

Collective Management in the European Union

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1. Introduction

With the rapid growth of the Internet and mobile telephones, the market for legitimate music delivery services has literally exploded in recent years. Since online music services are accessible across the European Union (EU), the need for multi-territorial licensing that spans throughout the European territory is more acute than ever. In order to avoid liability for copyright infringement, online content providers must currently obtain a licence from each and every relevant collective management society in each territory of the EU in which the work is accessible. Rights clearance for the exploitation of non-domestic repertoire now occurs via a network of reciprocity representation arrangements between collective management societies. The multi-territorial licensing of on-line music is but one illustration of the difficulties caused by the lack of a coherent system of cross-border licensing of copyright protected works in Europe.¹ For this reason alone, the role and functioning of collective management societies in the exploitation of copyright protected works in Europe should be re-examined in order to develop innovative and effective solutions for the licensing of the aggregate repertoire of works administered by all European societies.²

Improving the cross-border licensing of copyright protected works raises an important corollary question: should the market for collective management of rights be liberalized for rights-owners and users? The proponents of this solution have argued that the most effective model for achieving multi-territorial licensing of legitimate on-line music would be to enable right-holders to authorize a collective management society of their choice to manage their works across the entire EU. Similarly, users should also be able to obtain a licence from any society within the European Union, even if located outside of the user's territory of economic residency.³ In principle, increased competition between collective management societies should be beneficial

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¹ 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'*, (April 30th, 2003) O.J. L. 107/58 (EC) [IFPI Simulcasting], online: <http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_107/l_10720030430en00580084.pdf> (last visited: October 2nd, 2005).

² L. Guibault, "When will we have cross-border licensing of copyright and related rights in Europe?" (April-June 2005), *Copyright Bulletin*, UNESCO, online: <http://portal.unesco.org/culture/en/file_download.php/810dcd8497789602cd8a2c38fb256499guibault_en.pdf> (last visited: October 2nd, 2005).

³ Commission of the European Communities, *Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Cases COMP/C2/39152 — BUMA and COMP/C2/39151 SABAM (Santiago Agreement — COMP/C2/38126)*, (August 17th, 2005) O.J. C. 200/11, online: <[http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:52005XC0817\(03\):EN:HTML](http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:52005XC0817(03):EN:HTML)> (last visited: October 2nd, 2005).

for both authors and users, as the societies would have to compete on the basis of their economic efficiency, transparency and accountability.⁴

The importance of these matters has not escaped the European legislator. The creation, at the European level, of a level playing field for collective management societies has been an item on the European Commission's agenda at least since the publication of the Green Paper of 1995.⁵ Discussions have intensified recently, however, as evidenced by the European Parliament's Resolution on a Community framework for collective management societies in the field of copyright and neighbouring rights,⁶ and by the European Commission's Communication on the Management of Copyright and Related Rights in the Internal Market.⁷ Furthermore, the establishment of a regulatory framework for collective management societies has been included as part of the European Commission's Work Programme for 2005.⁸ In this context, the European Commission recently published a comprehensive study on the cross-border collective management of legitimate online music services setting out the possible options for regulation.⁹ If the publication of these documents suggests one thing, it is that a European directive on the subject of collective management societies should be part of reality within a not too distant future.

The structure and operations of collective management societies have never been harmonized at the European Community level. External control has been exercised strictly on the basis of the European rules on competition. Over time, the European Court of Justice (ECJ) and the European Commission have developed an impressive body of jurisprudence putting the alleged anti-competitive behaviour of collective management societies to the test of articles 81 and 82 of the EC Treaty.¹⁰ Assuming that the monitoring of the European collective management societies'

⁴ For an article expressing doubt on this point, see: P.B. Hugenholtz, 'Is concurrentie tussen rechtenorganisaties wenselijk?' (2003), *AMI* 203, at 205.

⁵ Commission of the European Communities, *Green Paper on Copyright and Related Rights in the Information Society of 19 July 2005*, COM(95) 382 final, online: <<http://www.eblida.org/ecup/lex/com95382.doc>> (last visited: October 2nd, 2005).

⁶ The European Parliament, *European Parliament Resolution on a Community framework for collective management societies in the field of copyright and neighbouring rights (2002/2274(INI))*, (January 15th, 2004), (P5_TA(2004)0036), [Community Framework Resolution] online:

<<http://www.europarl.eu.int/omk/omnsapir.so/calendar?APP=PDF&TYPE=PV2&FILE=p0040115.EN.pdf&LANGUE=EN>> (last visited: October 2nd, 2005).

⁷ 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*, (April 16th, 2004), COM(2004) 261 final, [Management of Copyright Communication] online:

<http://europa.eu.int/eur-lex/en/com/cnc/2004/com2004_0261en01.pdf> (last visited: October 2nd, 2005).

⁸ Commission of the European Communities, *Commission Work Programme for 2005 – Communication from the President in agreement with Vice-President Wallström*, (January 26th, 2005), COM(2005) 15 final, [Commission Work Programme] online: <http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2005/com2005_0015en01.pdf> (last visited: October 2nd, 2005).

⁹ Commission of the European Communities, "Commission Staff Working Document - Study on a Community Initiative on the Cross-Border Collective Management of Copyright" (July 7th, 2005), [Commission Staff Working Document] online:

<http://europa.eu.int/comm/internal_market/copyright/docs/management/study-collectivemgmt_en.pdf> (last visited: October 2nd, 2005).

¹⁰ See IFPI Simulcasting, *supra* note 1 at para. 59 (with reference to, *inter alia*, *Belgische Radio en Televisie (BRT) v. SABAM*, (1974) E.C.R. 51 [*BRT v. SABAM*]; *Musik-Vertrieb Membran GmbH v. GEMA*, (1981) E.C.R. 147; *GVL v. Commission*, (1983) E.C.R. 483.

competitive behaviour will remain unaffected, what would a directive on collective management of rights actually harmonize? Arguably, a new regulatory framework would aim at establishing principles of good governance within collective management societies, as well as at creating a uniform external control mechanism. Would harmonization in this area effectively contribute to the establishment of a level playing field between societies? Would such a harmonization be likely to fulfil its objective of fostering creation within the Internal Market, in the light of the current practical problems encountered by collective management societies?

This chapter attempts to provide some answers to these questions in three main parts. Section 2 provides a brief overview of the current regulatory framework concerning collective management societies in Europe, first at the European Union level and second, at the Member State level. Section 3 examines the main aspects of the intended Community framework on collective rights management as evidenced by the several documents issued by the different European bodies. On the basis of the findings of sections 2 and 3, Section 4 analyzes whether there is an actual need for harmonization with respect to multi-territorial licensing and to the principles of good governance and supervision of collective management societies. This section also examines the options available to the Community legislator to implement such a legal framework: either in terms of a legislative action or of alternatives hereto. Upon examining the option of a legislative action, this chapter will also consider whether it would meet the basic requirements in the EC Treaty (such as the principles of attribution, subsidiarity and proportionality). Section 5 concludes on the need for Community action with respect to the regulation of collective management societies.

2. Current regulation of collective management societies

Since the structure and the operations of collective management societies have never been the object of harmonization at the European Union level,¹¹ the activities of collective management societies have until now been controlled exclusively under the Community rules on competition. By contrast, collective management societies are usually subject to some form of specific regulation at the Member State level. Often, collective societies will be subject to a dual form of regulation within a Member State: in addition to the control exercised on the basis of competition law, the activities of collective management societies must conform to the requirements of specific national regulatory measures. This section provides a brief overview of the existing regulatory framework concerning collective management societies in Europe, first at the European Union level and second, at the Member State level.

2.1. Regulation at Community level

An exhaustive account of the European case law on the subject of collective management societies would go far beyond the objectives of this book. The following pages are therefore limited to giving a broad overview of the main elements of the European competition rules as applied to collective management societies.¹² As discussed below, the intervention of the

¹¹ H. Cohen Jehoram, 'Harmonizing Intellectual Property Law within the European Community' (1992), 23 *International Review of Industrial Property and Copyright Law* 622.

¹² For further reading, see: I. Govaere, *THE USE AND ABUSE OF INTELLECTUAL PROPERTY RIGHTS IN E.C. LAW*. (London: Sweet & Maxwell, 1996), 337; D.G. Goyder, *EC COMPETITION LAW*, 4th Edition. (Oxford: Oxford University Press, 2003), 660; F.L. Fine, 'The Impact of EEC Competition Law on the Music Industry' (1992), *Entertainment Law Review* 6, at 11; T. Kaufmann, 'Competition issues relevant to copyright and the information society' (1995), European Commission Legal Advisory Board meeting on 'The Information Society: copyright and multimedia', Luxembourg, April 26th, 1995, online: <<http://europa.eu.int/ISPO/legal/en/lab/950426/kaufmann.html#fn1>> (last visited: October 4th,

European Court of Justice and of the Commission has traditionally addressed three broad issues: 1) the relationship between collective management societies and their members; 2) the relationship between collective management societies and users; and 3) the reciprocal relationship between different collective management societies.

2.1.1 The relationship with members

The main aspects of the legal framework regarding the relationship between collective management societies and their members are still laid down in the early decisions rendered by the European Commission involving the German collective management society, GEMA. In the *GEMA I* case,¹³ the Commission made at least two important rulings. First, the obligation set by a collective management society requiring its members to assign unduly broad categories of rights, *e.g.*, to exclusively assign all their current and future rights with respect to all categories of works worldwide could constitute an abuse of dominant position. This aspect of the decision was later confirmed by the ECJ in the *BRT v. SABAM* case.¹⁴ In the Court's opinion, the decisive factor when examining the statutes of a collective management society in the light of the European competition rules, is whether the statutes exceed the limits absolutely necessary for effective protection (the "indispensability" test) and whether they limit the individual copyright holder's freedom to dispose of his work no more than necessary (the "equity" test).¹⁵ In this case, the Court ruled that "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".¹⁶

Second, the European Commission stressed in the *GEMA I* case that collective management societies may not discriminate among members as regards the distribution of income.¹⁷ 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. Moreover, the Commission ruled that collective management societies 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 to become an ordinary or extraordinary member (a voting member).¹⁸ According to the Commission, such practices must automatically be regarded as an infringement of Article 82 of the EC Treaty, as they run counter to the principle of equal treatment resulting from the prohibition of "any discrimination on grounds of nationality" in Article 12 of the EC Treaty. Moreover, the refusal to accept the membership of nationals of other Member States falls directly

2005); E. Lui, 'The Eurovision song contest: A proposal for reconciling the national regulation of music collecting societies and the single European market' (2003), *Entertainment Law Review* 67 at 73; and K.J. Koelman, 'Collectieve rechtenorganisaties en mededinging – deel I' (2004), *AMI* 45, at 49-50.

¹³ *Gesellschaft für Musikalische Aufführungs--und Mechanische Vervielfältigungsrechte (GEMA) v. Commission of the European Communities*, (1971) O.J. L. 134/15 [GEMA I].

¹⁴ *BRT v. SABAM*, *supra* note 10.

¹⁵ *Ibid.* at paras. 8 – 11.

¹⁶ *Ibid.* at para. 12.

¹⁷ See *e.g.* Fine, *supra* note 12 at 12; and L. Bently and B. Sherman, *INTELLECTUAL PROPERTY LAW*, 2nd Edition. (Oxford: Oxford University Press, 2004), 1231 at 285.

¹⁸ See also: *GVL v. Commission*, (1981) O.J. L. 370/49. See also *GVL v. Commission*, (1983) E.C.R. 483 (ECJ).

under the special prohibition of discrimination under Community competition law, as contained in Article 82(c) of the EC Treaty. In this respect, the European Court of Justice confirmed, in the *Phil Collins* case,¹⁹ 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.

2.1.2 The relationship with users

Regarding the application of Community competition law to the relationship between a collective management society and its users, the European Court of Justice and the European Commission have developed an important body of jurisprudence over the years. The seminal case in this area remains the ECJ's judgement in the *Tournier* case.²⁰ In this case, French discothèque owners had complained that the fees charged by the French collective management society SACEM were excessive, in particular because the discothèque owners mainly used popular dance music of Anglo-American origin while the SACEM's fees were calculated for the use of the worldwide repertoire. As a result, the discothèque owners attempted, without success, to obtain a licence directly from the relevant foreign collective management societies.

The *Tournier* case delivered a ruling on at least three important points. First, the ECJ ruled that a national collective management society may only refuse to grant direct access to its own national repertoire to users established in other EU Member States for efficiency reasons. For example, if it would have been too burdensome to organize its own management and monitoring system in these countries. However, if the refusal were the result of agreements or concerted practices between the national collective management societies in the Member States in which the users are established, this would have the object or effect of restricting competition in the common market contrary to Article 81 of the EC Treaty.²¹ Second, the Court considered whether collective management societies could refuse to grant licenses for only parts of their repertoire.²² Instead of a blanket licence, the discothèque owners had asked SACEM to grant them licenses for only the part of its repertoire that they actually used (popular dance music of Anglo-American origin), but SACEM refused. The Court ruled that the refusal by a collective management society to grant national users authorization limited solely to the foreign repertoire which it administered in the territory in question would not be prohibited under Article 81 of the EC Treaty, unless access to a part of the protected repertoire could entirely safeguard the interests of the right holders without thereby increasing the costs of managing contracts and monitoring the use of protected works.²³

Third, in relation to SACEM's tariffs, the Court observed that one of the most pronounced differences amongst collective management societies in the Member States lies in the level of operating expenses. The discothèque owners complained that SACEM charged excessive, non-negotiable and unfair royalties. The Court considered that a national collective management society imposes unfair trading conditions in the meaning of Article 82 of the EC Treaty, if the royalties charged are appreciably higher than those charged in other Member States, unless the differences were justified by objective and relevant factors.²⁴

¹⁹ *Phil Collins v. Imtrat Handelsgesellschaft GmbH*, (1993) I E.C.R. 5145 (EMI Electrola GmbH v. Patricia Im- und Export was a joined case) [*Phil Collins*].

²⁰ *Ministère public v. Tournier*, (1989) E.C.R. 2521 [*Tournier*].

²¹ *Ibid.* at paras. 16 – 26. See also *Lucazeau v. SACEM*, (1989) E.C.R. 2811 at paras. 10 – 20 [*Lucazeau*].

²² See e.g. Kaufmann, *supra* note 12; Hugenholtz, *supra* note 4 at 205, Bently & Sherman, *supra* note 17 at 288 and J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, AUTEURSRECHT: AUTEURSRECHT, NABURIGE RECHTEN EN DATABANKENRECHT. (Deventer: Kluwer, 2005), 762 at 466.

²³ See *Tournier*, *supra* note 20 at paras. 27 – 33.

²⁴ *Ibid.* at paras 34 – 36; *Lucazeau*, *supra* note 21 at paras. 21 – 33.

2.1.3 The reciprocal relationship between collective management societies

Early on, the European Commission held that the collective management societies in the different Member States must compete against each other, at least in certain areas. In 1985, the Commission held that the practices of GEMA, who charged royalties on sound recordings manufactured in Germany, even where the licensee had obtained a mechanical licence from a collective management society in another Member State, constituted an abuse of a dominant position.²⁵ According to the Commission's Press Release announcing the settlement of this case,²⁶ a licence granted by a collective management society in a Community Member State is valid throughout the Community and authorizes manufacture of sound recordings in any Member State. In other words, once a mechanical licence has been granted in a Community Member State, this exhausts the right of a collective management society in a Member State where the sound recordings are imported to charge another licensing fee. As a consequence, collective management societies in Europe now have to compete against each other for so-called "Central European Licensing" deals, allowing any user to acquire a mechanical licence from one collective management society which is valid throughout the Community.²⁷

In the *Tournier* and *Lucazeau* cases, the ECJ addressed the reciprocal relationship between collective management societies and concluded that such reciprocal agreements did not, as such, fall under Article 81(1) of the EC Treaty, provided no concerted action was demonstrated. Accordingly, the reciprocal representation agreements appeared in those days to be economically justified in a context where physical monitoring of copyright usage was required.²⁸

More recently, the Commission investigated two sets of reciprocal representation agreements, known as the "*Santiago Agreement*" and the "*BIEM Barcelona Agreement*".²⁹ According to these agreements, each of the participating societies may issue multi-territorial licences for the on-line use of copyrighted works of the repertoires of these societies only to on-line users established in their own territory.³⁰ In the *IFPI Simulcasting* decision, the Commission ordered the parties to amend their reciprocal agreement to allow users established in the territory of the European Economic Area³¹ to approach any collective management society, established within the territory and party to the agreement, to seek and obtain a multi-territorial simulcasting licence.³² The Commission considered that the monitoring task of collective management societies in the on-line

²⁵ See e.g. Fine, *supra* note 12 at 8 – 9; Kaufmann, *supra* note 12; and Koelman, *supra* note 12 at 49.

²⁶ Commission's Press Release of 6 February 1985, 2 *Common Market Law Review* 1.

²⁷ See M. Kretschmer, 'The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments' (March 2002), 24 *European Intellectual Property Review* 126, 133, online: <http://www.cippm.org.uk/pdfs/kretschmer_eipr_032002.pdf> (last visited: October 5th, 2005).

²⁸ *Tournier*, *supra* note 20 at paras. 34 – 46; and *Lucazeau*, *supra* note 21 at paras. 21 – 33.

²⁹ Notification of "*IFPI Simulcasting agreement*" (COMP/C2/38.014), OJ C 231/18 (2001), Notification of "*Santiago agreement*" (COMP/C2/38.126), OJ C 145/02 (2001) and Notification of "*BIEM Barcelona agreement*" (COMP/C2/38.377), OJ C 132/18 (2002).

³⁰ See Guibault, *supra* note 2, for more details about the competition aspects and the Commission's viewpoints of these agreements.

³¹ The European Economic Area (EEA) consists of all the EU Member States plus Norway, Iceland and Liechtenstein.

³² *IFPI Simulcasting*, *supra* note 1 at paras. 27 and 28.

environment can easily be carried out directly on the Internet and can therefore take place from a distance, which means that the traditional economic justification for collective management societies not to compete in cross-border provision of services no longer applies in this context.³³ Moreover, the parties in this case must undertake to increase transparency as regards the payment charged, by separating the tariff which covers the royalty proper from the fee meant to cover the administration costs.³⁴ This transparency in pricing should enable users to recognize the most efficient societies and to seek their licences from the society that provides them at the lower cost.

2.2. Regulation at Member State level

A rapid survey of the legislation in force in the twenty-five Member States of the European Union shows a significant disparity between the national regulatory systems applicable to collective management societies. Each Member State has established its own set of rules regarding the formation and operation of collective management societies, accompanied in most countries by a supervisory authority. At first glance, only the laws of Luxembourg and Estonia would seem not to provide for the creation of any supervisory body.³⁵ Approximately one third of all Member States have preferred to enact the provisions dealing with collective management societies in a separate piece of legislation (Austria,³⁶ Czech Republic,³⁷ Germany,³⁸ Greece,³⁹ The Netherlands,⁴⁰ Portugal⁴¹), while the vast majority of the European national legislators have chosen to incorporate the relevant provisions inside the general copyright act (Belgium,⁴²

³³ *Ibid.* at para. 61.

³⁴ *Ibid.* at para. 103.

³⁵ *Loi du 18 avril 2001 sur les droits d'auteur, les droits voisins et les bases de données*, Mémorial A - N° 50, April 30th, 2001, as amended by *Loi du 18 avril 2004 modifiant 1) la loi du 18 avril 2001 sur les droits d'auteur, les droits voisins et les bases de données*, Mémorial, A – N° 61, 29 April 2004, 942 art. 66, online <http://www.legilux.public.lu/leg/a/archives/2004/0612904/2004A09421.html> (visited October 12th, 2005); *Copyright Act of Estonia* (Adopted on November 11th, 1992 as amended by *Act of 22.09.2004*, Riigi Teataja I 1999, 54, 580 arts. 76-79a on-line: <http://www.legaltext.ee/text/en/X40022K6.htm> (visited October 12th, 2005).

³⁶ *Federal Law concerning collecting societies, 1936*, BGBl. 112/1936, Bundesgesetzblatt für die Republik Österreich online: <http://www.ris.bka.gv.at/bundesrecht/> (visited October 12th, 2005).

³⁷ *Law No. 237 of September 27, 1995 on the collective administration of copyright and neighbouring rights and on the modification and amendment of certain laws*, Sbírka zákonů c., 237/1995, Částka 64, Strana 3499 online: http://www.wipo.int/clea/docs_new/pdf/en/cz/cz003en.pdf (visited October 12th, 2005)

³⁸ *Law on the Administration of Copyright and Neighbouring Rights (Copyright Administration Law) of September 9, 1965*, Bundesgesetzblatt, Teil I, 1965, 1294 and Teil I, 2003, 1774 online: <http://transpatent.com/gesetze/urhwg.html> (visited October 12th, 2005).

³⁹ *Presidential Decree No. 311/1994 as amended by Law No. 2557/1997. Articles of Association of the "Copyright Organization"*, Official Journal (FEK) 06/10/1994, No. 165 A' and 1997, No. 271 A', online: http://www.wipo.int/clea/docs_new/pdf/en/gr/gr216en.pdf (visited October 12th, 2005)

⁴⁰ *Act on the Supervision of Collective Management Organizations for Copyright and Related Rights (2003)*, Gazette 2003, 20 March 2003, 111, online: <http://www.ivir.nl/wetten/nl/wettoezichtcollectieve.html> (visited October 12th, 2005)

⁴¹ Act N° 83/2001 of 3 August 2001, online:

http://www.gda.pt/novidades/lei_gestao_colectiva.html (visited October 12th, 2005).

⁴² *Law of June 30, 1994 on Copyright and Neighboring Rights*, Moniteur belge/Belgisch Staatsblad, 27 July 1994, 19297 and 5 November 1994 (erratum), 27467 last modified by Act of 22-05-2005 Moniteur belge/Belgisch Staatsblad 27-05-2005, 24997. online: http://www.droit-technologie.org/legislations/loi_droit_auteur_SI_220505.pdf (visited October 12th, 2005)

Cyprus,⁴³ Denmark,⁴⁴ Finland,⁴⁵ France,⁴⁶ Hungary,⁴⁷ Ireland,⁴⁸ Italy,⁴⁹ Latvia,⁵⁰ Lithuania,⁵¹ Malta,⁵² Poland,⁵³ Slovakia⁵⁴, Slovenia,⁵⁵ Spain,⁵⁶ Sweden,⁵⁷ and the United Kingdom⁵⁸).

⁴³ *The Copyright Law No. 59, of December 3, 1976*, as amended by Laws 63/77, 18(I)/1993, 54(I)/1999, 12(I)/2001, 128(I)2002 and 128(I)/2004. online: <http://www.ldlaw.com.cy/services/intellectual.htm> (visited October 12th, 2005).

⁴⁴ Consolidated Act No. 164 of March 12, 2003, art. 47 – 52 online: <http://www.kum.dk/sw4550.asp> (visited October 12th, 2005)

⁴⁵ Law No. 404, of July 8, 1961, as last amended by Law No. 748, of October 9, 1998, art. 26c and ff. online: http://portal.unesco.org/culture/en/file_download.php/a211212947dd52866031787ed0ae9109Copyright_Act.pdf (visited October 12th, 2005)

⁴⁶ *Intellectual Property Code*, Legislative Part, L. n. 92-597, 1st July 1992, as last amended by Act 2004-1338 of 8 December 2004, arts. L. 321-1 – L.321-13, online: <http://www.irpi.ccip.fr/code-propriete/index.html> (visited October 12th, 2005)

⁴⁷ *Act No. LXXVI of 1999 on Copyright*, of 6 July 1999 arts. 85-99 completed by Decree No. 16/1999. (XI. 18.) NKÖM of the Minister of National Cultural Heritage on the rules governing the records of societies concerned with the collective administration of authors' rights and neighboring rights, online: http://www.hpo.hu/English/jogforras/1999_16NKOM.html (visited October 12th, 2005).

⁴⁸ *Copyright and Related Rights Act, 2000 (No. 28 of 2000)*, of 10th July, 2000, art. 149 and ff online: http://www.ucc.ie/law/irlit/statutes/2000_28.htm (visited October 12th, 2005).

⁴⁹ *Act of 22 April 1941, n. 633 (last modified by legislative decree of 9 April 2003, no. 68)*, arts. 180 – 185, online:

<http://www.patnet.it/LeggiFind.asp?Argomento=Copyright&Ricerca=633&Descrizione=Diritto+d%27autore+%28Copyright%29> (visited October 12th, 2005)

⁵⁰ *Copyright Law (of 6 April 2000)*, arts. 63 – 67 online:

<http://www.km.gov.lv/UI/ImageBinary.asp?imageid=360> (visited October 12th, 2005)

⁵¹ *Law on Copyrights and Related Rights No. VIII of May 18, 1999*, as amended by Law No. IX-1355 of 5 March 2003, arts. 71 and 72, online: <http://www3.lrs.lt/c-bin/eng/preps2?Condition1=226598&Condition2=> (visited October 12th, 2005).

⁵² *Copyright Act*, chapter 415 as amended by *Act No. IX of 2003*, Government Gazette of Malta No. 17,467, September 2, 2003, arts. 52-58 online: http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt415.pdf (visited October 12th, 2005).

⁵³ *Act of 4 February 1994 on Copyright and Neighboring Rights*, Monitor Polski, February 23rd, 1994, No. 24, item 83, as amended by Act of April 1, 2004 (Ustawa o zmianie ustawy o prawie autorskim i prawach pokrewnych z dnia 1 kwietnia 2004 r.) arts. 104 – 100. online:

http://ks.sejm.gov.pl/proc4/ustawy/2465_u.htm (visited October 12th, 2005).

⁵⁴ *Copyright Act, No 618/2003 of 4th December 2003*, art. 78 – 86 online:

<http://www.culture.gov.sk/english/doc/copyright.pdf> (visited October 12th, 2005).

⁵⁵ *Copyright And Related Rights Act of March 30, 1995*, Uradni list Republike Slovenije, April 14th, 1995, No. 21, as amended by Act Amending the Copyright and Related Rights Act, Official Gazette RS No. 43/04, art. 162 online: http://www.uil-sipo.si/Laws/ZASP_EN_04.pdf (visited October 12th, 2005).

⁵⁶ *Real Decreto Legislativo 1/1996, de 12 de abril, (BOE 22-4-1996), por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia, constituye la piedra angular de la regulación sobre propiedad intelectual en España*, Art. 159 online :

http://www.mcu.es/propint/files/LeyProp_Intelectual_mod172.pdf (visited October 12th, 2005).

⁵⁷ Act 1960:729 on Copyright in Literary and Artistic Works, as amended by Act 2005:359 of 26 May 2005 art. 42a and ff., online: <http://www.sweden.gov.se/content/1/c6/01/51/95/69b07709.pdf> (visited October 12th, 2005).

In practice, the specific regulations in the Member States diverge widely on both scope and efficiency. The national provisions establishing a control mechanism vary from "strict supervision" to "*de minimis* supervision", where most national legal systems take up an intermediate position. An exhaustive account of the national regulatory framework in force in each Member State on the subject of collective management societies would go far beyond the objectives of this book.⁵⁹ The following pages are therefore restricted to giving a portrait, by means of examples, of the main elements of each of the three types of regulatory systems.⁶⁰

2.2.1 Strict supervision

Examples of a "strict supervision" system can be found in the German, Austrian and Portuguese legislation. In Germany, the administration and exploitation of all collective management societies is regulated under the 1965 Law on the Administration of Copyright and Neighboring Rights ("LACNR").⁶¹ This act establishes a regulatory and supervisory legal system subjecting all collective management societies to the control of the *Deutsches Patent- und Markenamt*, the German Patent and Trade Mark Office ("GPTO"). This German legislation is said to constitute "the most comprehensive legal system" of control of collective management societies on the international level,⁶² and indeed, many important elements of collective rights management in Germany are supervised by the GPTO. One of the most fundamental characteristics of the German legislation, to be found in Article 1 of the LACNR, is that anyone who wants to conduct business in the collective management of rights must obtain prior authorization.

Once the authorization is granted, a collective management society remains under the permanent supervision of the GPTO. The GPTO controls whether a collective management society faithfully discharges the obligations incumbent on it under the LACNR (Article 19(1) LACNR). This should ensure that the collective management society does not abuse its powers in its relationship with both right-holders and users and that it renders account to the society as a whole.⁶³ To that end, the Act sets out a comprehensive legislative framework, with strict obligations for collective management societies. In addition, the LACNR provides for an arbitration procedure for the amicable settlement of disputes between collective management societies and users regarding tariffs and licensing conditions.

⁵⁸ *Copyright, Designs and Patents Act 1988 (c. 48)*, Her Majesty's Stationary Office, June 1995, art. 145 and ff. [CDPA] online: http://www.opsi.gov.uk/acts/acts1988/Ukpga_19880048_en_1.htm (visited October 12th, 2005).

⁵⁹ On the supervision systems of France, Germany, the Nordic Countries and the United Kingdom see the relevant chapters elsewhere in this book.

⁶⁰ For a more comprehensive account of certain national regimes, see: Y. Gendreau, ed., *COPYRIGHT ADMINISTRATIVE INSTITUTIONS*. (Montreal: Editions Yvon Blais, 2002), 678.

⁶¹ *Law on the Administration of Copyright and Neighboring Rights of 9 September 1965*, *Bundesgesetzblatt*, Teil I, 1965, p. 1294 [LACNR].

⁶² See e.g. A. Dietz, *COPYRIGHT LAW IN THE EUROPEAN COMMUNITY: A COMPARATIVE INVESTIGATION OF NATIONAL COPYRIGHT LEGISLATION, WITH SPECIAL REFERENCE TO THE PROVISIONS OF THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY*. (Alphen aan den Rijn: Sijthoff & Noordhoff, 1978), 312 at 219; and J. Reinbothe, 'Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten (Urheberrechtswahrnehmungsgesetz)', in: G. Schricker, *URheberRECHT, KOMMENTAR*, 2nd Edition. (Munich: Beck Juristischer Verlag, 1999), 2145 at 1823.

⁶³ Reinbothe, *ibid.* at 1909.

2.2.2 Intermediate supervision

The legislation of the vast majority of Member States falls under the category of intermediate supervision. Besides imposing a number of requirements of transparency and accountability, the national acts will subject the exercise of the activities of the collective management societies to the supervision of an independent person or administrative body. Often, the minister responsible for copyright matters will receive the task of exercising control over the operations of the collective management societies. In addition to this supervisory authority, certain Member States have also set up a dispute settlement mechanism, the competence of which will vary from one country to another.

The legislation of the Netherlands provides a good illustration of an intermediate degree of supervision. Under the Act on the Supervision of Collective Management Societies (“ASCMS”)⁶⁴, not all collective management societies are subject to specific supervision. Only those societies which, after appointment or consent of the Minister of Justice, enjoy a *de jure* or state-supported monopoly fall under the jurisdiction of the supervisory body. Without providing an explicit framework of obligations for these societies, the ASCMS sets out a comprehensive list of elements, which are controlled by the Supervisory Commission on a permanent basis. The general statutory task of the Supervisory Commission is to exercise supervision on the collection and distribution of the payments by the collective management societies. Furthermore, the Supervisory Commission must, according to the Act, ensure that a collective management organisation:

- a) Provides adequate awareness of its general and financial policy to right-holders and those obliged to make payments;
- b) Is adequately equipped to be able to fulfil its duties properly;
- c) Lawfully distributes the payments it has collected amongst the right-holders in accordance with the re-allocation regulations;
- d) Takes adequate account of the interests of those obliged to make payments when carrying out its work;
- e) Makes use of a reliable dispute resolution scheme for right-holders;
- f) Treats similar cases in a similar way.⁶⁵

The Dutch Act does not provide a dispute settlement regulation, however. Moreover, the ASCMS explicitly states that the Supervisory Commission will not maintain supervision over the societies to the extent that such supervision is already exercised by the Dutch competition authority. The Dutch competition authority also controls all other collective management societies. To that end, it may fully apply the provisions of Dutch competition law, as well as of Community competition law.

⁶⁴ *Act on the Supervision of Collective Management Organizations for Copyright and Related Rights (2003)*, Gazette 2003, 20 March 2003, 111, online:

<http://www.ivir.nl/wetten/nl/wettoezichtcollectieve.html> (visited October 12th, 2005)

⁶⁵ See: House of Representatives, “Parliamentary Report of the Dutch Lower Chamber” (2000/2001), 27 775, no. 3 (Explanatory Memorandum), at 6-7.

2.2.3 *De minimis* supervision

Contrary to most other Member States, the legislation of Ireland,⁶⁶ Poland,⁶⁷ and the United Kingdom⁶⁸ merely establishes a "*de minimis* supervision" system, where the external control is essentially limited to the tariff. Taking the United Kingdom's CDPA as an illustration, no provision in the Act sets out requirements regarding the formation of collective management societies or the regulation of their activities. Furthermore, there exists no specific authority that permanently supervises the societies. The only regulation contained in the CDPA is an *ad hoc* control in cases of complaints. The Copyright Tribunal, which has been established for this purpose, has jurisdiction to hear and determine matters arising from a relationship between a collective management society and its users.

The British Copyright Tribunal's general jurisdiction to settle matters regarding licences and licensing schemes is broadly limited to two kinds of cases. First, it has jurisdiction to hear disputes arising in respect of an individual licence (the so-called "application"), for example, when a collective management society unreasonably refused to grant a licence or when the terms and conditions of a proposed licence are deemed unreasonable. These "applications" may be referred to the Tribunal by individual users seeking a licence. Second, the Copyright Tribunal has jurisdiction where the terms and conditions of a licensing scheme as a whole are contested (the so-called "reference"). In this respect, a "licensing scheme" is defined as a scheme specifying the circumstances and terms under which a licensing body is willing to grant licenses. These "references" may be referred to the Tribunal by associations of users claiming that they require a licence, and, when the scheme is operational, also by individual users seeking a licence under this scheme. In other words, the Tribunal's general competence is limited solely to disputes between collective management societies and their users, and not to disputes arising between the societies and their members. Moreover, the Tribunal can only entertain references brought to it by users, and not by members or on its own initiative.⁶⁹

In summary, the significant differences in the regulation of collective management societies at the Member State level are due, in particular, to the various forms of supervision under specific legislation. As regards the application of competition law, the national regulatory systems show relatively little disparity. Moreover, where Community competition law is put into effect and applied equally throughout the Member States, this aspect of regulation seems to be fully harmonized.

3. Intended Community framework on collective rights management

As mentioned in the introduction, the creation, at the European level, of a level playing field for collective management societies has been an item on the European Commission's agenda at least since the publication of the Green Paper of 1995.⁷⁰ Discussions have intensified during the past year, which have resulted in the adoption of several documents by the different European

⁶⁶ *Supra* note 47.

⁶⁷ *Supra* note 52.

⁶⁸ *Supra* note 55.

⁶⁹ See: U. Suthersanen, *An Overview of the Practice and Policy of the United Kingdom Copyright Tribunal*, in *COPYRIGHT ADMINISTRATIVE INSTITUTIONS*, *supra* note 57 at 487.

⁷⁰ *Supra* note 5.

bodies.⁷¹ The following pages describe the main aspects of the intended Community framework on collective rights management as evidenced by the several documents issued by the different European bodies.

3.1 *The Resolution of the European Parliament*

The European Parliament's Resolution of January 2004 on the subject sets out a number of policy considerations, which the European Commission should take into consideration when the time comes to draw up the text of a directive.⁷² At the outset, the European Parliament emphasized the importance of the cultural and social aspects of collective rights management and the traditional and still necessary role of collective management societies.⁷³ The Parliament points out that in the area of copyright and related rights, a proper, fair, and professional system of collective rights management is crucial for financial as well as cultural success. Collective rights management can constitute an important factor in stimulating creativity and influencing the growth of cultural and linguistic diversity. Nevertheless, the Parliament is rather critical about the actual state of collective rights management in the European Union. It notes, for instance, the deficit in the internal democratic structures of collective management societies, the lack of transparency in the financial policy of the societies and the absence of rapid dispute settlement mechanisms. In addition, the European Parliament observes that there are major structural differences in the regulation and efficiency regarding the external control of collective management societies in the different Member States. Therefore, the European Parliament believes "that a Community approach in the area of the exercise and management of copyright and related rights, in particular of effective collective rights management in the internal market, must be pursued".

In this respect, the European Parliament presents several possible solutions.⁷⁴ One of them would be the creation of common tools and of comparable parameters and the coordination of collective management societies' areas of activity. With respect to the societies' internal democratic structure, a proposal is made to establish minimum standards for organisational structures, transparency, accounting and legal remedies. Furthermore, the European Parliament calls for 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. A framework of minimum standards for the calculation of tariffs and of uniform coding standards for works should also be instituted in order to simplify the exercise of rights. With regards to the cooperation between collective management societies, a call is made for an efficient exchange of information between the societies and the discontinuation of so-called "B contracts" in reciprocal representation agreements.⁷⁵ Finally, the European Parliament makes a general call for the instauration of efficient, independent, regular, transparent and expert control mechanisms and for comparable and compatible arbitration mechanisms in all EU Member States.

⁷¹ See: Community Framework Resolution, *supra* note 6; Management of Copyright Communication, *supra* note 7; Commission Staff Working Document, *supra* note 9.

⁷² Community Framework Resolution, *supra* note 6.

⁷³ See A. Dietz, "European Parliament versus Commission: how to deal with collecting societies?" (2004), *International Review of Intellectual Property and Competition Law*, 809 at 810-814.

⁷⁴ *Ibid.* at 819.

⁷⁵ See paras. 45 and 56 of the Community Framework Resolution, *supra* note 6. In the current system of reciprocal representation agreements, there are two kinds of agreements. Under the "A agreements" a reciprocal transfer of royalties collected is provided for, where under the "B agreements", no money or data is transferred and each society collects and distributes royalties used in its territory only to its own right-holders.

However, together with the introduction of equitable, transparent and balanced rules for collective management societies, the European Parliament also appeals to the restriction of competition law to cases of abuse, in order to safeguard rights management effectively both now and in the future. According to the Explanatory Statement to the Resolution, a misguided insistence on competition would lead to further fragmentation of the markets, chaos in the clarification of rights and dumping tariffs. Furthermore, the European Parliament sees collective management societies as an important safeguard in the world of media concentration. It stresses that the monopoly of collective management societies should not be replaced by a monopoly of the media industry.

3.2 *The Communication from the Commission*

In contrast to the Parliament's Resolution, the European Commission's Communication on the Management of Copyright and Related Rights in the Internal Market is a rather technically and legally oriented document.⁷⁶ The European Commission states 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 is required. Although the Commission recognizes that competition rules remain an effective instrument for regulating the market and the behaviour of collective management societies, it takes the view that an internal market in collective rights management can be best achieved if the monitoring of collective management societies under competition rules is complemented by the establishment of a legislative framework.

According to the Commission, complementary action is needed on those aspects of collective rights management, which impede the full potential of the Internal Market as regards the cross-border trade of goods and provision of services based on copyright and related rights. In this respect, the efficiency, transparency and accountability of collective management societies are of particular importance. To improve the functioning of collective rights management in the internal market, the Commission intends to establish a level playing field in which general conditions for several features of collective rights management are defined. These features are:

a) The establishment and status of collective management societies

The Commission would want the establishment of collective management societies to be subject to similar conditions in all Member States. These conditions should relate to the persons who may establish a society, the status of the latter, the necessary proof of efficiency, operability and accounting obligations, and a sufficient degree of representativity. On the other hand, the Commission sees no need to bring uniformity as regards the legal form of organization of collective management societies, as it reasons that the efficiency of a society is not linked to its legal form.

b) The relationship with users

In their relation to users, the Commission deems it necessary to safeguard the functioning of collective management societies as one-stop-shops for licensing. Common ground should therefore be required on the grant of licences under reasonable conditions, the transparency in the pricing policy of the collective management societies and the reasonableness of the tariffs. Furthermore, the Commission finds it essential for users to be in a position to contest the tariffs before national courts, specially created mediation tribunals or with the assistance of supervisory authorities.

⁷⁶ *Supra* note 7.

c) The relationship with right-holders

In their relation to right-holders, the Commission wishes to achieve a level playing field as regards the acquisition of rights (the mandate), the conditions of membership and the termination of membership. The mandate should offer right-holders a reasonable degree of flexibility on its duration and scope. In principle, right-holders should also have the possibility, in the light of the deployment of Digital Rights Management (“DRM”) systems, to manage certain right individually if they so desire. Moreover, the Commission would want similar conditions to exist on the representation and the position of right-holders within the society, for example, as regards their influence on the decision-making process and their access to internal documents and financial records in relation to distribution and licensing revenue and deductions. In this respect, the leading principles must be the good governance, non-discrimination, transparency and accountability of the collective management societies.

d) The external control of collective management societies

Finally, the Commission wishes to create a level playing field with respect to the external control of collective management societies. The external control should cover such matters as the behaviour of collective management societies, their functioning, the control of tariffs and licensing conditions and the settlement of disputes. The Commission would like to see adequate external control mechanisms be established throughout the Community and, to that end, make sure that specific supervisory bodies (such as specialized tribunals, administrative authorities or arbitration boards) will become available in all Member States. In addition, the Commission would want to establish common ground on the powers of these bodies, on their composition and on the binding or non-binding nature of their decisions.

When considering the possible options to achieve the objectives outlined in the Communication, the Commission expressly states that it does not seem to be an option anymore to abstain from legislative action. For the Commission, it neither appears to be an appropriate option to rely on soft-law or on codes of conduct agreed upon in the market place. Therefore, the Commission expresses the intention to propose a legislative instrument.

3.3 *The Commission Work Programme 2005*

As a logical consequence of the Communication, the Commission announced that the adoption of a legislative proposal on collective rights management in the Internal Market would be part of its Work Programme 2005.⁷⁷ This should create a level playing field which would enhance both right-holders’ and users’ trust into collective management societies. The main objectives of such a legislative framework would be:

- To ensure the transparency and efficiency of collective management societies;
- To ensure that the control of collective management societies is exercised in such a way that a similar general interest protection level can be guaranteed in all Member States;
- To enhance competitiveness of creative industries, including small ones as well as individual authors and artists, to strengthen innovation and to promote culture and cultural diversity;

⁷⁷ Commission Work Programme, *supra* note 8 at 16.

- To reinforce the existing *acquis communautaire* in the field of intellectual property.⁷⁸

In order to meet these objectives, the Commission discussed the possibility of adopting either a directive or a regulation. It concluded that although a regulation would have the advantage of being directly applicable, it would also require very detailed and precise harmonization. A regulation would not only lead to a major overhaul of the different laws and traditions existing at present, but it would also result in regulatory over-complexity and would take considerable time and resources to negotiate. On the other hand, a directive – once implemented – would provide for a certain level of harmonization and of legal certainty for all parties involved, without imposing over-complex rules. Moreover, it would allow agreement on essential requirements at Community level while providing for the necessary flexibility for Member States. According to the Commission, the most appropriate way to achieve the objectives mentioned, therefore, appears to be the adoption of a directive.⁷⁹

3.4 *The study on cross-border collective management of copyright*

The very latest document published by the European Commission on the subject of collective management societies focuses on the cross-border collective management of copyright.⁸⁰ Although it is not entirely clear whether the recommendations made in the study concern the broad issue of cross-border collective management of copyright, or only the cross-border collective management of legitimate online music services, one could interpret the document as reflecting the Commission's wish to first adopt the principles set out therein with respect to online music services, before expanding the cross-border collective licensing system to copyright management as a whole.

The study reveals that the main problem encountered in the cross-border collective management of copyright is that the core service elements “cross-border grant of licences to commercial users” and “cross-border distribution of royalties” do not function in an optimal manner and hamper the development of an innovative market for the provision of online music services. Three different policy options are available:

- Option 1: To abstain from Community action;
- Option 2: To eliminate territorial restrictions and discriminatory provisions in the reciprocal representation agreements concluded between collective management societies;
- Option 3: To give right-holders the choice to authorise a collective management society of their choice to manage their works across the entire EU.

Option 2 would limit EU policy to improving the traditional way in which national collective rights societies in the 25 Member States cooperate in order to ensure the cross-border management of copyright. It would introduce a single entry point and choice for commercial end users but it would not introduce increased choice as to collective rights manager at the level of

⁷⁸ See: Commission of the European Communities, “Roadmaps – Commission Work Programme 2005” (2005), at 35, [Commission Roadmaps] online: <http://europa.eu.int/comm/off/work_programme/20050128_clwp_roadmaps.pdf> (last visited: October 5th, 2005).

⁷⁹ According to the Commission Roadmaps, *ibid.*, the planned date of adoption of the proposal would be October 2005.

⁸⁰ Commission Staff Working Document, *supra* note 9.

right-holders. This solution would also improve the way reciprocal agreements function, by improving the way the affiliate society monitors, collects royalties and transfers them back to the management society. In relation to licensing, this option would ensure that the territorial restrictions in classical reciprocity agreements that hinder the affiliate society from licensing the management society's repertoire beyond its own home territory are removed from all reciprocal representation agreements.⁸¹

By contrast, Option 3 would not rely on reciprocal representation agreements to give 25 collective management societies licensing authority over a homogeneous product. Instead, it would give all right-holders across the EU the possibility to adhere to any collective rights manager of their choice for the EU-wide exploitation of their online rights. Option 3 would effectively cut out the intermediary – the affiliate society – in favour of direct membership in a CRM who, by choice of the right-holder, could receive an EU-wide mandate to manage this right-holder's copyright protected works. Option 3 would therefore introduce choice and competition at the level between right-holders and collective rights manager. The study concludes that in the long-term, Option 3 would offer the most effective model of cross-border management of copyright.⁸²

The scope of issues addressed in this study appears much narrower than that of the European Parliament's Resolution or of the Commission's Communication. According to the European Commission, both issues are inter-related, however, since the enhancement of competition between societies would bring about the enhancement of transparency, accountability, royalty distribution and the quality of enforcement. At this point, two questions arise, however. First, is there an actual need for harmonization in this area or should the whole be left to the forces of the market? Second, how does the European legislator intend to transpose into practice the recommendations concerning the creation of a legal framework for collective management societies, or option 3 of the study on cross-border licensing of on-line music services? Should this be achieved by means of guidelines or through the adoption of a directive?

4. Towards a harmonization in respect of collective management societies

As seen in Section 2 above, the significant differences in the regulation of collective management societies at Member State level are due to a large extent to the various forms of control under specific legislation. On the other hand, the application of European competition law in the different Member States seems to be fully harmonized. If Section 3 revealed one thing, it is that the intentions of the European Commission concerning the harmonization of the rules on collective management are not the clearest, ranging from the broad issue of the good governance and supervision of collective management societies to the narrower problem of the multi-territorial licensing of rights. Do the differences in the national legislation concerning the good governance and supervision of collective management societies and the problems associated with the cross-border licensing system justify engaging in the process of harmonization?

The following pages will take a closer look at the question of whether there is an actual need for harmonization, both with respect to the cross-border licensing issue and to the rules on good governance and supervision of collective management societies. They will then consider the options available to the European legislator, in terms of a legislative action and in terms of measures designed to promote self-regulation, with a special look at whether legislative action

⁸¹ *Ibid.* at 34.

⁸² *Ibid.* at 54.

would meet the basic requirements in the EC Treaty, such as the principles of attribution, subsidiarity and proportionality.

4.1 *Actual need for harmonization*

The *IFPI Simulcasting* case⁸³ presents a patent example of circumstances where both aspects of the collective management of rights may benefit from harmonizing measures across the European Union. Not only did the case address the complex issues involved in the multi-territorial licensing agreements, but it also touched upon the need to establish principles of good governance within collective management societies. For, in the opinion of the European Commission, the facilitation of the multi-territorial licensing of rights cannot be fully achieved without a fair and transparent collective management system. Absent proper measures, there would be no level playing field for all collective management societies across Europe and neither right-holders nor users would be in a position to decide which European collective management society is best suited to their needs. Let us consider both types of issues.

4.1.1 Multi-territorial licensing

With respect to the multi-territorial licensing of rights, the European Commission has expressed its distinct preference for the option, which would give right-holders the choice to authorise a collective management society of their choice to manage their works across the entire EU.⁸⁴ The main advantage of such a competitive cross-border licensing system is the possibility given to each collective management society of functioning as a ‘one stop-shop’, where each society would be in a position to grant a single multi-territorial simulcast licence covering the repertoire of all other collective management societies. Moreover, all protected recordings, regardless of origin, would be subject to the same conditions for all users in the same country, in accordance with the principle of national treatment, as a result of which, administration costs would be lower and these efficiencies could be passed on both to the rights-holder and to the user.

According to the recent study published by the European Commission, effective structures for the cross-border collective management of copyright for legitimate online music services would require regulatory intervention. The main reason for this lies in the fact that the market has failed to produce effective structures for cross-border licensing and cross-border royalty distribution; and that it has not rectified a series of contractual restrictions preventing authors or other right-holders from seeking the best collective rights management service across national borders.⁸⁵ In all likelihood, the Commission would not limit itself to the regulation of the cross-border licensing of online music services but would probably aim at all types of multi-territorial licensing.

The European Commission stresses that this model would not only be interesting for successful right-holders, but also for less successful right-holders. The benefits for successful right-holders are indeed obvious: for them, it is of particular importance to find the collective management society that gives them the highest royalties. Therefore, they will invest time and money to find the most efficient society. Arguably, not all right-holders – especially not the less successful ones

⁸³ *Supra* note 1.

⁸⁴ Commission Staff Working Document, *supra* note 9 at 54.

⁸⁵ *Ibid.* at 30.

– would invest as much time and money in looking for the most efficient and cost-saving society. The Commission’s assumption according to which most if not all right-holders would switch to another collective management society may not become reality. Moreover, the Commission admits that option 3 would not achieve the single access point for all European repertoire for all European territories because the European repertoire will be split among a small number of collective management societies.⁸⁶ Moreover, it may encourage the development of a few larger collective management societies (the most efficient and cost-saving societies) where the successful right-holders gather. This could bring about the negative consequence that commercial users would want to contract only with these few larger societies since they represent the most popular musical works. Such a concentration in the market for collective management of rights could be detrimental to the dissemination of cultural works over the Internet.

Of course, it is impossible at this time to predict how a competitive market for multi-territorial licensing of online music services - or of any other online copyright protected work – would evolve. Any prediction in this sense is pure speculation. Nevertheless, it is not entirely clear that any measure towards the liberalization of the market for collective management of rights will actually yield the advantages mentioned in the European Commission’s study.

4.1.2 Principles of good governance and supervision

With the liberalization of the market of the collective management of rights, collective management societies would have to compete among themselves to attract right-holders. This implies that all right-holders, authors, composers, publishers, performers or others, should be treated equally, irrespective of their domicile, by the putting in place of effective structures to enhance transparency, and accountability. In the Commission’s own words, this option could provide a still higher level of transparency for right-holders, since the collective rights manager of their choice would be accountable for all use made of works across the Community and for the redistribution of royalties in exact proportion to this use. If the right-holder were not satisfied with the society to which he adhered, he would have the choice to seek Community-wide clearance services elsewhere. This would constitute a strong incentive to carry out optimal and transparent clearance and royalty payment services. Empowering right-holders to choose their collective rights manager would lead the latter, in order to attract or retain business, to adapt their business practices and become more efficient in relation to their management services. The case previously made in the Commission’s Communication for the introduction of transparency requirements and rules of good governance and accountability would be achieved, according to the Commission, by the societies themselves without regulatory intervention. Whether this would actually come true in practice remains to be seen!

At the Commission’s own admission, the liberalization of the market for collective management of rights would be more favourable to right-holders than to commercial users. Such a regime could therefore lack the necessary safeguards for users. Where users have no alternative but to seek a licence from a collective management society holding a monopoly position – and, in the case of EU-wide mandates a super-monopoly position – there could be risk that such a powerful society would abuse its position. The failure to implement comparable regulatory regimes could affect the free circulation of goods and services with respect to the functioning of collective management societies in their relationship with users, for instance, as regards the regulation of tariffs and licensing conditions. In Member States with more lenient regulations, collective management societies may be tempted to charge excessive tariffs or to impose unreasonable licensing conditions. Without a proper regulation, these societies may arbitrarily determine the

⁸⁶ *Ibid.* at 40.

price and other conditions of a licence.⁸⁷ As a result, small commercial users could be unable or unwilling to pay the price of such licences and could be prevented from negotiating more advantageous licensing conditions. Such a practice may ultimately form a barrier to the free movement of copyright-based goods and services within the Community.

Without the instauration of a competitive market for the collective management of rights, existing disparities in the laws of the Member States relating to the functioning of collective management societies in their relationship with right-holders may cause obstacles to the free movement of goods and to provide services. If one Member State regulates the societies' acquisition of rights ("the mandate"), and the other one not, this may create discrepancies in the scope of rights that the different societies are allowed to manage on behalf of their members. If no statutory safeguard exists in the legislation of certain Member States, right-holders may be obliged, for instance, to assign all their rights for the whole world and for the duration of the copyright protection. Such an obligation could clearly hinder the freedom of right-holders to "shop around" for the services of collective management societies in other Member States in respect of certain categories of rights or in respect of the exploitation of their rights in some countries.⁸⁸ Moreover, such an obligation could hamper the exploitation of works in the digital environment by preventing right-holders from managing certain rights individually or from contracting directly with users by means of Digital Rights Management systems.

To summarize, the European legislator has in respect of the regulation of the cross-border licensing issue essentially two choices. Either, he decides to implement Option 2, thereby eliminating territorial restrictions and discriminatory provisions in the reciprocal representation agreements concluded between collective management societies. In this case, the European legislator may need to solve existing disparities in the laws of the Member States concerning the good governance of collective management societies in their relationship with *right-holders*, since discrepancies in the acquisition or management or enforcement of rights may cause obstacles to the free movement of goods and the provision of services. Or, the legislator decides to implement Option 3, thereby giving right-holders the choice to authorize a collective management society of their choice to manage their works across the entire EU. In this case, the European legislator may need to solve existing disparities in the laws of the Member States concerning the good governance of collective management societies in their relationship with *users*, where discrepancies in the regulation of tariffs and licensing conditions could create obstacles to the free movement of goods and the provision of services.

In general, competition authorities are not equipped to supervise the good governance of collective management societies, since their primary mandate is to ensure the maintenance of a competitive market and not to control the efficiency, transparency, accountability and non-discrimination of individual undertakings. Since the tools currently available for the control of the activities of collective management societies are limited to the rules on competition law, an argument could be made in favour of the establishment of a regulatory framework with respect to the good governance of collective management societies. Collective management societies could be subject across the European Union to positive requirements to ensure their efficiency,

⁸⁷ See M.J. Freegard, "Quis Custodiet? The Role of Copyright Tribunals" (1994), *European Intellectual Property Review* 286.

⁸⁸ See *Greenwich Film Production v. SACEM and Société des Éditions Labrador*, [1979] E.C.R. 3275 [*Greenwich Film Production*]. See also Fine, *supra* note 12 at 14.

transparency, accountability, and non-discrimination.⁸⁹ In addition, the establishment of an easily accessible dispute settlement mechanism competent to hear any individual cases involving a collective management society – whether the complaint is instituted by a right-holder or a user – would certainly be in the interest of all stakeholders.

4.2 *The harmonization through legislative action*

The European Commission expressed its clear intention to adopt a legislative instrument, most probably in the form of a directive, to tackle the problems in the field of collective rights management. A Community framework directive would provide for common minimum rules on how collective management societies should account for revenue collected, how they should distribute the revenues among right-holders – including right-holders in other EU Member States – and how the collective management of rights should be organized. This Section examines whether such instrument can cater the needs for harmonization in the field. In this respect, a review of the question of whether the adoption of a legislative instrument would be in conformity with the basic requirements of the EC Treaty seems appropriate,⁹⁰ since these requirements determine to a large extent the limits to Community action. Accordingly, we must find out whether the Community legislator has the power to establish the intended legislative instrument and to what extent it may exercise these powers under the principles of subsidiarity and proportionality.

4.2.1 The attribution principle

Any new piece of Community legislation must comply with the principle of attributed powers, as set out in the first paragraph of Article 5 of the EC Treaty: “The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein”. This provision delineates the powers of the Community from those of the Member States: if no powers have been conferred upon the Community, the powers shall remain with the Member States.⁹¹ The Community powers are restricted to a number of specific purposes. The Community legislator, therefore, has no general power to act. It may act only (a) if and insofar as powers have been conferred upon it by the provisions of the EC Treaty, and (b) with a view to realize the EC objectives.⁹² This principle thus sets the boundaries within which harmonization can be governed at the Community level.

In principle, harmonization must be correlated to the achievement of certain objectives. Harmonization is not an end in itself.⁹³ This rule is derived from Article 3(1)(h) of the EC Treaty, which states that the laws of the Member States can only be approximated “to the extent required for the functioning of the common market”. But what objective would be achieved by a harmonization in the field of collective rights management? According to the Communication, in

⁸⁹ Guibault, *supra* note 2; and Koelman, *supra* note 12 at 46 (who describes that economical theories predict that monopolies, especially the *de jure* monopolies, can become lazy and arrogant and that therefore additional supervisory rules are required).

⁹⁰ See in this respect: *Les Verts v. Parliament* (1986), *E.C.R.* 1339, at para. 23.

⁹¹ See K. Lenaerts and P. van Nuffel, *EUROPEES RECHT IN HOOFDLIJNEN*, 2nd Edition. (Antwerpen-Apeldoorn: Maklu, 1999), 911 at 136.

⁹² See L.A.J. Senden, *SOFT LAW IN EUROPEAN COMMUNITY LAW: ITS RELATION TO LEGISLATION*. (Nijmegen: Wolf Legal Publishers, 2003), 558 at 64.

⁹³ See W.T. Eijsbouts, J.H. Jans and F.O.W. Vogelaar, *ALGEMEEN DEEL VAN HET EUROPEES RECHT*. (Groningen: Europa Law Publishing, 2004), 390 at 91.

which the Commission sought to provide arguments for a possible legislative action,⁹⁴ the aim would be to achieve a genuine Internal Market for both the off-line and the on-line exploitation of copyright and related rights.⁹⁵

The general legal basis for the pursuit of such an "internal market objective" can be found in Article 95 of the EC Treaty. According to this provision, measures may be adopted "for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the Internal Market". In other words, the measures taken by the Community legislator must purport to iron out the differences in the legislation of the Member States that are relevant to the establishment and functioning of the Internal Market.⁹⁶ In addition, the European legislator may invoke Article 47(2) in conjunction with Article 55 of the EC Treaty as a basis to a legislative action, since collective management societies are generally held to participate in the commercial exchange of "services" in the meaning of Article 50 of the Treaty.⁹⁷ Directives may therefore be issued "for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as [service providers]". Again, these provisions intend to confer on the Community legislator specific powers to adopt measures intended to improve the functioning of the Internal Market.⁹⁸ Consequently, any measure adopted with respect to collective management societies must contribute to the well functioning of the Internal Market.⁹⁹

The European Court of Justice has consistently held that a measure may satisfy this test in two ways: (1) by removing disparities between the laws of the Member States that are liable to create or maintain distorted conditions of competition, and (2) by removing disparities between the laws of the Member States that are liable to hinder the free movement of goods or the freedom to provide services within the Community.¹⁰⁰ The Court also held that the choice of the legal basis for a measure may not solely depend on an institution's conviction as to the objective pursued. The choice of the legal basis is not a matter of discretion;¹⁰¹ it must be based on objective factors, which are amenable to judicial review, including in particular the aim and content of the measure.¹⁰²

For our purposes, it follows that harmonization in the field of collective rights management through legislative action by the Community legislator may validly rest on Article 95 of the EC

⁹⁴ See F. Gotzen, "Collective Administration of Copyright and Community wide licensing: Copyright and Competition Law revisited" (2004), Conference on Copyright for creativity in the enlarged European Union, Dublin, June 2004, at 7, online: <http://europa.eu.int/comm/internal_market/copyright/docs/conference/2004-dublin/gotzen_en.pdf> (last visited: October 5th, 2005).

⁹⁵ See Chapter 3.6 of the Management of Copyright Communication, *supra* note 7.

⁹⁶ A. Dashwood, 'The Limits of European Community Powers' (1996), *European Law Review* 113 at 120.

⁹⁷ See: *IFPI Simulcasting*, *supra* note 1 at para. 59 (with reference to *BRT v. SABAM*, *supra* note 10, *Musik-Vertrieb Membran GmbH v. GEMA*, *ibid.*, and *GVL v. Commission*, *ibid.*).

⁹⁸ See: *Germany v. European Parliament and Council*, (2000) I E.C.R. 8419, at para. 87.

⁹⁹ Dashwood, *supra* note 92 at 120.

¹⁰⁰ Category (1) goes back to *Commission v. Council*, (1991) I E.C.R. 2867 at para. 15, and category (2) to *Spain v. Council*, (1995) I E.C.R. 1985 at para. 33. In general, see also *Germany v. European Parliament and Council*, *supra* note 94 at paras. 76 – 95 and *British American Tobacco (Investments) and Imperial Tobacco*, (2002) I E.C.R. 1453 at para. 60.

¹⁰¹ See Dashwood, *supra* note 91 at 116.

¹⁰² See: *Commission v. Council*, (1987) E.C.R. 1493 at para. 11; and *Commission v. Council*, *supra* note 96, at para. 10.

Treaty and/or Article 47(2) in conjunction with Article 55 of the EC Treaty, if the said action, judged in the light of its aim and content, intends to improve the conditions for the establishment and functioning of the Internal Market, by actually contributing to the removal of distortions of competition or to the elimination of actual or potential obstacles to the free movement of goods or to the freedom to provide services, provided that this is supported by objective criteria. In the Communication, the Commission reasons that harmonization is necessary to remove disparities between the national regulations of the Member States that are liable to hinder the free movement of goods and the freedom to provide services.¹⁰³ In this respect, the European Court of Justice has recognized the possibility that the activities of collective management societies “may be conducted in such a way that their effect is to partition the common market and thereby restrict the freedom to provide services [...]”.¹⁰⁴

Contrary to the Commission, it could be argued that harmonization may also be necessary to remove disparities between the national regulations of the Member States that are likely to create or maintain distorted conditions of competition. Disparities that relate to the regulation of the transparency of the general and financial policy of collective management societies, for example, do not seem to create too many obstacles to the free movement of goods or to the freedom to provide services. They may, however, contribute in maintaining distorted conditions of competition in cases where right-holders are prevented from "shopping around" for the services of collective management societies. This falls squarely within the bounds of the Commission's powers, since the removal of distortions of competition is also a valid ground for harmonization.

Finally, the question must be asked whether the Community is also empowered to establish common rules on the external control of collective management societies. Although harmonization of these rules does not aim as such at the establishment and functioning of the Internal Market, since it does not directly remove distortions of competition or eliminate obstacles to the free movement of goods or services, it would, however, add much value to an efficient control of collective management societies, if there was a higher degree of efficiency and convergence with respect to these rules. In other words, a level playing field in the external control would be desirable in order to realize a true Internal Market in collective rights management. In our opinion, it can therefore be argued that harmonization of these rules may be justified under the "*effet utile* doctrine", according to which the powers conferred upon the Community must be given full effect to realize the objectives of the EC Treaty.¹⁰⁵

4.2.2 The subsidiarity principle

A subsequent condition in the establishment of Community legislation is marked by the principle of subsidiarity. Once the existence of a Community power has been established, this principle of subsidiarity determines whether that power may be exercised in a given instance.¹⁰⁶ In other words, this principle specifically guides the decision of whether Community powers should

¹⁰³ This reasoning can be found throughout the Management of Copyright Communication, *supra* note 7 and in particular in Chapters 1.2, 3.5 and 3.6.

¹⁰⁴ See *Greenwich Film Production*, *supra* note 84 at para. 12.

¹⁰⁵ This "*effet utile* doctrine" is developed in European case law and goes back to *Fédération charbonnière de Belgique v. ECSC High Authority*, (1954-1956) E.C.R. 245, and *Walt Wilhelm and others v. Bundeskartellamt*, (1969) E.C.R. 1. See Senden 2003, *loc.cit.*, footnote 87, p. 66-67.

¹⁰⁶ See Senden, *supra* note 88 at 75.

actually be used, or whether the objective to be attained could also be achieved by the Member States individually, using their own powers.¹⁰⁷

According to Article 5(2) of the EC Treaty, the Community level is the appropriate level “if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community”. In order to examine whether this condition is fulfilled, three guidelines have been formulated in the Protocol on subsidiarity and proportionality annexed to the EC Treaty.¹⁰⁸ According to these guidelines, Community action may be justified if (a) the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action of the Member States; (b) action by Member States alone or lack of Community action would conflict with the requirements of the EC Treaty or would significantly damage Member States’ interests; and (c) action at Community level would produce clear benefits by reason of its scale or effects compared with action at Member State level. In this respect, the Protocol emphasizes that the Community may legislate only to the extent necessary and that its measures should leave as much scope for national decision as possible.

In the present context, the question arises of whether the European Community would be the appropriate level to harmonize the regulatory framework with respect to collective rights management among the different Member States, or whether the matter should be left to the Member States to take appropriate action. In general, little debate should be expected as to whether the Community level would be the appropriate level for a harmonization in this field. Since all collective management societies in Europe operate on the basis of the national law and with respect to the territory of the Member State in which they are established, it would only increase disparities between Member States if the issue was left to them. In order to achieve a true level playing field in the collective management of rights in Europe, action at the Community level would thus be required.

This does not mean, however, that the Community level would necessarily be the appropriate level to deal with all the issues in this area. It seems, for example, that there are valid reasons to leave regulation to the Member States, as far as a harmonization of specific rules on the "external control" of collective management societies is concerned. Although it may be possible for the Community legislator to generally instruct the Member States to establish specific supervisory bodies and to set up additional dispute settlement mechanisms, the details thereof can, in our opinion, be satisfactorily regulated by action of the Member States, as long as the authorities in each Member State control the same set of good governance rules. The Commission seems to have a similar opinion, where it indicates in its Work Programme 2005 that the purpose of an eventual legislative proposal would not be to harmonize all the rules governing collective management societies, but “to impose obligations necessary to the smooth functioning of the Internal Market without prejudging the legal mechanisms to be used by Member States in order to implement them”.¹⁰⁹

4.2.3 The proportionality principle

Once it has been established that the Community has power to act and indeed may exercise this power in a given instance, yet another requirement must be fulfilled before legislation may be adopted by the Community legislator. Hence, Community action must comply with the principle

¹⁰⁷ See Dashwood, *supra* note 92 at 115.

¹⁰⁸ Protocol (30) on the application of the principles of subsidiarity and proportionality (1997), as has been annexed to the EC Treaty by the Treaty of Amsterdam 1997.

¹⁰⁹ See: Commission Work Programme, *supra* note 8 at 16.

of proportionality, as laid down in the third paragraph of Article 5 of the EC Treaty. This principle of proportionality concerns the intensity of Community action: “Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty”.¹¹⁰

The European Court of Justice has consistently held that the principle of proportionality is one of the cornerstones of Community law. By virtue of this principle, Community action must be appropriate and necessary in order to achieve the objectives legitimately pursued by it. This means that the action must be suitable and reasonably effective. In addition, disadvantages caused by the action must not be disproportionate to the objectives pursued. Accordingly, the positive effects and the adverse effects of the action must be balanced. Finally, if there are other, equally effective, but less detrimental means to achieve the aim in question, the Community legislator must have recourse to those means. In other words, under this final requisite, the action must be necessary and indispensable.¹¹¹

In the context of the possible establishment of a Community framework in the field of collective rights management, the practical importance of the application of the principle of proportionality is that the Community legislator must not only take account of the Internal Market objectives, but that it also has to consider other issues and interests involved. It seems essential that the Community legislator shall at least take account of the impact that the intended framework may have on the nature of the subject matter, on the cultural and social aspects, as well as on the well-established legislation of the Member States.

In our opinion, the Community legislator cannot harmonize the field of collective rights management without taking due account of the collective management societies’ particular responsibility for cultural and social aspects. According to Article 151 of the EC Treaty, the Community has a general aim to “contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore”.¹¹² In this respect, the Community legislator is generally required to “take cultural aspects into account in its action under other provisions of the Treaty, in particular in order to respect and to promote the diversity of its cultures”.¹¹³ As a consequence, the Community legislator is responsible for ensuring that the national and regional diversity of the cultures of the Member States will be respected. Since collective rights management is considered to be an important factor in influencing the growth of cultural and linguistic diversity,¹¹⁴ it is apparent that this deserves appropriate attention.¹¹⁵

While respecting Community law, the Community legislator should also take care to respect the well-established national arrangements as well as the organization and working of Member States’ legal system. That is explicitly stated in the Protocol on subsidiarity and proportionality.¹¹⁶ However, since the rules regulating collective management societies vary from one Member State to another because of historical, legal, economic and, above all, cultural reasons,¹¹⁷ it shall not be

¹¹⁰ See Dashwood, *supra* note 92 at 115.

¹¹¹ See *The Queen v. Ministry of Agriculture, Fisheries & Food, ex parte FEDESA & others*, (1990) I E.C.R. 4023 at para. 13; and Senden, *supra* note 88 at 82.

¹¹² Article 151(1) of the EC Treaty.

¹¹³ Article 151(4) of the EC Treaty.

¹¹⁴ See: Community Framework Resolution, *supra* note 6, No. 22.

¹¹⁵ See Dietz, *supra* note 69 at 811-14 (which states that a clear focus on the cultural and social aspects can contribute to a “modern justification of copyright” that may help to defend the existence of collective management societies and their regulation).

¹¹⁶ Point 7 of the Protocol on subsidiarity and proportionality, *supra* note 104.

¹¹⁷ See: Community Framework Resolution, *supra* note 6, Nos. 26 and 35.

easy to respect all these different national legal systems. As an example, we can mention the reserve funds that are set up by collective management societies in most continental European countries, for which deductions are made for social and cultural purposes. Should these "well established national arrangements" be respected by the Community legislator, even though several objections have been made against them, for example by the UK where such reserve funds do not exist?¹¹⁸ Since the Commission is considering the introduction of an obligation requiring collective management societies to indicate clearly the deductions they make for social and cultural activities,¹¹⁹ it would appear that the Commission intends to respect the reserve funds indeed, albeit under certain conditions.

In summary, the principle of proportionality requires the Community legislator to show restraint in all its harmonization efforts. It must carefully weigh the measures it intends to establish and try to find an appropriate balance between these measures and the various other issues and interests involved. Additionally, the principle of proportionality also requires the Community legislator to show reserve as regards the form of Community action to be taken. According to the Protocol on subsidiarity and proportionality, the form of Community action should be as simple as possible: other things being equal, directives should be preferred to regulations and framework directives to detailed measures.¹²⁰ In other words, when there is a choice between several appropriate measures, recourse must be had to the least onerous. In this respect, the Commission has already indicated that, if it indeed takes legislative action, a directive would be preferable to a regulation,¹²¹ and moreover, that a framework directive seemed to be more appropriate than a detailed measure.¹²²

4.3 *Alternatives to legislative action*

Instead of adopting a directive, the Commission could also issue guidelines, including a minimum set of guidelines on good practices regarding the collection and distribution of royalties, in particular regarding the distribution of royalties to right-holders from other EU Member States. These guidelines would subsequently have to be transposed into a code of conduct by the collective management societies.¹²³ The Community legislator has increasingly used soft law as an alternative to legislation.¹²⁴ The development of this practice can be derived from the Protocol on subsidiarity and proportionality, since it explicitly provides that the Community should legislate only to the extent necessary, that its measures should leave as much scope for national decision as possible and that the form of Community action should be as simple as possible.¹²⁵

¹¹⁸ See, e.g., H. Cohen Jehoram, "De toekomst van auteursrechtenbureaus" (2000), *Informatierecht/AMI* 156, at 160-161; H. Cohen Jehoram, "The future of copyright collecting societies" (2001), *European Intellectual Property Review* 134, at 137-38; and M. Ficsor, "Collective Management of Copyright in the International Environment" (2003), *Zeitschrift für Urheber- und Medienrecht* 3, at 9-11.

¹¹⁹ See T. Lüder, "Legislative and Policy Developments in the European Union" (2005), Thirteenth Annual Conference on International Intellectual Property Law and Policy, Fordham University School of Law, New York, April 2005, online:

<http://europa.eu.int/comm/internal_market/copyright/docs/docs/fordham2005_en.pdf> (last visited: October 5th, 2005).

¹²⁰ Protocol on subsidiarity and proportionality, *supra* note 104, point 6.

¹²¹ Commission Roadmaps, *supra* note 74 at 35.

¹²² Commission Work Programme, *supra* note 8 at 16.

¹²³ Lüder, *supra* note 115.

¹²⁴ Senden, *supra* note 88 at 21-23.

¹²⁵ *Ibid.* at 21. See also Points 6 and 7 of the Protocol on subsidiarity and proportionality, *supra* note 104.

The question that arises in this context is to what extent harmonization in the field of collective rights management could be achieved through the use of soft law, more in particular, through the issuance of guidelines to be transformed into a code of conduct.

In order to answer this question, one must first determine what the Commission exactly means by the issuance of "guidelines". Guidelines are not uncommon in Community law, although they do not appear in the list of general Community instruments in the EC Treaty.¹²⁶ The term "guidelines" can generally be understood as referring either to rules of conduct that aim to provide guidance as to the interpretation and application of Community law, and more particularly, to indicate the way in which a Community institution will apply Community law provisions in individual cases (*i.e.* the use of guidelines as a decisional instrument),¹²⁷ or to rules of conduct that primarily aim to steer or guide behaviour or action prior to, at the same time as, subsequent to, or independently of Community legislation (*i.e.* the use of guidelines as a steering instrument).¹²⁸ Accordingly, as the *acquis communautaire* does not yet contain legislation governing rules in the field of collective rights management, the term "guidelines" should in this context be interpreted in the latter meaning, *i.e.* as a steering instrument.¹²⁹

Since guidelines do not constitute a recognized general Community instrument and, therefore, have only gained *de facto* significance in the Community legal order,¹³⁰ the question can be raised, on which legal basis guidelines may be adopted by the Community institutions. According to Senden, a specific legal basis is not required for the adoption of soft law. Although the author argues that the attribution principle does indeed also apply in the case of adoption of Community soft law, it would be sufficient "that one [could] speak of a power implied in another power or task that has been specifically assigned to a Community institution".¹³¹ In this respect, it must also be noted that several provisions of the EC Treaty leave room for the adoption of soft law instruments, where they contain very general terms regarding the way in which the Community institutions should act.¹³² In this respect, we may, for instance, point to Article 95 of the EC Treaty, which allows "measures" to be adopted, without any specification of the instruments that may be used. Since the Commission has announced that these guidelines should be designed in such a way that collective management societies can easily transform them into a "code of conduct", the rules of conduct to be laid down in these guidelines must be naturally intended to influence the behaviour of their addressees. This means that the rules need to be of a normative nature.¹³³ In this respect, guidelines incorporating rules on the good governance of collective management societies should not be too difficult to establish.

The question remains, however, whether possible future guidelines may also contain rules on the establishment of adequate mechanisms of external control. The answer to this question depends to a large extent on to whom these possible guidelines are to be addressed: to the collective management societies or to the Member States? If the Community legislator merely aims at the coordination of self-regulatory action, the guidelines may be addressed to the collective management societies only. This way, future guidelines would contain no rules on the external

¹²⁶ Article 249 of the EC Treaty mentions regulations, directives and decisions (hard law) and recommendations and opinions (soft law) only.

¹²⁷ See Senden, *supra* note 87 at 156-57 (to be read in conjunction with p. 137-140).

¹²⁸ *Ibid.* at 165-69.

¹²⁹ Note, however, that "guidelines" may also be adopted under the heading of other soft law instruments.

¹³⁰ Senden, *supra* note 87 at 169.

¹³¹ *Ibid.* at 340-41.

¹³² *Ibid.* at 52.

¹³³ *Ibid.* at 249.

control of collective management societies. On the other hand, if the Community legislator also wants to achieve a certain level playing field in the external control of the collective management societies, it needs to coordinate legislative action at the Member State level and must therefore address part of these guidelines to the Member States as well. Given the two available options, it would be desirable that each Member State regulate the control of collective management societies in their relationship with both right-holders and users. At least part of the guidelines would therefore also have to be addressed to them.

One of the benefits of using a soft law instrument over the use of a legislative instrument is that it is possible to define more precisely the intention of the Community legislator regarding the rules to be established. For instance, whereas a possible framework directive may generally instruct the Member States to establish external control mechanisms without addressing exact details of such mechanisms, guidelines may provide additional information on the structure of an external control mechanism, for example, as regards the powers of the supervisory bodies, their composition and the binding or non-binding nature of their decisions. Of course, Member States remain free to choose whether to follow such detailed instructions and even whether to establish external control mechanisms at all. But if most Member States indeed paid attention to it, this could result in an approximation of the laws of the Member States on aspects, which could hardly be harmonized through the use of a legislative instrument.

On the other hand, the use of a soft law instrument also has its drawbacks. The downside of using soft law instruments is, in particular, that they are not directly enforceable in legal terms since they are voluntary measures. In principle, guidelines may be ignored by their addressees. The risk is that they miss their goal. These drawbacks should not be over-exaggerated. Although soft law instruments can generally be characterised by their lack of inherent legally binding force, that is not to say that these instruments are incapable of having an incidentally legally binding force or certain legal effects.¹³⁴ In the *Grimaldi* case, for example, the European Court of Justice ruled that national courts may be bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or Community law.¹³⁵ Although a recommendation is a soft law instrument, it cannot, therefore, be regarded as having no legal effect at all.

Does this mean that the same may apply to guidelines? Although the case law in this respect is scarce, we may indeed argue that this is the case, since guidelines fulfil a similar function as recommendations, in the sense that they too lay down normative, general and external rules of conduct.¹³⁶ Accordingly, to the extent that the guidelines lay down normative rules of conduct for collective management societies, they may have an incidentally legally binding force. As we have seen, this would at least be the case where the guidelines provide rules on the good government of collective management societies. It seems therefore that both Community courts and national courts could refer to these guidelines in their interpretation of Community law and national law.

It is also worth pointing out that if the guidelines do not achieve the desired effects within a reasonable delay, the Community legislator can always decide to adopt a Community legislative framework. In this respect, if the European legislator chose to proceed through the adoption of guidelines, it would be advisable to include a deadline for their implementation into codes of conduct. In other words, the European legislator should prescribe a certain delay within which

¹³⁴ *Ibid.* at 22 and 52 and, in detail, at 261-458.

¹³⁵ See: *Grimaldi v. Fonds des maladies professionnelles*, (1989) E.C.R. 4407 at para. 18. See, e.g., F. Beveridge and S. Nott, 'A hard look at soft law', in: P. Craig & C. Harlow (eds.), *LAWMAKING IN THE EUROPEAN UNION*. (London: Kluwer Law International, 1998), 548 at 290.

¹³⁶ See Senden, *supra* note 87 at 467.

collective management societies would have to transform the guidelines into a code of conduct. In summary, it is argued that guidelines could be used as a complement to Community legislation in order to achieve proper harmonization in the field of collective rights management.

5. Conclusion

The discussions around the establishment of a European legal framework for collective management societies have shifted over the past few years from the wish to harmonize rules on the good governance of collective management societies to the need to solve the more pressing multi-territorial licensing issues. In this respect, the European Commission has argued that effective structures for the cross-border collective management of copyright for legitimate online music services require regulatory intervention. The main reason advanced for this lies in the fact that the market has failed to produce effective structures for cross-border licensing and cross-border royalty distribution; and that it has not rectified a series of contractual restrictions preventing authors or other right-holders from seeking the best collective rights management service across national borders.

On 18 October 2005, the European Commission issued a Recommendation on collective cross-border management of copyright and related rights for legitimate online music services.¹³⁷ Considering the Commission's repeated intention to regulate the matter by means of a directive, the adoption of a soft law instrument came somewhat as a surprise. Less surprising is the fact that the Commission decided to favor Option 3 of its Staff Working Document, to give right-holders the choice to authorize a collective management society of their choice to manage their works across the entire Union. The Recommendation is therefore addressed to the Member States and to "all economic operators which are involved in the management of copyright and related rights within the Community."

The Recommendation sets out principles with respect to the good governance of collective rights management societies and the multi-territorial licensing of legitimate online music services. Member States are invited to take steps necessary to facilitate the growth of legitimate online services in the Community by promoting a regulatory environment which is best suited to the management, at Community level, of copyright and related rights for the provision of legitimate online music services. The Recommendation further contains a number of requests directed to collective right managers. It emphasizes for example that right-holders should have the right to entrust the management of any of the online rights necessary to operate legitimate online music services, on a territorial scope of their choice, to a collective rights manager of their choice, irrespective of the Member State of residence or the nationality of either the collective rights manager or the right-holder.

Right-holders should, in addition, be able to determine the online rights to be entrusted for collective management, the territorial scope of the mandate of the collective rights managers. 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 collective rights manager, irrespective of the Member State of residence or the nationality of either the manager or the right-holder. This entails that where a right-holder has transferred the management of an online right to another collective rights manager, without prejudice to other forms of cooperation among rights managers, all collective rights managers concerned should ensure that those online rights are withdrawn from any existing reciprocal representation agreement concluded amongst them.

¹³⁷ 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 October 2005.

Collective rights managers are also urged under the Recommendation to inform right-holders and commercial users of the repertoire they represent, any existing reciprocal representation agreements, the territorial scope of their mandates for that repertoire, the applicable tariffs and any changes to the above. Collective rights managers are invited to abide by the principle of non-discrimination in the grant of licenses to commercial users as well as in their relationship with right-holders. Royalties should be distributed according to principles of equity and fairness. Collective rights managers should operate in a transparent manner. In particular, they should specify vis-à-vis all the right-holders they represent, the deductions made for purposes other than for the management services provided as well as report on licenses granted, applicable tariffs and royalties collected and distributed. With respect to the establishment of a dispute settlement mechanism, Member States are invited under the Recommendation to provide for effective solutions in particular in relation to tariffs, licensing conditions, entrustment of online rights for management and withdrawal of online rights.

Of course, the Recommendation being a non-binding instrument, the Commission could set no deadline for implementation. The Recommendation does invite Member States and collective rights managers to report, on a yearly basis, to the Commission on the measures they have taken in relation to the Recommendation and on the management, at Community level, of copyright and related rights for the provision of legitimate online music services. The Commission intends to assess, on a continuous basis, the development of the online music sector, in the light of the Recommendation, and to consider the need for further action at Community level.

Only time will tell whether the Recommendation will carry enough weight to bring about the changes envisaged by the Commission with respect to the licensing of legitimate online music services. Time will also tell whether the changes brought about with respect to this narrow aspect of the collective rights managers' activities will spill over to the rest of their activities, thereby eliminating the need for a regulatory instrument on the good governance of collective rights managers. The impact of the principles set out in the Recommendation also remain uncertain particularly with regard to the relationship between collective societies and commercial users.