[IT] Competition Authority finds collecting society SIAE abused its dominant position

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On 25 September 2018, the *Autorità Garante della Concorrenza e del Mercato* (Italian Competition Authority - AGCM) condemned the *Società Italiana degli Autori ed Editori*(Italian Society of Authors and Publishers –SIAE) to pay a symbolic fine of EUR 1 000 for abusing its dominant position in breach of Article 102 TFEU in the markets for (i) the provision of services for the management of copyrights to authors; (ii) the licensing of copyrights to users; and (iii) the provision of services for the management of copyrights on behalf of foreign collecting firms. The AGCM alleges that, since at least 1 January 2012, the SIAE has implemented a unitary, exclusionary strategy aimed at extending and preserving a legal exclusivity, which, until full implementation in Italy of the so-called Barnier Directive (2014/26/UE), was granted to the SIAE by Article 180 of Law No. 633/1941. According to the AGCM, the contested conducts hindered the ability of new-entrant collecting firms to offer services outside the scope of the legal monopoly or even in the absence of any legal monopoly (following its complete suppression in October 2017). More specifically, the set of conducts of which the SIAE is accused consists of:

(a) obliging authors, as a condition for the SIAE supplying any copyright's management service, to exclusively assign to SIAE the task of managing and protecting all kinds of authors' rights over all the authors' present and future works, without limiting the exclusivity to rights covered by the legal monopoly or to certain works only (for example, bundling the managing of rights for off-line uses together with online uses and with services for protection against plagiarism); (b) restricting the authors' ability to revoke or limit the licence to the SIAE over certain works or rights only, by imposing on the rightsholders a contractual and statutory prohibition (and/or objective impossibility) to split the rights and services covered by the licence to the SIAE as well as by invoking a principle of non-severability of the joint ownership of a single copyrighted work; (c) *de facto*managing and collecting all the rights of all co-authors of copyrighted works, even where certain co-authors refused to assign their rights to the SIAE and explicitly demanded that certain rights be managed by a competing collecting firm or by the authors themselves; (d) prohibiting live concert organisers from paying copyright fees to a competing collecting firm (or any third-party) by alleging that that would constitute a breach of the legal exclusivity and threatening to use its special powers (granted to the SIAE by Article 164 Law

633/41) to enforce the collection of payments from users, even though the rightsholders clearly mandated the very same task to a competing collecting firm; (e) hindering the ability of TV broadcasters to deal with competing collecting firms and/or directly with the rightsholders (even in case of a clear will and demand from them to this effect) by either proroguing outdated licence agreements designed under the statutory monopoly (which assigned the SIAE 100% of the collecting rights over all broadcasted works of all authors) or by imposing on broadcasters a method of calculating the copyrights uses (and fees) based on flat rate, statistical presumptions which do not reflect the actual reality of the copyrights' uses by broadcasters or of the authors' representation by the SIAE; (f) hindering the ability of foreign collecting firms to deal directly with authors or with competing collecting firms in Italy, also in connection with works of foreign authors that have never been covered by the legal monopoly, by either falsely affirming the continuing existence (and extension to all rights and works) of the legal monopoly to the foreign collecting firms or by proroguing outdated reciprocal exclusive representation agreements with such firms.

It is worth highlighting that the AGCM rejected the SIAE's argument that the relevant market should have been defined as a unique, two-sided market for the intermediation of services for the licensing, collection and management of copyrights between authors and users. Instead, the AGCM affirmed that there can be a separate product market for each service provided by collecting societies and, further, for each type of rights managed on each side of the market. The geographic scope of the market is still deemed national by the AGCM, although it recognises that it is set to evolve to an EEA-dimension. In addition, the AGCM rejected the argument that the contested conducts were objectively justified by the former legal monopoly and related public mission (invoking Article 106 TFEU) or by any technical obstacle. The AGCM argued that the contested conducts were disproportionate and unnecessary for any possible public mission, even when the legal exclusivity was in force, and that new and readily available technological tools enabled the analytical calculation of the actual time of both the copyrights' use and of the authors' representation. However, the AGCM conceded that the novelty of the infringement represented a mitigating circumstance that justified a symbolic fine.

Autorità Garante della Concorrenza e del Mercato, Delibera del 25 settembre 2018 nella procedura A508 - SIAE / SERVIZI INTEREMDIAZIONE DIRITTI D'AUTORE

http://www.agcm.it/dettaglio?db=41256297003874BD&uid=82BB58EFA22C0C68C1258335005ACA48&view=&title=-SIAE/SERVIZI%20INTERMEDIAZIONE%20DIRITTI%20D%27AUTORE&fs=Abuso%20di%20posizione%20dominante