



Sanctions

- In Greece, any violation of the provisions of this Law or of Law 2121/1993 by a collective management, shall result in the imposition, cumulatively or alternatively, of the following sanctions, on the basis of the following procedure:
- a) an administrative fine of two thousand (2,000) to two hundred thousand (200,000) euro,
- b) temporary or definitive revocation of the operating license.
- (Art. 46 par. 1 of Law 4481/2017 on Collective Management).



Government supervision to prevent possible abuses of CMOs' monopoly position

- In theory three cases of abuse of CMOs' monopoly position may exist.
 - Refusal to license certain uses without any valid reason.
 - Unreasonable discrimination between users in the same category.
 - Setting tariffs and other licensing conditions in an arbitrary way
- Supervision is done by national and EU competent competition authorities under anti-monopoly legislation special rules.



Abuse of dominant position and relations with the CMOs members-Assignment (1)

- A CMO can abuse of its dominant position **if the assignment of the rights from its members is excessively restrictive of their liberty.**
- *BRT v SABAM* case 127/73, 21 March 1973:
A compulsory assignment of all copyrights, both present and future, no distinction being drawn between the different generally accepted types of exploitation, may appear an unfair condition, especially if such assignment is required for an extended period after the member's withdrawal.



Abuse of dominant position and relations with the CMOs members-Assignment (2)



The decisive factor when examining the statutes of a CMO in the light of competition rules is whether the statutes exceed the limits absolutely necessary for effective protection (the indispensability test) and whether they limit right-holders' freedom to dispose his works no more than necessary (the equity test).



Right Balance: Right holder may want to withdraw some of his rights or some of the uses that considers that they would be better managed individually.



For security reasons and the facilitation of the functioning of the CMOs **a large assignment is preferable.**



Solidarity excludes that an individual member determines unilaterally the assignment of his rights, reserving the most valuable rights and thus undermining Collective Management system.



Abuse of dominant position and relations with the CMOs members- Withdrawal

- About the withdrawal of a member which in principle is a liberty of the adherent in a CMO, Commission found excessive the clause in GEMA statute that the assignment is required for an extended period of six years after the member's withdrawal.
- Daft Punk Decision, 06.08.2002. The two Daft Punk members wished to individually manage their rights for exploitation on the Internet, CD-ROM, DVD etc. SACEM refused membership and the Commission considered this refusal as a disproportionate curtailment of individual management.
- Legitimacy for SACEM to retain the means to monitor which authors wish to manage certain rights individually. But each application must be examined on a case-by-case basis, and its decisions must be reasonable and objective.
- Following the Daft Punk decision, SACEM modified its statutes, which now allow members to apply for partial withdrawal of the rights assigned.



Abuse of dominant position and relations with the CMOs members-Discrimination Practices



GEMA I case: distribution of income by GEMA 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 3 years.



The refusal of the German collecting society of performers GVL to sign an agreement with foreign performers not domiciliated in Germany or discriminatory terms that prevent foreign right-holders to become an ordinary or extraordinary member (a voting member).



International agreements between affiliated CMOs providing that the money collected for the foreign CMO remain in the country of the perception, unless the absence of accurate documentation justifies such a practice.



On the contrary the clause prohibiting to GEMA's members to negotiate directly with the broadcasters, in order to prevent them from obtaining individual advantages was judged valid for reasons of equity between the members.



Abuse of dominant position and relations with the users-Discrimination practices



Reductions for certain categories of users in execution of collective agreements could be abusive if the disparity can not be justified objectively.



Kanal 5 case C-52/07, 7 February 2009. The fact that the royalties due are calculated differently depending on whether the broadcasting company is commercial or public may constitute an abuse if the CMO applies dissimilar conditions to equivalent services and if it places the TV companies at a competitive disadvantage without objective justification.



Abuse of dominant position and relations with the users-Level of royalties



A CMO imposes unfair trading conditions if the royalties which it charges to discothèques are appreciably higher than those charged in other Member States, the rates being compared on a consistent basis .



That would not be the case if the CMO in question was able to justify such a difference by reference to objective and relevant dissimilarities between copyright management in the Member States concerned and copyright management in the other Member States



Directive 2014/26/EU of 26 February 2014 on collective rights management and multi-territorial licensing of rights in musical works for online uses.

Exchange of information between competent authorities (Art. 37)

- Where a competent authority considers that a collective management organisation established in another Member State but acting within its territory may not be complying with the provisions of the national law of the Member State in which that collective management organisation is established which have been adopted pursuant to the requirements laid down in this Directive, **it may transmit all relevant information to the competent authority of the Member State in which the collective management organisation is established, accompanied where appropriate by a request to that authority that it take appropriate action within its competence.** The requested competent authority shall provide a reasoned reply within three months.





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