European Commission: Collecting Society Practices that Limit the Freedom of Music Authors and Users Banned

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On 16 July 2008, the European Commission adopted an anti-trust decision intended to prohibit copyright-handling practices that create artificial barriers to the provision of music across European borders. These involve clauses in reciprocal representation agreements between collecting societies (all of which operate under the umbrella of CISAC – the International Association of Collecting Societies of Authors and Composers) that have been deemed to infringe the European rules on restrictive business practices (Article 81, EC Treaty and Article 53, EEA Agreement; see also the European Court of Justice's Tournier and Lucazeau judgements). Reciprocal representation agreements are agreements concluded between collecting societies so as to enable each other to grant licences for the copyright of all signatory societies' members (i.e. music authors). These agreements are, for the most part, based on CISAC's non-mandatory model contract for reciprocal representation agreements and reflect its language.

More specifically, collecting societies are now obliged to review their reciprocal representation agreements in order to remove any a) "membership clauses", which prevent music authors from choosing between collecting societies; and b) territorial restrictions that prevent collecting societies from offering licences to users outside their domestic territory. The latter are embodied in the reciprocal representation agreements in "exclusivity clauses", whereby one collecting society authorises another to administer its repertoire on an exclusive basis within a certain territory, and corresponding concerted practices. The result is a segmentation of the European market along national borders.

The investigation leading up to the decision was opened following complaints from the broadcasting group RTL and Music Choice, a British online music provider. Companies such as these, desiring to offer transnational music services, are limited by the inability to obtain multi-territorial licenses rather than negotiate with 24 separate collecting societies. CISAC itself has already removed such anti-competitive clauses from its model contract as of November 2004 and for this reason is not an addressee of the decision. Nevertheless, they continue to survive in a number of specific agreements concluded by its members.

The Commission had initially attempted to reach an amicable solution. In this context CISAC and 18 collecting societies submitted commitments, which were

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then market-tested. Nevertheless, the results, on the basis of the observations submitted both by market players and the collecting societies themselves, were negative and it was therefore concluded that effective competition could not be introduced through a negotiated procedure.

The decision is intended to encourage collecting societies to improve the quality of their services and administrative costs through competition to attract authors free to choose the collecting society that caters best for their needs. The Commission is requiring that collecting societies inform it of modifications to their agreements and practices within a deadline of 120 days, but has not imposed any fines. The decision does allow collecting societies to maintain their current system of bi-lateral agreements and to retain the right to set the levels of royalty payments due within their domestic territory. It has drawn criticism from both CISAC and ECSA (the European Composer and Songwriter Alliance).

"Antitrust: Commission prohibits practices which prevent European collecting societies offering choice to music authors and users", IP/08/1165, Brussels, 16 July 2008

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