15 Collective management of copyright and related rights: achievements and problems of institutional efforts towards harmonisation

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Introduction
The European Commission has commented that many aspects of substantive copyright law have now been harmonised and, in order to progress towards a genuine Internal Market, the remaining aspect of intellectual property that needs to be reviewed concerns the rules and conditions of rights management. When discussing such rules and conditions one should start with the acknowledgement that collecting societies are bodies which traditionally are not only in charge of the administration of rights for certain types of protected works, but also play an active and influential role in the enforcement of the now harmonised copyright provisions. Because of such a special role, expectations on the possible initiatives for the harmonisation of rules concerning collective management of rights are high. However, the harmonisation process in its various forms is still characterised by a large degree of uncertainty over the type of initiative that should be undertaken to align some characteristics of collecting societies and ensure that they operate according to common or comparable standards across the EU. Thus, while action at the European level has already started, it is agreed that collective management is still largely a non-harmonised field, where the territorial connotation of copyright instruments remains prevalent even when copyright-protected material is being transferred via the use of cross-border internet platforms.

The current level of harmonisation of collective management has been achieved via different instruments of public intervention. They have involved on the one hand the repeated participation of the Directorate-General for Competition and this has led to decisions being taken by the European Commission acting in its capacity as regional competition authority, and on the other hand the contribution of the Directorate-General for the Internal Market, which also exercised its influence with the effect that several documents were issued by the European Commission in its regulatory capacity.5

In order to provide a satisfactory picture of the aspects that have been subject to harmonisation it is therefore necessary to consider the two streams of initiatives, which have mainly affected the collective management of rights for musical works and sound recordings. However, before analysing the results and prospects of the activities of the Commission, the issue of harmonisation ought to be contextualised by considering collecting societies as institutions realising efficiencies that the individual management of rights would not be able to generate. Comments on the origin and developments of collecting societies will be followed by a short presentation of the economic arguments behind the emergence and the desirability of collecting societies as instruments of copyright enforcement. An illustration of some of the problems arising from the position that collecting societies hold in the market will conclude the first part of the chapter.

The second section of the chapter will focus on reciprocal representation agreements as the traditional instruments that the market offers to meet the demand for multi-territorial multi-repertoire licences. Comments will be offered on how these instruments spontaneously became the favoured method to respond to the challenges of new technologies. The analysis will consider the issues which were raised following the official notifications of the IFPI-Simulcasting Agreement, the Santiago Agreement, and the BIEM-Barcelona Agreement. The complaint concerning the CISAC Agreement will provide an opportunity for discussion on the effective ability of the societies to actually adapt their traditional instruments for both online and offline exploitation. The final review will be of the Cannes Extension Agreement and will consider how supervision on instruments of cooperation among societies fits with the harmonisation of specific commercial aspects of the exploitation of protected works.

The third section of the chapter will analyse the aspects of harmonisation brought forward at European level, specifically via regulatory attempts of the

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Directorate-General for the Internal Market. In the absence of a European Directive addressing collective management of rights as such, the Commission decided to engage in several initiatives aimed at testing the opportunity for precise regulatory intervention, which culminated in a Recommendation being issued in October 2005 and which is now producing its effects and generating varied reactions, for the parties involved as well as among European institutions. A critical analysis of these initiatives provides a guide through the orientation adopted by the Commission towards the introduction of regulatory measures, beside the effort already put into supervising the activities of the collecting societies via competition law. Finally, reflections on the controversy raised by the actions of the European Commission and the corresponding criticism by the European Parliament regarding the Recommendation will provide useful indications on the future prospects of harmonisation for collective management, not only for music exploitation but possibly for all cultural industries relying on the activities of collecting societies.

Emergence and evolution of collective management in the European markets: a mixture of tradition and modernisation

Collective management as a solution towards the full enjoyment of exclusive rights granted under copyright or author’s right legislation in Europe is traditionally carried out by the collecting societies, institutions resulting from a strong cultural, social and legal tradition.6 Quite appropriately, it is contended that ‘[n]o work on music copyright is complete without the story of the French composers in the café’.7 Such a story dates back to 1847 and tells of two composers, Paul Henrion and Victor Parizot, and a songwriter, Ernest Bourget, who happened to be at a café called ‘Les Ambassadeurs’, where an orchestra was playing their works without paying them any remuneration. As a countermeasure to the lack of monetary recognition, they refused to pay their bill for what they consumed on the premises. Hence, they were sued by the owner of the café but they were successful before the court and, as they requested, the owner of Les Ambassadeurs was ordered to pay compensation for the music that had been played. The victory obtained by the three creators provided the precedent for the courts to rule in favour of artists whose music was played in public. Shortly after this episode, in 1850, music composers set up their organisation called ‘Société des auteurs, compositeurs et éditeurs de

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musique’ (SACEM). This story conveys a meaningful lesson on the justification of collective management but also indicates that, due to the expansion of the range of rights that can generate remuneration for right holders, it is natural that the traditional forms of licensing and monitoring uses, collecting fees and distributing royalties are subject to constant review.

**Insights from the economic literature**

The historical emergence of collecting societies is often recalled by economists when demonstrating the existence of an economic rationale which led to the development of institutions administering copyright and related rights in specific countries and for specific categories of works. In fact, it is legitimate to pose the question of why, despite the many differences existing in the rules applying to collecting societies and enforced at the national level, collecting societies have ended up developing along similar paths in most territories, not only in Europe but across the globe. The answer, according to a transaction cost analysis, lies in the economies of scale and scope generated within a single institution administering the rights of right holders with similar interests. More rigorously, ‘administration of copyright of a group of owners increases production efficiency when its cost is lower than that of administering the copyrights of all possible subsets of the same group of owners’. This point is intuitive if one thinks about the cost of managing the rights held in a single protected work in respect of the value of such a work when considered in the context of the worldwide repertoire. The argument about efficiencies being created by collective administration is even more compelling when the other side of the coin is considered, namely the risk that, in the absence of collective administration, transactions could not actually take place because of the prohibitive costs of engaging in such transactions. It has been suggested that, without collecting societies, music rights would experience a ‘tragedy of the anti-commons’, where the exclusivity that each individual right holder is granted prevents all the others from entering into an agreement to do business.

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It is claimed that a coordination mechanism is therefore necessary to avoid the complete absence of transactions and the social cost associated with it.

Economic theory, however, also teaches that the aggregation of power in a few hands entails costs (both expected and real) which need to be systematically compared with the costs of operating alternative solutions. If one accepts that the option of direct management by individual right holders was traditionally not available at the time of the establishment of collecting societies, it means the costs related to not having collecting societies were definitely higher than the costs generated by centralising rights in the hands of an agent in charge of enforcing those rights and defending the interests of the delegating individual or company. Yet markets and regulation had to find some method to minimise the latter category of costs, in order to ensure that the maximum level of remuneration was returned to members of the society.¹³ National and regional authorities had and still have to look for those methods, and act to correct the market failures that collective administration is always likely to generate.

Choosing the optimal method of external control: national versus regional authorities

Control by the public authorities for the achievement of the highest level of efficiency for collecting societies has mainly been exercised by national powers, for example via the imposition of rules of establishment, the requirement to submit tariffs to a public body for approval, the presence of designated institutions to solve disputes that may arise internally between the collecting society and its members, or externally between the society and its users.¹⁴ These are only some of the aspects that, to varying extents, have been regulated either under national copyright law or under other specific measures, and directly apply to the national collecting societies in their specific countries. Within Europe, following the harmonisation of competition principles, the different competition laws of the countries in question also allow the national authorities to exercise an additional form of control. Given that elements of control are already in place, it is legitimate to question the reason for the call for harmonisation of collective management across Europe following the harmonisation of most aspects of substantial copyright law. In answer to that question, it is helpful to compare the character of the uses when collecting societies first emerged, and the uses made nowadays. Collecting societies


¹⁴ See Dietz, A. op. cit., p. 819.
were formed to administer rights arising when works were performed in public before an audience. Nowadays they are expected to provide rapid and efficient solutions for internet uses that make works available everywhere in the world. The differences are clear.\(^1\)

The European Commission, in 2004, pointed to the situation created by online uses when it specified that collective management had become relevant for services which (1) have a cross-border character; (2) are provided to nationals of other Member States or persons resident in other Member States; (3) have been provided via the nexus of reciprocal representation agreements between collecting societies, and these agreements have been found to contain restrictions, in terms of territory, nationality and economic residence, which limit the provision of the services in question.\(^2\) The main point is that collecting societies now have an impact which extends beyond their own national territory. Through the nexus of agreements of reciprocal representation, they are able to exploit the works belonging to their repertoire beyond their national boundaries, and they are in charge of licensing foreign repertoires in their own specific jurisdictions. In the light of these aspects, the Commission maintained that collective management could not remain a matter that was solely under the supervision of national authorities. Hence action had to be taken by the European authorities to address the traditional market structure and the way the administration of foreign royalties was commonly carried out. This could be done under Article 12 (which prohibits any discriminations on grounds of nationality) and Article 49 (which prohibits restrictions on the freedom to provide services) of the EC Treaty. In performing the necessary subsidiarity test, the Commission believed that ‘Member States acting alone within the confines of national copyright law would be able to regulate the activities of CRMs [Collective Right Managers] within their national borders but not in relation to the cross border provision of services’,\(^3\) which arguably is the field where intervention from the European authorities is required. As far as the necessity for intervention is concerned, the Commission submitted that online music services in particular do require regulatory action, ‘because the market has failed to produce effective structures for cross-border licensing, cross-border royalty distribution and 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’.\(^4\) Taking into consideration the need to readdress the situation and the demonstration that action by

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\(^1\) Lüder, T., *op. cit.*, pp. 16–18.
\(^3\) Study (2005), para. 1.5.2.
\(^4\) Study (2005), para. 1.5.3.
the European authorities would be justified by the provisions of the EC Treaty, it is now necessary to proceed to an analysis of those steps that have so far been taken by the Commission both in its role as competition authority for Europe and in its regulatory function, to investigate how harmonisation has partly already been achieved and to determine whether more needs to be done in order to fulfil the goals of an efficient Internal Market.19

**Competition law acting towards harmonisation**

Reliance on principles of competition law and, in Europe, on Articles 81 and 82 of the EC Treaty has been, for many years, the only way national and regional authorities could act on the working mechanisms of collecting societies.20 The territorial nature of copyright and the national connotations of the action of collecting societies have never allowed for an extensive homogenisation of operational standards to take place. National authorities exercised, in many cases, some form of control over the societies acting in their specific territory. Only EU competition case law, over the years, has effectively influenced collecting societies in a coordinated manner.

Traditionally, Article 82 has been used to address specific types of behaviour by collecting societies in their relationship with users and in their relationship with their members. In prohibiting abuses of dominant position, competition law has addressed some of the problematic aspects of collecting societies acting as *de facto* (and in certain cases *de iure*) monopolies in their national territories and, for this reason, enjoying the freedom of unilaterally deciding terms and conditions for the delivery of their service, both towards right holders and users. The relevant case law represented an important step in collecting societies being controlled as normal undertakings. It ensured that they acted according to rules and principles aimed at the establishment of a well-functioning Common Market.21 Over time, the lessons from the *GEMA* case imposing sanctions against abusive conditions of membership22 and of

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20 Study (2005), para. 1.5.3.

21 In particular, case law has categorically excluded collecting societies from being undertakings *‘entrusted with the operation of services of general economic interest within the meaning of article 90(2) of the Treaty and that therefore subject to the rules on competition only in so far as the application of such rules does not obstruct the performance of the particular task assigned to [them]’* (Case 7/82, *GVL v Commission*, [1983] ECR 483 para. 32). Therefore competition principles fully apply.

the Tournier case\(^{23}\) on the elaboration of the fees to be charged to users have become a strong deterrent for collecting societies engaging in abuses, as well as a reassurance for both right holders and users that their collecting societies have implemented more efficient measures for the management of the relevant rights.

On the other hand, the intervention of the Commission on matters involving collecting societies has also specifically addressed the relationship of collecting societies with each other. It can be said that, in recent years, the supervision of the Commission has contributed to the harmonisation of collective management in the light of the increasing importance of cross-border uses of the material, and in particular of the need for licensees to obtain multi-repertoire licences, not only in one jurisdiction but in two or more jurisdictions. The focus of the Commission has been the extent of cooperation among collecting societies in the drafting of new licensing solutions for online uses. Inevitably, cooperation became subject to concerns over adherence to Article 81 of the Treaty, which prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.\(^{24}\) This part of the chapter analyses current examples of cooperation among societies, which have been subjected to the scrutiny of the European Commission. It highlights the role of the competition authority not simply in preventing the negative effects of anti-competitive behaviours but also in determining the main elements of new licensing solutions for the digital environment.

**Multi-repertoire and multi-territorial licences under scrutiny**

Case law indicates that reciprocal representation agreements are not always contrary to the law:

Reciprocal representation contracts between national copyright management societies concerned with musical works whereby the societies give each other the right to grant, within the territory for which they are responsible, the requisite authorizations for any public performance of copyrighted musical works of members of other societies and to subject those authorizations to certain conditions, in conformity with the laws applicable in the territory in question, where those contracts have the dual purpose of making all protected musical works, whatever their origin, subject

\(^{23}\) Case 395/87, Ministère Public v Tournier (ECJ), [1989] ECR 2521.

to the same conditions for all users in the same Member State, in accordance with
the prohibition of discrimination laid down in the international conventions on
copyright, and to enable copyright management societies to rely, for the protection
of their repertoires in another Member State, on the organization established by the
copyright management society operating there, without being obliged to add to that
organization their own network of contracts with users and their own local moni-
toring arrangements, are not in themselves restrictive of competition in such a way
as to be caught by Article 85(1) [now 81(1)] of the Treaty. 25

On this ground, many agreements have been drafted and subsequently
amended to adapt them to various types of exploitation, 26 under the supervi-
sion of umbrella organisations such as BIEM and CISAC.

The IFPI-Simulcasting Agreement
The IFPI-Simulcasting Agreement was submitted to the attention of the
European Commission in November 2000 by IFPI (International Federation of
the Phonographic Industry) on behalf of several record producers’ collecting
societies from several countries, coming from both inside and outside the EU.
IFPI, in accordance with Article 14 of Regulation No. 17, was seeking nega-
tive clearance, or an exemption under Article 81 (3) of the EC Treaty. The
model agreement would have enabled each of the participating societies to
authorise the simulcasting of sound recordings belonging to the repertoire of
the other contracting party, or when claiming equitable remuneration to collect
such remuneration. 27 Tariffs would then have been calculated in accordance
with the ‘country of destination’ principle. In particular, the simulcasting tariff
for multi-repertoire multi-territorial licences had to be based on those pre-
determined national tariffs which, when aggregated, constituted the global
licence fee valid for each contracting party. This way of designing the tariff had
the effect, according to the Commission, of restricting competition within the
meaning of Article 81 (1). The criticisms raised by the Commission referred in
particular to the impossibility of distinguishing between the element of the
tariff that would have gone towards the royalty distributed to right holders, and
the element of the tariff that would have contributed to the administration fee
for the society performing the different tasks for which it had been appointed.
In fact, it was argued, charging the same administration fee would not have
reflected the economic implications of the various administration tasks, as each
society in its specific country was likely to bear different costs.

25 Joined cases 110/88, 241/88 and 242/88, François Lucazeau and others v
Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others [1989]
ECR 2811.
26 Lüder, T., op. cit., p. 41.
The parties submitted that their criteria for formulating the global licence fee were indispensable for the preservation of their members’ interest. It was accepted on the one hand that, if each party could have granted multi-repertoire multi-territorial licences and decided its own fees, it would have had the incentive to lower prices to appropriate the largest possible slice of the market, even beyond what is efficient for a service which runs on a system of low costs per marginal transaction but high fixed and sunk costs. On the other hand, users would have had the incentive to engage in ‘forum shopping’ and obtain a licence from the society which charged the lowest fee. Ultimately, the result would have been that all contracting parties would have reduced their fees, with a negative effect on the remuneration returned to right holders. Societies would have had no reason to be part of an agreement that did not protect them against this possibility.28

The question was to what extent the risks of price fixing could be balanced against the efficiency gains that the agreement could have generated, and whether it was possible to diminish that risk through the introduction of modifications to the way tariff levels were formulated. The parties agreed to change the notified agreement in April 2002 and offered to identify the royalty element and the administration fee separately when charging a licence fee to a user.29 In this way, a society granting a multi-repertoire multi-territorial licence would have to charge an aggregated fee in accordance with the predetermined royalty element of the other societies and its own level of administrative fee, which reflected the actual cost of carrying out the administration service. This modification satisfied the Commission which, in fact, concluded that the amended version of the model agreement in question did not eliminate competition in respect of a substantial part of the relevant products and therefore fulfilled the cumulative conditions of Article 81 (3) of the Treaty and Article 53 (3) of the EEA Agreement.

The Santiago Agreement
The Santiago Agreement concerned the standard bilateral agreement designed to govern the relationship of reciprocal representation among performing right societies for the online public performance of musical works on a worldwide basis, via technologies such as webcasting, streaming and online music on demand. The Agreement prescribed that users could obtain a licence either from the society operating in the country corresponding to the URL used by

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28 Ibid. at 79–80.
29 The case not only addressed ‘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’ (Guibault, L. and van Gompel, Stef, op. cit., p. 136).
the content provider, where the primary language used at the site of the content provider is the primary language of that country, or from the society operating in the country where the content provider was incorporated. This means that, according to the Agreement, a user would not have been free to obtain a licence from the collecting society of his choice but was bound to seek clearance from its national collecting society (‘economic residency clause’). This aspect generated concerns in relation to its compatibility with Article 81.30 The Agreement was first notified in April 2001. It was subsequently well received by a number of societies, not only those from the European Economic Association (EEA). Many of them decided to join and operate as one-stop-shops in the granting of online licences. In 2004, a Statement of Objections was issued by the Commission on the basis of the comments received in response to the initial Notice. The Statement of Objections underlined the existing problem with the economic residency clause and the possible negative effect that such a clause would produce, namely of ‘preventing the market from evolving in different directions and crystallising the exclusivity enjoyed by each of the participating societies’.31 The Statement of Objections dictated the future of the Agreement. Only BUMA (Het Bureau voor Muziek Auteursrecht) and SABAM (Société Belge des Auteurs, Compositeurs et Editeurs) provided commitments in reply to the concerns raised by the Commission and undertook not to be party to an agreement concerning licences for online performing rights containing an economic residency clause.32 The Santiago Agreement was not renewed.

The BIEM Barcelona Agreements
In February 2002, the European Commission received notification of a standard bilateral agreement to be entered into by the members of BIEM (the Bureau International des Sociétés Gérant les Droits d’Enregistrement et de Reproduction Mécanique), the umbrella organisation representing and coordinating the activities of mechanical rights collecting societies. The standard form agreement was based on the reciprocal representation agreements already existing between mechanical rights collecting societies, which were amended to cover exploitation of musical compositions by electronic means, including the internet, for example via webcasting technology and on-demand transmission of music by acts of streaming or downloading. The model agreement established that licences had to be granted by the user’s national collecting

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32 Ibid.
society, with wording that reflects the rule of the Santiago Agreement. Also in the case of the BIEM-Barcelona proposal, the customer allocation clause was not well received by the Commission on account of the impact it could have had on the possible partitioning of the market. The agreement has not been renewed and this forced the industry to look at alternative solutions, with regrets from the societies, which decided they then had no choice but to go back to forms of licensing territory by territory.33

Recent proceedings against CISAC
The CISAC Agreement contained the contract proposed by CISAC (The International Confederation of Authors and Composers Societies) as a model for the reciprocal representation contracts between members of the Confederation. It relates to the collective management of copyright for every category of exploitation covered by the public performance right. Following a complaint in April 2003 by Music Choice plc (a digital music broadcaster for Europe and Asia), the Commission issued a Statement of Objections in January 2006 which focused on the compatibility of the treatment of some specific aspects of internet, satellite transmission and cable retransmission of music contained in the model agreement with Article 81 of the EC Treaty and Article 53 of the EEA Agreement. The first matter of concern was the ‘membership clause’, according to which a society which enters into a reciprocal representation agreement cannot, without the consent of the other society, accept as a member any member of the other society, or any natural person, firm or company having the nationality of one of the countries in which the other collecting society operates.34 The second matter is the ‘territoriality clause (or ‘economic residency clause’, as referred to above) whereby commercial users can only obtain a licence from the local collecting society.35 This enables collecting societies to have the exclusive power to grant rights to specific users located in a certain territory, but also limits the validity of such a licence to the domestic territory, even as far as internet, cable retransmission and satellite transmission are concerned. The ‘territorial delineation’36 character of this agreement specifically differentiates it from the Santiago and Barcelona Agreements, which were aimed at the issuing of multi-territorial and multi-repertoire licences.

34 Notice, C 128/12, 9 June 2007, 5 (1).
35 Ibid., at 5 (2).
36 Ibid.
The CISAC proposal makes one reflect on the effective adaptation of the traditional instruments of reciprocal representation to the current needs of those seeking licences for uses that are not necessarily limited to specific territories. The need for modernisation of such instruments is addressed in the concerns raised by the Commission, and dealt with in the commitments offered by the parties. In relation to the ‘membership clause’, CISAC offered not to recommend in relation to the reciprocal representation between the EEA societies, and the signatory societies offered to remove from their bilateral agreements, clauses identical, similar or having the same effect as the clause concerned.37 In relation to the ‘territoriality clause’, CISAC offered not to recommend the granting of exclusive rights between EEA societies, and the signatory societies offered to remove from their bilateral agreements any clause identical, similar or having the same effect as the exclusivity clause contained in the model contract.38 In respect of the specific aspect of ‘territorial delineation’, the societies undertook either to license performing rights directly across the EEA or to mandate, under certain conditions, each signatory society that fulfils specific qualitative criteria39 to grant multi-repertoire multi-territorial licences for internet services, satellite services and cable retransmission services.

It is interesting to note, also in relation to the second part of the discussion concerning the initiatives of the European Commission in its regulatory role, that it was made explicit that the concerns in terms of competition principles were ‘not based on the reciprocal representation contracts as such’,40 but only on some restrictive clauses contained in those contracts. According to this approach, the problem does not rest with the instrument of reciprocal representation agreements, but with the conditions that collecting societies attach to it when coming to define the practical working mechanisms of those agreements.

**Competition issues of certain commercial conditions**

*The Cannes Extension Agreement*

In February 2003, Universal Music BV lodged a complaint with the Commission in relation to an agreement concluded in November 2002 between major music publishers and mechanical copyright collecting soci-

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37 ‘Proposed commitments under Article 9 of Regulation 1.2003’ (7 March 2007), at 4.
38 Ibid., at 3.
39 Ibid., at 5 (IV).
40 Press Release accompanying the Statement of Objections, MEMO/06/63 (7 February 2006).
eties on the administration and issuing of mechanical licences in respect of musical works, for the reproduction of sound recordings on physical carriers. The agreement in question was an extension of a similar agreement signed in 1997 and cleared in 2000, concerning in particular the maximum administration fee that societies could charge their members for the service they provided.

Through the Central Licensing Agreement (introduced in the mid 1980s) it is possible for record companies to obtain a single licence, valid not for a single territory but for the entire EEA. Then, under the nexus of reciprocal representation agreements, each society would be responsible for distributing royalties to the other national mechanical collecting societies for the use made of their respective works. It must be pointed out that the extent to which licences can be negotiated between a user and a mechanical collecting society is limited by reason of the well-established system of concerted negotiation that takes place between BIEM and IFPI contracting on behalf of their members. In considering the restriction that the Cannes extension presented, one should keep in mind that the degree of freedom in the negotiation of the commercial terms of the licence is already limited. Imposing further restrictions on the few elements that can actually provide a minimum degree of flexibility to the transaction could be detrimental, as it would uniformise even further the basis of the relationship between mechanical collecting societies and their users.

Two clauses gave cause for concern in terms of their compatibility with Article 81 of the EC Treaty and Article 53 of the EEA Agreement, as emerged from the preliminary assessment of the Commission.41 On the one hand, clause 9 (a) imposed a prohibition on collecting societies granting rebates to record companies. Specifically, it provided that ‘[g]iven the royalties and other sums collected by the Societies are destined for their members, no Society may under any circumstance give any money to any record company or allow any record company to retain or be paid money in the form of a rebate or reduction of tariff or any other form (by way of lump sum, provision of services or royalty reduction or any other return of value) unless agreed in writing with the relevant member’.42 This clause was introduced as an instrument to increase transparency in relation to the destination of income generated by members of a collecting society but not returned to them because of ‘give away’ strategies. The clause did not completely ban rebates which could still be granted, for example, if they were paid out of

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41 Market Test Notice, OJ 122/2 (23 May 2006).
administration fees. This, however, has limited commercial applicability. Thus, the clause would have made it almost impossible for a record company to obtain a rebate, as consent by the interested parties would have been required. Obtaining such consent is impractical, especially in the many cases where a record company seeks blanket licences, or licences for bundled repertoires.

On the other hand, clause 7 (a) (i) was identified as the ‘non-compete clause’ and provided that ‘[s]hould a Society find it right to enter into what could be considered as commercial activity, the said activity should be carried out only in relation to the promotion of the interests of that Society’s members and should not be in any case detrimental to that Society’s members’ interests and shall never be an activity that would be undertaken by a Publisher or a record company except that the use of de minimis amounts of so-called cultural funds for the purpose of producing or supporting the production of recordings of members repertoire in circumstances where otherwise such recordings would not happen shall be permitted provided that such activity shall not be intended to be profit-making in nature except to the extent that any publisher or other rights holder shall specifically grant the exercise of the rights to the Society in question. Nor shall any Society act in any significant manner where it (or any entity controlled by or in any way associated with it) shall be both licensor and licensee of any rights.’ This clause appeared to have the potential to crystallise the structure of the industry by eliminating a competitive element from the market. While it is unusual to consider that collecting societies may want to diversify their activity and start acting also in the field of music publishing or as record companies, it must be accepted that, within the music industry, collecting societies hold a strong position. For this reason, for example, they are able to negotiate with large users in a way that would be impossible for individual right holders. Indeed, a collecting society can influence the equilibrium of the market. Hence a possible transformation of the society into an entity that also performs the tasks of a record company and/or a publisher must be carefully considered. The reasons for the introduction of clause 7 (a) (i) are partly intuitive. Members of a collecting society such as large publishers may not want the society to compete against them via the use of economic resources that the society derives from the exploitation of its members’ works. However, it is accepted that the revenue produced by the members is not the only source of income that could possibly be used to finance and support the activity of a society acting as publisher or as record company.

Because of the possible anti-competitive effect of these two clauses, the parties offered commitments. Clause 9 (a) was amended so as to allow rebates but only under the condition that they do not reduce the income of the Society’s members. As suggested, they could be paid out of administrative
fees.\textsuperscript{43} Clause 7 (a) (i) was deleted altogether.\textsuperscript{44} As a result, the Commission was satisfied by the commitments and, in accordance with Article 9 (1) of Regulation EC No. 1/2003, made them binding. This brought the action to an end.

On the basis of the outcome of this and the other cases analysed above, one can identify how the scrutiny by the Commission of collecting societies relates to all forms of cooperation among collecting societies, and exercises a considerable influence on several aspects of commercial relevance. For this reason, competition law is not a peripheral instrument of harmonisation but a primary one, and imposes its rhythm and, of course, its delays on the development of the new forms that collective licensing will acquire in the future.

**Regulatory efforts on the management of copyright and related rights**

Beside the intervention of the European Commission enforcing the principles laid down in competition law, another set of initiatives has taken shape to address the issue of collective management and to harmonise some of the aspects concerning the working mechanisms of collecting societies. In the state of the art, different phases can be identified concerning the analysis of such initiatives. First, a preliminary phase acknowledged the need to raise the operational standards of collecting societies and identified the fields in which action at the regional level was thought to be appropriate. In this initial phase, the European Commission issued a Green Paper (1995). This document was the platform for starting a series of initiatives, among them a hearing and a consultation that allowed the European authorities to obtain information from the parties directly involved in the new challenges introduced by rapidly changing technology. A second phase started in 2004 when the Parliament, with a Resolution, and the Commission, with a Communication, took an active role in the definition both of the objectives of a reform for the harmonisation of collective management of rights and of the methods to be adopted in order to achieve such objectives. The third phase relates to the actual formulation of a strategy which the Commission illustrated in the form of a Study and officially addressed to the parties involved in the form of a Recommendation. This third phase is complemented by a document of the European Parliament, consisting of a Resolution which may limit the effects of the Recommendation.

**Declarations of intent: the preliminary phase**

The Green Paper on Copyright and Related Rights in the Information
Society\textsuperscript{45} was issued on 19 July 1995 and provided specific comments on the issue of collective management.\textsuperscript{46} The most relevant aspect discussed in the document concerned the challenges posed by the management of rights for new categories of works, such as multimedia works, the legal implications of which were not fully dealt with by the legal instruments present at the time of the Green Paper. It was stressed that one of the difficulties to be faced in the field of management of copyright and related rights was the administration of licences for multimedia works and, more precisely, the difficulty that users encounter in the identification of the multiple right holders from which they need to obtain a licence.\textsuperscript{47} In facing this difficulty, the temptation to introduce new forms of compulsory licensing might have been strong. However, the direction taken in the Green Paper of 1995 maintained that the exercise of rights via the collecting societies should generally remain voluntary. On the other hand, users would have been assisted if a single entry point, operating for the purpose of identification, was established. It was argued that the necessary provision of information to the user ‘could be possible if different societies operated together and combined their databases, and systems of identification were progressively introduced’.\textsuperscript{48} This would not have diminished the role of collecting societies in the specific markets in which they were established. As for the possible anti-competitive impact of the establishment of a central body dealing with information relevant to multimedia uses, it was argued that a centralised scheme would not necessarily have contradicted competition rules and therefore the overall idea of establishing a one-stop-shop was not to be discarded.\textsuperscript{49}

The Green Paper was the starting point for a discussion on collective management and has been further developed through a series of documents that the European authorities have issued since 1995. Importantly, the follow-up to the Green Paper announced a strategic decision by the Commission in its future steps: ‘the development of assignment schemes, of facilitated individual licensing or of collective licensing should be left, at least for the time being, to the market’.\textsuperscript{50} This was the proposed path, even though the Commission also added that there was a need for a more precise definition of rights and obligations of collecting societies, ‘in particular with respect to

\textsuperscript{45} Green Paper, (COM (95) 382 final), p. 70.
\textsuperscript{46} Guibault, Lucie, and van Gompel, Stef, \textit{op. cit.}, p. 118.
\textsuperscript{47} Green Paper, p. 72.
\textsuperscript{48} Ibid., p. 75.
\textsuperscript{49} Ibid., p. 77.
methods of collection, to the calculation of tariffs, to the supervision mechanisms, and to the application of rules on competition’. Subsequently, the Commission organised a public hearing that took place in 2000. From the hearing, it emerged that further efforts had to be deployed in the elaboration of Community-wide licences which are deemed to overcome in part the problems of territorial licensing. Thus, not only did more centralised forms of management have to be considered, but also the scope of the licences had to be re-addressed in the light of the technological environment in which new uses were arising on a continuous basis.

**An active role in policy-making: the second phase**

*The Resolution of the European Parliament*

The real course of action was taken with the adoption of a Resolution by the European Parliament on 15 January 2004. With this document, the Parliament underlined the importance of the institutional goals that had been pursued by the collecting societies but nevertheless pointed to several problematic aspects of the *status quo*. The Parliament called for some changes to be introduced. In summary: (1) common tools and comparable parameters should become available in order to improve cooperation among the societies; (2) minimum standards for organisational structures, transparency, accounting and legal remedies should be granted to members of the collecting societies; (3) discrimination in handling royalties should be ended, in particular via the discontinuation of type B agreements among national collecting societies for the management of royalties generated by foreign right holders; (4) external control and dispute resolution mechanisms should also be in place and should be economically accessible.

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51 Ibid., pp. 26–7.
54 European Parliament Resolution 2004, No. 28. Adolf Dietz (op. cit., p. 810) underlines this aspect by arguing that ‘in spite of rather critical remarks . . . [the Resolution] is finally sympathetic to the traditional and still necessary role of such societies, including their particular responsibility for cultural and social aspects; in that regard the Resolution even sees them as vehicles of public authorities’.
55 Under type B agreements, ‘no payments are transferred between the contracting organizations; all the income remains in the country where it is collected, and is used in accordance with the rules of the organization of that country’ (Ficsor, Mihály, op. cit., p. 83).
Overall, the Parliament called for several steps to be taken for the purposes of harmonisation, democratization and transparency of collecting societies, notwithstanding the role already played by the competition authorities in preventing abuses. Precisely on the matter of competition, a close link exists between the orientations expressed in the Green Paper and the approach adopted in the Resolution. In both documents it is clear that the role of the competition authorities should remain one of supervision, because "[a] misguided insistence on competition would . . . lead to further fragmentation of the markets, chaos in the clarification of rights and dumping tariffs".

The Communication of the European Commission

Another highly relevant document, issued almost simultaneously with the Resolution, is the Communication of the European Commission dated 16 April 2004 and entitled ‘The Management of Copyright and Related Rights in the Internal Market’. Here the Commission provided a more legal and technical approach to the problematic issues at stake, with particular focus on the digital environment. It mentioned in passing, without thorough analysis, the problematic aspects of collecting societies from the perspective of competition law. Overall, the Commission submitted that a case existed ‘for a legislative approach based on Internal Market rules and principles within the copyright framework’. The legislative approach should have been designed to achieve a level playing field on collective management in the Internal Market, by acting on specific features of collective management, namely (1) the rules of establishment and status of the societies, (2) the relationship between collecting societies and users, (3) the relationship between collecting societies and right holders, and (4) the external control of collecting societies.

On the first point, the Commission wished to implement measures to ensure that the establishment of a collecting society would become subject to similar conditions in all Member States, in respect of the persons that may establish a society, of the status of the institution, and of the necessary proofs of efficiency, operability and accounting obligations. The project by the Commission to make conditions of establishment comparable in the different Member States appeared to be an arduous one, considering that the rules of

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59 See Dietz, op. cit., p. 814.
60 Communication (COM (2004) 261), para. 3.5.
61 Communication, para. 3.5.1.
establishment in the various territories were not only largely different but also well rooted in the legal traditions of the specific countries.

On the second point, namely the relationship between collecting societies and users, the Commission suggested that obligations should be established upon the societies to publish tariffs, grant licences with reasonable conditions and, in general, offer appropriate instruments (arbitration, mediation etc.) for users to contest the tariffs they may be requested to pay. According to the Commission, this was required for the purpose of promoting or safeguarding access to protected works. However, the argument that users’ access must be safeguarded is debatable, as European collecting societies are institutions normally appointed by right holders to manage their rights collectively and owing a fiduciary duty towards them. This takes the discussion to the third aspect, which concerns the relationship of collecting societies with their members.

The Commission insisted on the need for a collecting society to avoid discrimination and ensure good governance, transparency and accountability. It also added that the mandate with which the right holder appoints the collecting society should be flexible, to some extent, in duration and scope, so that, for example, individual management could become an option, should the individual right holder be in a position to rely on digital right management systems to perform the tasks otherwise performed by the collecting societies. While good governance of the societies is in the overall best interests of the parties involved, the impact of increased flexibility in the rules of membership is questionable. It must be recalled that the competition authorities have prevented the continuation of abuses that tied members to their collecting societies and restricted their mobility. However, the risk of excessive mobility should also not be underestimated, in terms of the legal certainty legitimately demanded by users acquiring bundled or blanket licences, and in practical terms for the day-to-day running of a collecting society unable to effectively rely on a consistent volume of members.

Finally, when reflecting on the fourth aspect of the forms of control for collecting societies, the Commission considered it appropriate for external control mechanisms to have similar characteristics in terms of competencies, composition and of the binding or non-binding nature of their decisions. Once again, the characteristics of the different legal systems make it difficult for a reform to rigorously implement a strong and consistent common ground throughout the territories involved. Especially for external control, a non-invasive form of harmonisation ought to be preferred, so that action is dedi-

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62 Communication, para. 3.5.2.
63 See supra, nn 22 and 23.
cated not to changing the nature of the existing mechanisms but to the qualitative improvements of such mechanisms via encouragement coming from national markets and public institutions.

Contributions commenting on the approach taken by the Commission in the Communication were submitted by 107 parties invited to participate in the consultation process. A review of the contributions provided commentators with useful insights into the diversity of opinions and feelings towards the approach adopted by the Commission. The divergent views expressed in the contributions also indicated that the plan to harmonise collective management via the introduction of a Directive was likely to encounter considerable obstacles. Nevertheless, the position of the Commission that legislative action was necessary to implement the changes highlighted in the Communication became part of the Commission Work Programme 2005, which maintained that a Directive would be appropriate: ‘[t]he purpose is not to harmonise all the rules governing collecting 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. A Directive seems the most appropriate way to reach that target.’ The Work Programme 2005 indicated October 2005 as the expected date for the adoption of the proposal.

The third phase: formulating the strategy for collective management of online music rights

The policy options of the European Commission

With its ‘Study on a Community Initiative on the Cross-Border Collective Management of Copyright’ (7 July 2005), the Commission focused its efforts on the cross-border management of legitimate online music services and, more precisely, on finding a solution that dealt with the ubiquity of the internet. The Commission found that the instruments available for cross-border licensing, namely agreements of reciprocal representation between collecting societies,

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65 Commission Work Programme for 2005, ‘Communication from the President in agreement with Vice-President Wallström’, 26 January 2005 (COM (2005) 15 final). See also Guibault, Lucie and van Gompel, Stef, op. cit., p. 140. ‘A directive could have provided for a certain level of harmonisation and legal certainty but it would also have avoided time consuming negotiations and the regulatory over-complexity that the adoption of a regulation is generally likely to produce’ (‘Roadmaps – Commission Work Programme’, p. 35).

were not efficient. On the contrary, they hampered the development of a market for the provision of online music services.\(^{67}\) This appears to be at odds with the view expressed by the Commission on a different occasion when called to provide a judgement on the CISAC system of reciprocal representation.\(^{68}\) Nevertheless, in its regulatory role, the Commission considered it necessary to provide players with the instrument that the market had failed to provide spontaneously, and submitted three possible policy options.\(^{69}\)

**Option 1:** Do nothing. This option is automatically discarded on the ground of the findings that the market has failed to produce effective structures for cross-border licensing.

**Option 2:** Eliminate territorial restrictions and discriminatory provisions in the reciprocal representation agreements concluded between CRMs. This option would improve the traditional instrument of reciprocal representation agreements by offering users the choice to obtain a licence not necessarily from their national collecting society, but from whichever collecting society they wished to bargain with. This would ensure that each collecting society at the national level operates as a one-stop-shop in relation to its repertoire as well as the repertoire of the other collecting societies in the network. However, the intrinsic risk of this policy is that collecting societies might try to obtain the largest possible number of users by lowering the price of their licences. This contradicts the fiduciary duty existing between the society and its members, and would ultimately reduce the remuneration received by the right holders.\(^{70}\)

**Option 3:** Give right holders the choice to appoint collecting societies of their choice to license their rights for online uses for the entire EU. This policy option, for which collecting societies would compete among themselves to be appointed by right holders possessing the most attractive repertoire, was favoured by the Commission. It was considered to be ‘the best model to harness digital technologies to the benefit of right-holders’.\(^{71}\) According to the Commission, Option 3 would also be the most sustainable long-term model for the offline world, even if a realistic timescale for switching from a national-based model to a regional-based (i.e. European) model would not allow for the immediate implementation of the new measures.

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\(^{67}\) European Commission, Study, para. 1.1.4.

\(^{68}\) See *supra*.

\(^{69}\) Study 2005, para. 3.

\(^{70}\) Study, para 4.1.3.

\(^{71}\) Study, para. 3.3.
In offering these three options for consideration, the Commission provided an analysis of their impact in relation to several aspects that were likely to be affected by any attempt at reform, such as the level of legal certainty, the degree of transparency and good governance, the cultural implications, the trade flows, the impact on innovation and growth, and the effect on competition and prices. Interestingly, when reflecting on the prospective role of the existing collecting societies in a reformed scenario, the Study accepted that Option 3 could represent a difficulty for those societies that derive a large portion of their income from licensing foreign repertoire. However, it was argued that Option 3 would not produce such a pronounced result as the extinction of smaller collecting societies. On the contrary, in a situation where societies compete to attract the most profitable right holders, there is room for a small collecting society to appropriate a large portion of the market if the level of efficiency of its services is higher than that provided by a bigger society. In other words, a right holder would not simply be attracted by size but also by the effectiveness of the operational mechanisms of a society. If he observed that a collecting society charged lower fees to its members and/or was more efficient in the distribution of remuneration, he could decide to change his CRM and go with the more efficient one. In this sense, a ‘race to the top’ mechanism would perhaps be encouraged. The final comments in the chapter will indicate why, from a practical perspective, this reasoning may break down.

An instrument of ‘soft law’: the Commission Recommendation

After having firmly supported the view that a Directive was the appropriate instrument to deal with collective management, the approach of the Commission turned to the elaboration of a Recommendation, officially adopted on 18 October 2005. The Recommendation did not exclude a subsequent move towards the issuing of a Directive. However, this would take some time.

The Commission is entitled, according to Article 211 of the EC Treaty, to formulate recommendations on matters dealt with in such a Treaty, ‘if it expressly so provides or if the Commission considers it necessary’. Yet a Recommendation is not a binding instrument, as clearly established under Article 249. Thus, when considering the evolution of the initiatives by the Commission, it is appropriate to wonder to what extent a level playing field on collective management in the Internal Market can properly be established via a Recommendation. In other words, is an instrument of soft law sufficient to

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72 Study, para. 4.11.2.
achieve the goals pursued at the European level? For the analysis that follows it is useful to keep in mind that Recommendations cannot be invoked by individuals, directly or indirectly, before national courts. However, the case law indicates that they ought to be considered by national courts in the interpretation of existing laws.\textsuperscript{74}

The content of the Recommendation includes some fundamental guidelines for Member States and all economic operators involved in the management of copyright and related rights within the Community.\textsuperscript{75} The document does not prescribe the elimination of the system of reciprocal representation agreements but leans towards the proposal of collecting societies competing for the most successful and profitable right holders (Option 3 of the Study).\textsuperscript{76} In this sense, it is recommended that ‘[r]ight-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 right manager or the right holder’.\textsuperscript{77} Mobility of right holders should also be granted, within reason, with the opportunity for them to withdraw their rights upon having served reasonable notice.\textsuperscript{78} This imposes on collecting societies a possibly heavier duty of keeping everyone (right holders, commercial users as well as each other) informed of the changes in the repertoire they represent.\textsuperscript{79} Whether this is feasible and improves the current licensing system is debatable. The aspects of legal certainty and stability of the repertoires are to be carefully evaluated\textsuperscript{80} as they are essential to the ability of all parties involved to enjoy the efficiencies that collective management is expected to produce.

On a different note, the Recommendation also considers the issue of social and cultural deductions. Without altering the situation currently in place, the Recommendation makes it explicit that collecting societies should specify in their membership rules whether cultural and social deductions apply. Moreover, as a form of protection for right holders, the Recommendation insists on the need to eliminate any form of discrimination between different

\textsuperscript{75} Recommendation, No. 19.
\textsuperscript{77} Recommendation, No. 3.
\textsuperscript{78} Recommendation, No. 5 (c).
\textsuperscript{79} Recommendation, Nos. 6 and 7.
categories of right holders. As a form of protection for users, Member States are invited to provide for effective dispute resolution mechanisms. Practical problems of compatibility between the cross-border nature of the licences concerned and the traditional territorial ways of dealing with such matters are likely to arise. On the one hand, how are cultural deductions going to benefit the right holders that have contributed to them but are scattered across different countries? In other words, how is the collecting society going to avoid discriminating in the use of cultural deductions? On the other hand, considering that online licences may cover a number of countries, which dispute resolution instrument would be competent in the cases where one is required? Would it be that of the country where the use has taken place, that of the country where the service provider has its economic residence, or that of the country of the collecting society which has issued the licence? These questions leave scope for discussion among the many parties involved in the process of a reform that does not appear to have reached its natural conclusion just yet.

A first obstacle to the reform: the European Parliament Resolution

The Recommendation by the Commission came up against the institutional obstacle of a disappointed European Parliament that issued a Resolution81, on 13 March 2007, to express its views in relation to the soft law approach adopted by the Commission. The Resolution was based on the Report presented by Katalin Lévai in November 2006.82 A major point of the Resolution is the fierce criticism directed at the Commission, liable for having failed to involve the Parliament when it should have done so. The Resolution indicates that the soft law approach contained in the Recommendation effectively circumvented the democratic process. In fact, it is argued that the Recommendation was not an instrument that merely interpreted and supplemented existing rules but that it went well beyond that. The view of the Parliament is that the Recommendation has already started to influence decisions in the market83 to

83 ‘First experience with the Recommendation shows that E.U.-wide online licensing will be offered by newly created platforms that are jointly operated by existing collecting societies. These platforms pool several publishers’ or societies’ repertoires and license them in one transaction across the E.U. Recent platforms include one for Anglo-American and German repertoires and another one for the French and Spanish repertoires’ (Lüder, T., op. cit., p. 56).
the potential detriment of competition and cultural diversity, not only as far as online music services are concerned but also in the overall scenario of collective management of music rights. In order to redress the imbalance created by the Recommendation, the Parliament invited the Commission to conduct a broad and thorough consultation of interested parties, and present as soon as possible ‘a proposal for a flexible framework Directive to be adopted by Parliament and the Council in codecision with a view to regulating the collective management of copyright and related rights as regards cross-border online music services’. Thus, Parliament goes back to the initial view that a Directive would be the most appropriate instrument to be adopted.

On the content of the Recommendation, the Resolution does not fully oppose the initiative of the Commission in enhancing the freedom of right holders to choose the collecting society they wish to appoint for the exploitation of online uses (Option 3 of the Recommendation). However, a main concern expressed in the Resolution is that encouragement of such flexibility and elimination of reciprocal representation agreements could have a negative impact, especially on the interests of smaller and local right holders, and would ultimately harm creativity and cultural diversity. The risk that the Parliament envisages in the elimination of reciprocal representation agreements is that large right holders (such as major publishers and record companies) could decide to appoint large collecting societies that would then act as oligopolists within the boundaries of the EEA. A similar situation would exclude smaller collecting societies from the management of the largest portion of the repertoire. The impact on the revenues which smaller collecting societies could rely on would be negative, and particularly detrimental for those right holders which, by virtue of their size and the character of their work, would naturally appoint a national collective manager. The Parliament therefore excludes the possibility that smaller collecting societies would survive out of the specialisation they could acquire in niche markets, or out of

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84 European Parliament Resolution of 13 March 2007 on the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC) (2006/2008(INI)), B and C. Explanatory Statement, Lévai Report: ‘The Recommendation has far-reaching consequences for the copyrights market and major players in the market are already acting on the basis of it. It clearly goes further than merely interpreting and supplementing existing rules and its impact has all the characteristics of a regulatory initiative.’

85 On the implications of the Resolution and further developments, see Frabboni, Maria Mercedes (2008), ‘From Copyright Collectives to Exclusive “Clubs”: The Changing Faces of Music Rights Administration in Europe’, Entertainment Law Review, 19, 100.

the reputation and volumes they could rely on if they perform their tasks in a more efficient manner. The Parliament therefore suggests that only those collecting societies that succeed in attracting large right holders would eventually resist the market, while the others would eventually disappear. The main criticism of the proposal contained in the Recommendation is that it would result in a *de facto* oligopoly which might fail to protect the smaller entities operating in the market, and would arguably harm creativity and cultural diversity. As a natural consequence of this submission, the Parliament indicates that reciprocal representation agreements should remain a major instrument for the collecting societies so that the global repertoire continues to be available to all of them. In order to achieve this goal, it is therefore necessary to prohibit any form of exclusive mandate between major right holders and the collecting societies for the direct collection of royalties across the different Member States, and reinstate a system based on the ‘country of destination principle’ for pricing the consumption made of protected works. This particular aspect highlights, once again, the struggle to reconcile the willingness to open up the market and therefore reduce the inefficiencies generated by the monopolistic positions of the collecting societies in their specific territories, and the need to make sure that a harmonised playing field for collective management appropriately protects both the economic and the cultural goals pursued via copyright law. The Parliament’s reasoning leads to the affirmation that, without the latter goal, the cultural industry would be exposed to a risk of a decrease in the quantity and quality of works exchanged in the Internal Market.

**Conclusions**

This chapter has analysed the two different approaches adopted by the European authorities to address the lack of harmonised provisions governing collective management of copyright and related rights. The results that have emerged from the enforcement of competition law principles have not necessarily found full

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87 This issue is debatable. ‘E.U. licensing platforms [emerging as a result of the Recommendation] do not appear to be limited to the repertoire of international music publishers. Despite all fears in this respect, E.U. direct licensing is not developing in the exclusive domain of Anglo-American music publishers. . . . platforms for the repertoire of small and medium sized publishers are emerging alongside those of the big music publishers’ (Lüder, T., op. cit., p. 57).

88 ‘Contrary to the avowed objective of the Recommendation of promoting fair competition, such action is potentially anti-competitive, as it is likely to lead to a *de facto* oligopoly, with market power concentrated in the hands of a few major right holders and a similar number of big CRMs’ (Explanatory Statement, Lévai Report).


support in the regulatory activity of the European bodies in charge of the harmonisation of the Internal Market. Moreover, the contrast between the European Commission and the Parliament described above is a sign not only of the formal obstacles that can be found in the attempt at reform, but also of a more fundamental difficulty that the current harmonisation process is encountering in singling out the precise boundaries for an efficient European action. Thus, if measures designed to harmonise collective management are justified in cases where they serve to remove disparities between the laws of the Member States that are liable either to create or maintain distorted conditions of competition, or to hinder the free movement of goods or the freedom to provide services within the Community, one can legitimately object to the special attention that cultural and social goals have received in the discussion over the necessity of harmonisation.\footnote{Guibault, Lucie and van Gempel, Stef, \textit{op. cit.}, p. 142.} Are these aspects likely to effectively impact competition, free movement of goods or the freedom to provide services? In general, while the question in relation to competition has already found answers in the activity of the European Commission acting as competition authority, the link between the current approach at the European level and the requirements relating to the principle of free movement of goods and freedom to provide services is not as straightforward. Nevertheless, it must be admitted that all policies that deal with economic exploitation of cultural goods have important cultural implications and therefore also the action proposed by the Parliament in the Recommendation cannot be fully dismissed as too broad. Harmonisation of collective management should therefore take into consideration also the cultural and social goals pursued by collecting societies, knowing however that those goals may find effective protection even without the specific involvement of national collecting societies.