Copyright, Competition and Development

Report by the

Max Planck Institute for Intellectual Property and Competition Law, Munich

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Preliminary note:

The preparation of this Report has been mandated by the World Intellectual Property Organization to the Max Planck Institute and has been released in December 2013. Most of the information that is provided in the Report was collected in the second half of 2012 and has only partially been updated until summer 2013.

This Report is authored by Professor Josef Drexl, Director of the Max Planck Institute. Many other scholars at the Institute took part in the research that led to this report. These include in particular Doreen Antony, Daria Kim and Moses Muchiri, as well as Dr Mor Bakhoum, Filipe Fischmann, He Kan, Dr Kaya Köklü, Julia Molestina, Dr Sylvie Nérisson, Souheir Nadde-Phlix, Dr Gintarė Surblytė and Dr Silke von Lewinski.

The author will be happy to receive comments on the Report. These may relate to any corrections that are needed regarding the cases cited in the Report or additional cases that would be interesting and that have come up more recently. It is planned to publish the Report in a revised version in form of a book at a later stage. Comments can be sent to Josef.Drexl@ip.mpg.de. As regards agency and court decisions, the author would highly appreciate if these decisions were delivered in electronic form.

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Summary of the Report

1 Introduction

(1) This text presents a summary of the Report of the Max Planck Institute for Intellectual Property and Competition Law on “Copyright, Competition and Development”. The Report itself analyses the practice of competition law jurisdictions on copyright-related markets around the world. The preparation of the Report was mandated to the Institute by WIPO in 2012. As part of the research for this Report, the Institute conducted a survey among competition agencies based on a Questionnaire, which is annexed to the Report. The bulk of this survey was conducted between September and December 2012. The Report was drafted between January and August 2013. This summary does not repeat any of the case studies provided by the Report. Rather, it is designed to give the reader a quick overview of the major results of the Report.

2 Motivation, Objectives and Scope of the Study

(2) The Report is motivated by the increasing economic importance of copyright-protected works, including most diverse subject-matter of protection ranging from cultural content, media and information products to more technology-based computer programs, including in emerging economies and developing countries. Growing populations in such countries provide a large basis of human resources for creativity and, at the same time, lead to large consumer markets. Copyright-related activity therefore has to be recognised as an important factor of economic development around the world but also and particularly in emerging economies and developing countries.

(3) The objectives of the Report are basically threefold: (i) The Report aims at making accessible a large body of competition law practice around the world as guidance for competition law enforcers in other jurisdictions. (ii) It also tries to promote general knowledge and understanding of how competition law should be applied to copyright-related markets. (iii) The Report is also meant to provide benefits for international copyright policy. With its market-oriented analysis, competition law can provide new insights on how markets for authorised use of copyright-protected subject-matter work in the practice of different jurisdictions.

(4) The Report only covers markets for copyright-protected works. Thereby, it takes into account all different markets in the distribution chain, from the creation of works to

the distribution of such works to consumers. This is why the Report puts a particular emphasis on media distribution. Media distribution also impacts on other rights in intangible assets such as sports rights, personality rights or trademarks. Such adjacent issues are not taken into account, although, with regard to the distribution and licensing of sports rights in particular, competition law jurisdictions have produced quite considerable case-law in recent years.

(5) The Report covers all different jurisdictions of the world. Whereas in the past comparative research mostly concentrated on US antitrust law and EU competition law, the Report puts its emphasis on the quickly increasing body of case-law in younger competition jurisdictions of the emerging economies and developing countries. In addition, it was not possible to report on all cases that have so far been dealt with. Especially with regard to the more experienced jurisdictions this would not have been feasible and would have changed the focus of the study. This is why US and EU law are mostly referred to as the jurisdictions where specific issues have first been dealt with and solved with international impact. This is so in particular with regard to the specific sector of collective rights management. Moreover, the Report puts an additional emphasis on the smaller jurisdictions, including those within Europe and the European Union, which are often overlooked and more difficult to access. National experience in EU Member States is of increasing importance due to the decision to decentralise EU competition law enforcement with regard to restrictive agreements and abuse of market dominance as of 2004.

3 Methodology

(6) The Report is based on two research methods, namely, on the abovementioned survey and on traditional legal research on case-law, done mainly by using available Internet resources. In addition, many contact persons, most at local universities, provided additional insights by answering the Questionnaire. The agencies of more experienced competition jurisdictions, where access to decisions is not a problem, did not receive the Questionnaire. Many agencies and researchers around the world put a lot of effort and enthusiasm into preparing their answers to the Questionnaire. However, the case-law that they mentioned was only taken as an indication of the most important cases and was – wherever possible – cross-checked with original sources. For countries in which it was not possible to establish contacts or whose agencies even declined to cooperate, mainly for lack of time and resources, the Report had to rely on publicly available sources. Only in a very few instances did competition law jurisdictions have to be completely excluded. Some jurisdictions are mentioned more frequently than others. This does not necessarily reflect the relative amount of case-law available in these jurisdictions. There were important practical

constraints, such as less developed Internet information and language barriers, that had an impact on the selection of the cases. In several instances interesting cases did not enter the Report because accessible information appeared inconsistent, for example when information in annual reports of the agencies was superficial or translated in deficient English.

4 The Survey Based on the Questionnaire

(7) The Questionnaire turned out to be a useful tool for collecting information on different jurisdictions. Yet it was only after the survey was completed that a decision had to be made on the structure of the Report. The latter considerably differs from the structure of the Questionnaire in that it generally follows the logic of the traditional competition law violations. This decision was made in order to provide more guidance to law enforcers in different jurisdictions.

(8) In addition to the case-law that was identified, the survey provided a series of most useful additional insights, including the following: (i) Some of the smaller and younger jurisdictions are not aware of the importance of copyright-related markets because they think that competition law does not apply due to exemption provisions on intellectual property they find in their competition laws. (ii) An extremely high number of competition law jurisdictions feel an urgent need to build up expertise concerning the interface of IP and competition law. This is also true in economically highly developed but smaller jurisdictions where agencies have problems finding staff knowledgeable in both fields. (iii) Some competition jurisdictions attributed the lack of practice in part to the fact that copyright law is poorly enforced in their jurisdiction. This is especially convincing in the field of collective rights management. In jurisdictions where CMOs have not yet managed to build up efficient systems of licensing and monitoring, users will not bring any complaints against CMOs. (iv) Many agencies felt a particular lack of understanding and even incompetence in the field of collective rights management and often declined to answer these questions.

5 On the Relationship between Copyright and Competition

(9) The preliminary question that needs to be answered at the interface of intellectual property and competition law is whether there is a fundamental conflict between intellectual property and competition law. Many jurisdictions around the world that have exemption provisions on IP seem to be inspired by the idea that this question is to be answered in the affirmative. In contrast, the Report is based on the modern understanding according to which IP and the competition principle are not in

inherent conflict. Rather, both IP law and competition law are designed to promote a system that creates incentives for dynamic competition for better and diversified processes and products by excluding competition by imitation and enhancing competition by substitution. Accordingly, copyright law and competition law have to be understood in the sense of promoting complementary goals (theory of "complementarity"). Yet conflicts may arise on the level of application, especially when competition law is relied upon to limit the exclusivity of the copyright. Hence, seen from this modern perspective, the question is not "whether" competition law should be applied but "how" it should be applied. The answer to the latter question requires a balancing approach that takes into account both pro and anticompetitive effects of the copyright on competition in the market.

(10) Indeed, in the general debate, the relationship of copyright law and competition law is primarily viewed from the perspective of this conflict between the exclusivity of rights and free competition. In this regard, competition law plays a "restrictive" role by limiting the exclusivity of the copyright. In such instances, competition law may provide for a duty to license.

(11) Yet the Report is not limited to cases of refusal to license. Rather, the Report also takes account of the "proactive" role of competition law which, so far, has largely been overlooked in the general debate on the relationship between the two fields of law. Copyright law is designed to provide the author of works with fair remuneration for his or her creative work. Yet it is not the exclusive right in itself that produces such income but the willingness of consumers to pay. This requires that consumers actually have access to works they prefer. Hence, copyright law essentially depends on the functioning of the distribution channels and of copyright-related markets on different levels of distribution. If these markets for authorised use do not work properly, consumers will even be incited to switch from legal copies to illegal ones. Competition law plays a crucial role in creating and maintaining competitive and efficient distribution markets. This function is most convincingly demonstrated by the Report. Competition law practice is abundant with regard to distribution cases. This is mostly due to the fact that, while works are usually highly diverse and have the potential to compete most effectively for consumers, copyright-related markets often have to rely on the bundling of works in the form of attractive repertoires and the use of centralised platforms for licensing and distribution. Both needs produce the tendency of market power in the hands of the intermediaries that control such repertoires and platforms. With regard to this proactive role of competition law, the Report demonstrates that competition law should not at all be understood as the "enemy" of copyright law but rather as a most important tool of a modern, more holistic copyright policy on the national and international level. The Report even provides evidence that competition law can be applied as an element of a better strategy to fight copyright piracy.

6 Competition Law Provisions on Intellectual Property

(12) In its first analytical part, the Report analyses IP-related provisions in the competition laws of different jurisdictions. In this regard, the Report refers to intellectual property rules in general, since jurisdictions that provide for IP-specific rules do not necessarily refer to copyright law in particular or, at best, mention copyright law along with other IP rights such as patents. On such rules, the Report provides an amazingly large spectrum of different approaches. While many jurisdictions do not mention IP at all in their laws, others contain exemption provisions that have led to considerable problems in applying competition law to IP-related cases. Yet there are also laws that explicitly confirm the application of competition law to IP in general or in the framework of individual provisions. At worst, especially in younger jurisdictions, exemption provisions lead to the misguided belief that competition law should never be applied to IP-related cases. More experienced jurisdictions are trying hard to work around those rules, using highly sophisticated theories on how to define the exact scope of the exemption. The comparison of approaches of different jurisdictions demonstrates that all these attempts can never be fully convincing. Rather, what is needed is guidance on *how* competition law is to be applied. Provisions that exempt IP from the scope of application of competition law already miss this question. Hence, the insight that needs to be drawn from this analysis is that such provisions should not be included in competition laws in the first place and that they should be deleted from legislation where they have been included. The latter is what some agencies recommend. But it is also clear that vested interests can hardly be overcome in the legislative process for achieving this result.

(13) What is more important is therefore guidelines on how to apply competition law to intellectual property. Such guidelines are usually provided by sub-laws such as binding regulations or guidelines that only provide information on the future practice of the agencies. With regard to copyright, the problem is that copyright-related cases are highly diverse and, therefore, can hardly be generalised. Some jurisdictions therefore refrain from including copyright in their guidelines or only cover copyright to some extent in the framework of guidelines on transfer of technology. Guidelines that cover copyright are usually more abstract and, therefore, do not provide much guidance at all. In this regard, the Report shows how important it is to take into account case-specific practice.

7 The Role of Copyright in Market Definition

(14) There is hardly any competition law decision that does not include an analysis of the relevant market. Copyright-related cases do not make an exception in this regard. In order to get a full picture of how agencies define markets in such cases, the reader will have to take into account the subsequent chapters of the Report, since market definition practically never arises alone, as an isolated problem in competition law cases, but is only a preliminary question to be answered in the framework of assessing violations of competition law. As a general note, case-law demonstrates that market definition is extremely difficult in copyright-related cases. There are several major reasons for this. First, where cultural content is concerned, highly subjective consumer preferences are largely unreliable and weak indicators for assessing demand-side substitutability. Second, in media markets in particular, dynamic technological developments make it very difficult to decide which technological distribution networks can be regarded as substitutable. Third, many copyright-related cases require enforcers to take into account the phenomenon of "two-sided markets". For instance, in the newspaper industry, the readers' market has to be clearly distinguished from the market of advertising. Enforcers therefore often have to assess effects on two or even more markets after having engaged in a most difficult and extensive definition of the relevant markets.

(15) Yet the Report highlights some specific core issues relating to market definition and dominance. In this regard, it first stresses that the copyright in the individual work, despite the exclusivity of the copyright, should not automatically be equated with market dominance in the sense of competition law. What is needed is a thorough analysis of the relevant market in the light of the criterion of demand-side and supply-side substitutability. Copyright protection can lead to market dominance. But copyright-protected works are rarely "must have" products for consumers. Exceptions are some scientific publications or computer programs access to which is essential due to network effects and standardisation.

(16) Things may change considerably when copyrighted works are integrated into larger repertoires by intermediaries on whom other downstream intermediaries depend in order to enter the market or to stay in the market. Examples are provided by the music publishing industry, film distribution to cinemas and, maybe most importantly, by collective rights management.

8 Restrictive Agreements

(17) Copyright-related markets are as much affected by restrictive agreements as other product markets. The Report provides a relatively large variety of horizontal and

vertical agreements that have been addressed by competition law enforcers. Especially, the practice on horizontal agreements demonstrates that copyright cannot justify the formation of price cartels, agreements in which right-holders use copyright for sharing markets or market-foreclosure agreements.

(18) With regard to vertical agreements, apart from exclusivity agreements regarding the distribution of works, resale-price maintenance, especially for books and press products, appears as the single most important issue on which jurisdictions disagree. Some competition agencies grant exemptions to such agreements, but at the same time may have a tendency to consider them as inherently anti-competitive.

9 Unilateral Conduct (Abuse of Dominance)

(19) Most competition law cases relate to the application of unilateral conduct rules. This is mostly due to the existence of market dominance on the intermediary levels of the distribution and licensing of copyrighted works.

(20) Cases can be categorised in different regards. The traditional distinction is between exploitative and exclusionary conduct. Copyright-related markets provide many examples in which competition agencies apply excessive pricing provisions to both right-holders and distributors. The control of the royalty rates charged by CMOs is probably the most important example in this regard.

(21) The other common distinction relates to the undertakings that engage in anti-competitive unilateral conduct. There are cases in which unilateral conduct rules are applied to right-holders and those in which they are applied to intermediaries and other distributors. In the latter case, unilateral conduct may have negative upstream effects, harming the interests of right-holders, or negative downstream effects on consumers. In all of these cases, application of competition law has the purpose of enhancing distribution of, and access to, works at affordable prices.

(22) The chapter on unilateral conduct also addresses the issue of refusal to license, which is the single most important and most debated issue at the interface of copyright protection and competition law. Most discussion concerns the case-law of the EU. However, these cases mostly relate to atypical categories of works or to computer programs. The analysis also covers examples of refusal to license patents, since it can generally be assumed that the rules of refusal to license will not distinguish between different IP rights. The analysis also demonstrates that refusal-to-license cases can take many different forms and require difficult distinctions. In this regard, cases of absolute refusal to license, in which the right-holder wants to exclude a competitor in a product market, need to be distinguished from exploitative cases, in which the right-holder relies on an injunction as leverage to extract excessive royalty rates. In

addition, discriminatory refusals to license have to be distinguished from absolute refusals to license. A relatively new issue, which is now more discussed with regard to refusals to license a patent, relates to the requirements that a petitioner has to fulfil before he or she is allowed to use the protected subject-matter.

(23) The analysis of unilateral restraints also presents a large body of practice relating to specific industries. The distribution of TV programmes through platforms using very different communication technologies and the distribution of newspapers provide most important insights on the role competition law can play in these industries all around the world. The TV distribution cases also provide an impressive picture of the role the media sector plays in the field of transfer of communication technologies to emerging economies and developing countries.

10 Concentrations (Merger Control)

(24) Competition law jurisdictions provide an enormous amount of practice on mergers among right-holders and distributors of works. Yet the role of IP in such mergers has so far only received very little research interest.

(25) With regard to undertakings in the media sector, merger control law often intersects with specific merger control systems that are designed to protect plurality of opinion and diversity. Given these different objectives, parallel systems of control make sense, for one thing because the different objectives may require different forms of market definition. However, there are other jurisdictions that only provide for merger control within the framework of competition law. In those jurisdictions, merger control may protect the more political objectives at least indirectly and attribute to merger control a much broader and far-reaching political meaning. Some competition laws take the broader political perspective into account by lowering the notification thresholds for media mergers and newspaper mergers in particular or providing for rules according to which the objectives of plurality and diversity are also to be considered in cases of media mergers.

(26) Intellectual property rights can come into the picture at all different stages of the analysis of merger cases. They may have to be taken into account for assessing whether there is a concentration in the first place, namely in the specific case when important IPRs are acquired as essential assets of a business. In rare cases, IPRs even play a role in applying the notification thresholds. IPRs play the most important role in the framework of assessing the effects of a merger on competition. Here IPRs are typically recognised as a form of barriers to market entry. Finally, IPRs are considered in the framework of merger remedies. Certain mergers can be allowed subject to the condition that certain IPRs are divested.

(27) Most merger cases in copyright-related markets are of a horizontal nature. Copyright ownership has so far proved most important in mergers of major music publishing companies and phonogram producers. Other very problematic horizontal mergers relate to platform providers in the media sector.

(28) Vertical and conglomerate mergers are less likely to harm competition than horizontal ones. Yet horizontal mergers may often have a vertical aspect if an already vertically integrated undertaking merges with a competitor. Vertical mergers may lead to exclusionary effects on competitors, especially when bottleneck distribution networks are involved. Such mergers can nevertheless get clearance subject to behavioural remedies that guarantee outsiders non-discriminatory access to the network. Conglomerate mergers of undertakings in adjacent markets have also become relevant in the media sector, especially when firms active in different media markets, such as TV channels and newspaper publishers, merge with negative results on the advertising market.

11 Collective Rights Management (CMOs)

(29) Collective rights management constitutes a very specific sector of competition law application with regard to copyright. Competition law problems arise due to the market-dominant position of CMOs on the national level in the two markets of rights management services provided to right-holders and licensing to users. Accordingly, CMOs are generally the addressees of unilateral conduct rules. With regard to international cooperation among CMOs through reciprocal representation agreements in particular, the rules on restrictive agreements are also relevant. Relatively rarely, competition law enforcers have to deal with mergers affecting collective rights management.

(30) For competition law enforcers, the primary challenge consists in appropriately assessing the pro-competitive effects of collective rights management in contrast to allegations that CMOs constitute a price cartel among right-holders. As the practice of US and EU law demonstrates, justifications can be found in this regard. Therefore, exemption provisions in favour of CMOs, as provided for in some jurisdictions, are neither required nor useful, since they have the tendency to exclude the much-needed control of anti-competitive conduct of CMOs under competition law.

(31) There are many jurisdictions that provide for national monopolies of CMOs as part of their copyright laws. As the comparison with other jurisdictions shows, such legally protected monopolies are not needed, since the economics of collective rights management always privileges, and tends to maintain the market-dominant position of, the incumbents. Quite on the contrary, laws providing for legal monopolies will

only protect the incumbent without any guarantee that the incumbent is the more efficient CMO and without sufficient guarantee that sector-specific regulation will provide sufficient control over abuse of dominance by such CMOs.

(32) Sector-specific regulation often provides that CMOs have to be non-profit organisations or membership-based associations of right-holders. Such restrictions are designed to reduce the risk of abuse of market power of CMOs vis-à-vis right-holders. However, this does not sufficiently respond to the need of preventing anti-competitive conduct of CMOs. In addition, each of the two requirements may also undermine the economic efficiency of the firms. In no way can such requirements justify an exemption of CMOs from competition law.

(33) Since CMOs are active as intermediaries in two-sided markets, competition law needs to be applied with regard both to the service they provide to right-holders and to their licensing practices regarding users. With regard to right-holders in particular, both US law and EU law have developed very strict regulatory approaches to protect their interests. This development is due in large part to the fact that neither of the two jurisdictions provides for sector-specific regulation in this regard. In the European setting, case-law also promotes the right of right-holders to choose between different national CMOs. Competition law also protects the freedom of right-holders to assign parts of his or her rights to different CMOs or to license rights directly to users. The latter is more important than ever since the Internet has increased the ability of individual authors to make autonomous decisions on how their rights should be licensed to users and also enables them to organise direct licensing to users. For similar reasons many competition law jurisdictions prohibit CMOs from requiring right-holders to assign rights on an exclusive basis. The latter principle is in tension with the objective of collective rights management to protect authors and performers from a buy-out of their rights on the part of large users and undertakings of the copyright industry with superior bargaining power.

(34) The Report unearthed an impressive body of practice on the control of the licensing practices of CMOs in many jurisdictions. Most importantly, this relates to the control of the fees charged by CMOs to users. The charging policy is also addressed in the consent decrees in the United States that constitute the traditional basis of US antitrust regulation of CMOs, although, under general principles, US antitrust law does not ban unilateral exploitative conduct. In the EU, control of the tariffs of CMOs provides a most important part of the case-law of EU competition law in general on excessive pricing. EU practice has not prevented national jurisdictions of EU Member States and their national authorities from developing their own techniques for controlling the fees of CMOs. Some competition agencies within and outside the EU however demonstrate considerable reluctance to control such tariffs. This not only derives from the general hesitation of such agencies to act as price regulators but

also from the difficulties of applying the standard cost-based analysis to assessing the adequate price for a copyright licence. The practice of the experienced jurisdictions however shows that protection can be provided by relying on the tariffs in other countries mostly of the same region and in a similar economic situation and by shifting the analysis from the amount to be paid to the methodology according to which the tariffs are set. Some jurisdictions also provide for a duty to license to users, which makes sense because it transfers bargaining power from the CMOs to users.

(35) With regard to reciprocal representation agreements among CMOs from different countries, the Report highlights the central role of the EU Commission and the European courts as international regulators. This is achieved by also making the international confederations of CMOs addressees of EU competition law with regard to the model agreements they develop for later bilateral adoption between individual CMOs. However, with regard to the most important current issue of how to organise multi-territorial licensing for online exploitation of works of music, European competition law has so far failed to provide satisfactory results.

(36) More generally, jurisdictions have to answer the question of how to regulate the relationship between sector-specific regulation and the application of competition law to CMOs. The Report provides no justification for exempting CMOs from the application of competition law. Rather, sector-specific regulation and competition law should be considered as complementary systems of control. Sector-specific regulation should adopt competition law-oriented approaches by providing institutional solutions to the competitive concerns that arise from collective rights management. Sector-specific regulators and adjudicatory bodies are better equipped to understand the particularities of collective rights management and to provide even *ex ante* control, for instance of the tariffs of CMOs, where competition law agencies can often only act *ex post*. The better sector-specific regulation works, the fewer complaints competition agencies will receive, and the less they will have to intervene. In this regard, applicability of competition law to collective rights management can work as a seismograph for how well sector-specific regulation actually works. Sector-specific regulators are more likely to be captured by vested interests and to favour one group of interests, such as those of right-holders in achieving high royalty rates. Therefore, competition law should be applied as a safeguard against such institutional failures. Legislatures can also implement more institutional cooperation by providing for standing or representation of competition agencies in proceedings of sector-specific regulation. Such institutional arrangements of cooperation, however, do not justify an exemption of collective rights management from the application of competition law.

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12 General Conclusion

1 Introduction

In 2012, the World Intellectual Property Organization (WIPO) mandated the Max Planck Institute for Intellectual Property and Competition Law in Munich to prepare a study on the practice of competition law jurisdictions on "Copyright, Competition and Development". This study is based on a survey that was conducted during the last four months of 2012. This Report presents the results of this survey.

The coverage of the study is at the same time limited and broad. On the one hand, it is limited to the application of the law against restraints of competition (so-called "competition law" or "antitrust law") to copyright-related markets. It is not on copyright itself, and it does not address issues of unfair competition, which, in several countries, also falls within the jurisdiction of competition agencies. On the other hand, by addressing restraints of competition in copyright-related markets, the study goes beyond the interface of copyright and competition law, i.e. cases in which the exclusivity of copyright and the use of copyright produces anti-competitive effects. It also includes restraints of competition that relate to the marketing of copyrighted works, whether those restraints are initiated by right-holders, distributors or users of copyrighted works. Last but not least, the study analyses the practice of competition law enforcers with regard to collective rights management organisations (CMOs, so-called "collecting societies"). Thereby, it also takes into account the interface with specific regulation of collective rights management by copyright law.

In geographic terms, the Report strives to include all competition jurisdictions of the world. Hence, despite its title, this Report does not only analyse the practice of younger competition jurisdictions of mostly developing nations and emerging economies. Although one of the goals of the Report consists in providing assistance to the agencies and courts of younger jurisdictions in particular, younger jurisdictions could also learn from the practice of more experienced jurisdictions where, particularly in quantitative terms, practice may be more substantial and accessible. Given its broad geographic coverage, this Report may be helpful for policy makers and competition law enforcers around the world, including even those from the most experienced jurisdictions, such as the United States or the European Union.

This Report takes a simultaneously descriptive and analytical approach. It is descriptive in the sense that it presents the current practice around the world. Yet this is not done by way of country reports. Rather, the material is presented in an analytical way, with a focus on competition policy issues. By following this approach, the Report avoids the problem of not being able to guarantee comprehensiveness in the case-law and, at the same time, responds to the need to provide better guidance to competition law policy makers and enforcers when they develop national policies and apply domestic law to future cases. This Report will largely refrain from commenting on the appropriateness of individual decisions. It does not aim at evaluating the practice of individual jurisdictions. Yet, by taking the abovementioned analytical approach, the Report certainly provides guidance for jurisdictions in the process of designing domestic competition law policies for copyright-related markets. In this regard, one of the virtues of this Report may well arise from its global perspective, which allows for integrating all different aspects of the application of competition law to copyright-related markets, while national jurisdictions only develop gradually and slowly on a case-by-case basis and against the specific backdrop of the domestic regulatory system. In this regard, the Report represents the first comprehensive and global analysis of competition law as applied to copyright-related markets, which can be used by policy makers and enforcers around the world as well as by WIPO itself when it comes to developing its future agenda at the interface of competition law and intellectual property.

2 Motivation, Objectives and Scope of the Study

2.1 Motivation

The reasons for this study can be explained in both economic and legal terms.

In economic terms, the study is a reaction to the growing importance of cultural content for the development of national economies around the world. Internationally, for many decades, the debate on the interface of intellectual property has mostly focused on transfer of technology and patent law. However, it is to be acknowledged that, given the vast human resources in developing nations, local creativity as a "resource" of the entertainment industry constitutes a most important asset for growth and development. Creativity also has the advantage that it can be easily developed even in the poorest countries, where the capacity for receiving and further developing technology is rather limited. Also, cultural content has large potential to appeal to a world public from wherever such content may originate. The Indian movie industry, which is not limited to Bollywood, has become an Asian success story. Latin American music is the second most popular "world" music next to the Anglo-American mainstream. African music seems to be catching up relatively quickly. Many world-renowned writers nowadays come from developing countries. The software industry and academic publishing, using English as a language in particular, rely on knowledge generation world-wide. Finally, cultural and creative content can be distributed globally at practically zero cost via digital technology. In sum, copyright-related industries promise great potential for development for all nations. At the same time, copyright-protected subject matter is often distributed globally. Both aspects make the application of competition law to copyright-related markets a truly international topic.

From a legal perspective, the internationalisation of creative production and the distribution of works coincide with purely national, at best supranational, systems of competition law. During the last 10 to 20 years, the number of competition law jurisdictions has grown enormously. This development was mostly triggered by economic globalisation and market reform in practically all developing and emerging economies. Competition law can now be found in all major economies of the world, which also include the culturally very rich Latin American countries, South Africa, India and China. Since these countries also provide a large market for the consumption of cultural and creative content, their competition law enforcers are in need of guidance for applying their new laws to copyright-related markets; indeed, they are already producing considerable case-law themselves, which may also be of interest for policy-makers in more experienced jurisdictions.

While copyright law is regulated in detail by the legislature, competition law provisions are hardly ever copyright-specific. Competition law "in practice" can only develop on a case-by-case basis and in the national context despite the internationalisation of creative production and distribution of works. This leads to the phenomenon that hardly any, or only a very few, competition law jurisdictions have the potential to develop a critical volume of practice that leads to the emergence of a coherent and inclusive competition policy regarding cultural and creative content. Also, due to the large diversity of such content and the related markets, competition agencies do not develop specific policies and agendas for this sector.

Finally, one of the challenges of the study arises from the fact that national competition law practice can only be understood and assessed against the background of the domestic regulatory and institutional set-up. Sector-specific regulation comes into the picture in many copyright-related markets. Especially audiovisual media are the subject of sector-specific regulation in most of the countries; such regulation is influenced by criteria, such as the goal of guaranteeing diversity and freedom of expression, that usually play no role in competition law. In the framework of assessing media mergers, for instance, competition agencies will look at the impact on the advertising market, while media regulators will concentrate on the outreach of the media to the audience for assessing the impact of the merger on public opinion. The existence or non-existence of competition law practice regarding CMOs can only be analysed by also taking into account the existence or non-existence of specific regulation of collective rights management activities in the framework of copyright legislation. In jurisdictions that have established workable mechanisms of controlling the reasonableness of the royalty rates fixed by CMOs – through copyright tribunals, for instance – competition agencies are hardly likely to be requested to apply a rule against excessive pricing as part of their prohibition of abuse of market dominance against CMOs. And whether a jurisdiction provides for a legal monopoly of CMOs may crucially depend on whether this jurisdiction's copyright law provides for statutory remuneration rights with mandatory administration by CMOs.

Also, the study has to take into account the specific national set-up of courts and institutions. In the most frequent case, competition law is administered by agencies and copyright is enforced by courts deciding on law-suits initiated by right-holders. But there are also jurisdictions where private enforcement of competition law is common, and, for instance in Latin American states, intellectual property offices play a major role in the enforcement of copyright law against infringement. Several countries also have created specialised courts with exclusive jurisdiction for competition law in particular, which may prevent general courts from addressing competition law issues when they decide on copyright infringement. Such regulatory and institutional variations advise caution in taking the competition law practice of foreign jurisdictions as guidance for deciding domestic cases.

This study also fills a gap in scholarly writing and economic theory at the interface of competition law and intellectual property. Research on this topic has on the whole followed the innovation/patent paradigm. At best, in publications on IP and competition law, copyright law plays a marginal role.[1] Such literature and research generally concentrates on the analysis of competition law practice in the different fields of technology, and then often makes generalisations on intellectual property at large. And even where the development of the law at the interface of IP and competition law is driven by copyright cases, such as the application of EU competition law to refusal to license,[2] such cases are usually discussed in the light of the innovation paradigm. There is quite some legal and economic literature that focuses on the economics and application of competition law to specific sub-markets for the production and distribution of cultural and creative content. Yet, there is no literature that would assess the application of competition law to copyright-related markets in general.

In sum, these preliminary considerations underline the fact that the study on which this Report is based is not only very timely but also very challenging and unique. For competition law enforcers the approach of the study may also appear as very unusual, since cases are analysed in the light of the categories of competition law. Thereby, the case-law is not categorised along the lines of different intellectual property rights but in terms of different kinds of restraints, namely, by distinguishing between (1) restrictive agreements (collusion), (2) unilateral conduct and (3) concentrations. Nor do competition law enforcers attribute a particular role to cultural and creative content. What matters more to them is to define the product market correctly. In this regard the uniqueness of copyright is broken up by a large diversity of different categories of works and of the different downstream markets in which such works are distributed. Hence, from a competition law perspective, a case on market dominance in the software industry which is characterised by network effects has very little to do with a media merger. The fact that all copyright-related markets are taken together in this study may therefore be attributed to the specific initiative of WIPO as an intellectual property organisation. Indeed, one of the major reasons for conducting this study is to find

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1 See, for instance, Christian Handke, Paul Stepan and Ruth Towse, 'Development of economics in copyright' in: Josef Drexl (ed), *Research Handbook on Intellectual Property and Competition Law*, Edward Elgar, Cheltenham, UK and Northampton, MA, 2008, pp 373-402.

2 See the most important two cases on refusal to license decided by the European Court of Justice (ECJ) that are both copyright cases: Joined Cases C-241/91 and C-242/91 *RTE and ITP v Commission* ("*Magill*") [1995] ECR I-743; Case C-418/01 *IMS Health* [2004] ECR I-5039.

out what competition law can contribute to copyright policy from an international perspective.

2.2 Objectives

The study and, hence, this Report pursue a number of different goals.

2.2.1 Guidance for competition law application

The Report is meant to inform competition law enforcers on the practice around the world as a source of inspiration and guidance when they apply their own laws. This guidance function also explains the structure of the analysis below. Competition law enforcers deal with cases according to the concepts that characterise competition law by focusing on different forms of restraints – restrictive agreements, unilateral conduct and concentration – and, within these forms, on more specific restraints and theories of harm. It is clear that this way of presenting the practice will fail to provide comprehensive analyses of the current situation in individual countries. Yet it is held that it is more important for competition law enforcers to have immediate access to the problems they have to solve, whereas they would feel a considerable lack of orientation if the Report consisted only of a collection of country reports. Also, country reports would only describe the situation as it presents itself at the time of writing and would quickly become outdated.

2.2.2 Promoting competition policy for copyright-related markets

Beyond informing competition law enforcers about practice elsewhere, the comprehensive analysis of the practice worldwide is also meant to promote knowledge and understanding of how competition law should be applied. The comparative approach will highlight differences between jurisdictions and approaches and help practitioners to understand which approaches are best suited for further developing national competition policies.

2.3.3 Promoting national and international copyright policies

While the first two objectives focus on domestic competition law enforcers as users of this Report, the Report is also intended to promote a better understanding of competition policy among policy-makers responsible for copyright law. Traditionally, and still today, copyright specialists tend to see a tension between copyright and competition law. This is based on the concept of copyright as an exclusive right that restricts competition at least to some extent. This Report, however, will demonstrate that there is an additional, and maybe more important, dimension of competition law that enhances the incentive mechanism of copyright by keeping and making copyright-related markets more efficient. This function has been largely overlooked in current debates on copyright issues on the national and international level.

2.3 Scope

To conduct the study, it was most important to have a clear understanding of how to define its scope. The decisions made in this regard certainly need some explanation.

First of all, copyright is only one of several forms of intellectual property. The concentration of the study on copyright may risk missing important cases on other intellectual property rights (IPRs) that provide precedents for copyright cases. For instance, jurisdictions may develop practice on refusal to license as an abuse of market dominance in the context of patent-related cases that also has relevance for copyright-related cases. Similarly, from a competition law perspective, the clearance of a merger among music publishers under the condition that they outsource a number of copyrights may not be any different from a similar condition imposed on merging pharmaceutical firms to sell certain patents. Still, also as a matter of practicality, this study only pursues to inform on the copyright-related cases, which will not exclude taking account of patent-related cases where this appears useful. Such cases will enter the Report in particular if there are no copyright-related cases in a given jurisdiction and if these cases serve as indicators on how enforcers will decide copyright-related cases in the future.

Copyright covers a large variety of cultural and creative subject-matter of protection. The different "categories of works" that are known from copyright legislation also serve as guidance for defining the scope of the study. While the study strives to include all copyright-related markets, it nevertheless focuses on such subject-matter for which all jurisdictions would generally provide protection. In a positive sense, this includes literary works (fiction, scientific and academic writing, newspaper articles), music, films, computer programs, visual arts (paintings, sculptures, works of architecture). In a negative sense, the grey zones of what can be protected, and is only protected by the copyright law of some jurisdictions, will not be considered. This is especially the case for works of applied arts at the intersection with design law. From a competition law perspective this excludes the important area of protection for spare parts, especially for motor vehicles, which has produced quite some case-law at the intersection of intellectual property and competition law.[3] Spare parts for cars may not be protected at all by some jurisdictions; other jurisdictions may provide design protection, while yet others may also accord copyright protection.

In terms of competition law, specific subject-matter of copyright protection may constitute the basis for the definition of a relevant market. However, copyrighted works are intangible goods and enter into many products that are sold in downstream product markets. This is

[3] See the two early cases of the ECJ: Case 53/87 *CICRA v Renault* [1988] ECR 6039, Case 238/87 *Volvo v Veng* [1988] ECR 6211. These two cases, however, constituted precedents which were considered by the ECJ in the copyright cases of *Magill* and *IMS Health*, *supra* n. 2, for further developing European principles on refusal to license.

why the analysis in this Report is not limited to the (licensing) markets for copyright-protected subject-matter, but also includes markets for follow-on products. For instance, it does not suffice to concentrate on the market for copyright licences for musical works. Music can indeed be brought to consumers by a large variety of products, including DVDs, online downloads, films, broadcasts (building on a variety of different technologies such as analogue terrestrial broadcasts, cable, satellite or the Internet) or other forms of public performances such as in concert halls, night clubs and restaurants or supermarkets. Consequently, the analysis will look at a large variety of industries, including the film, media and publishing industry, with their different market players on different levels of production and distribution.

Yet this study will not necessarily cover all competition law cases that relate to these industries. For instance, the many cases that several competition law jurisdictions have produced with regard to the broadcasting rights of sports events – football matches in particular – will be left outside this study.[4] While it is true that broadcasters may typically be protected by a copyright-related – neighbouring – right with the broadcasting entity as the original right-holder, sports events as such are not protected by copyright.[5] At best, the transmission of sports events leads to a concomitant transmission of copyrighted works, such as music or emblems, which should not be mixed up with the sporting event as such. Many jurisdictions have gathered quite a body of competition law practice with regard to the question of whether the licensing of the broadcasting rights for the matches of league sports can be centralised in the hands of the national and international sports associations.[6] For such cases, intellectual property may only come into play to the extent that national laws have recognised specific exploitation rights for sports events.[7] Yet, with regard to decisions on centralised licensing of the broadcasting rights for football matches, the question may

4 In this regard, the recent judgment of the ECJ on the cross-border satellite transmission of football matches has attracted most interest: Joined Cases C-403/08 and C-423/08 *Football Association Premier League and Karen Murphy* [2011] ECR I-0000 (not yet officially reported). Among the numerous jurisdictions that dealt with centralized grant of broadcasting rights of football matches are also younger jurisdictions of emerging economies such as Tunisia. See Decision No. 61126 of 22 April 2010 (reported by the Tunisian Competition Council). The case was taken up by the Competition Council on its own motion, which categorized the centralized grant of the broadcasting rights through the Tunisian Football Federation to the National Television Corporation a restrictive agreement in the sense of Article 5 of the Competition Act.

5 Confirmed by the ECJ in *Football Association Premier League*, *supra* n. 4, para. 98.

6 See, for instance, the two Decisions of the European Commission on centralised sale of the UEFA football matches and of matches of the German national football league: Commission decision of 23 July 2003, Case 37398 *Joint selling of the commercial rights of the UEFA Champions league* [2003] OJ No. L 291/25; Commission decision of 19 January 2005, Case 37214 *Joint selling of the media rights to the German Bundesliga* [2005] OJ No. L 134/46.

7 Such a right can be found, for instance, in the French *Code du sport*. Articles L 331-1 through L 331-5 of the *Code du sport*, which provides for an exclusive right of audiovisual exploitation of the sports associations. Entitlement of the association matters for competition law assessment. In this regard, central licensing of the matches cannot be considered a cartel among the individual sports clubs, since the central entity – the association – is vested with an original entitlement rather than being entrusted with the licensing of rights belonging to its members.

well be asked whether such decisions have relevance for copyright-related markets when copyright holders organise centralised licensing schemes – through CMOs, for instance – and, thereby, restrain competition. This, however, does not advocate a comprehensive assessment of this specific case-law on sports rights in this Report. In any case, competition law enforcers may find precedents in many different fields of competition law application when they decide cases on copyright-related markets. Centralised licensing of the broadcasting rights for sports events may just be one, however important, example.

2.4 Geographic scope in particular

In addition to defining the kind of cases that the study should cover, there is also the need to define its geographical scope. First of all, there was a clear interest in finding out about the nascent case-law in the often very large jurisdictions of the emerging economies, including China, India, Brazil, Mexico, South Africa and Russia. While those countries are nowadays economically extremely important, the concept of the study made it important to include the practice of more experienced competition jurisdictions as well. The reasons are basically twofold: first, the practice in these latter jurisdictions may provide important insights that can help the many younger jurisdictions to design their own policies and to decide individual cases. Second, the markets of the experienced jurisdictions are important distribution markets for works from developing and emerging economies. In the framework of the survey, it also became apparent that it was not possible to include all important cases of the more experienced jurisdictions such as the US and the EU, but also France, Germany or the UK. The EU and the US are chiefly, and practically exclusively, taken into account as the jurisdictions that first developed important principles on specific issues. Hence, with regard to these jurisdictions the Report does not seek to provide a full picture of the practice there.

A different yet related question was whether the size of the economy should matter for the decision whether a specific jurisdiction should be included in the study or not. This question was answered in the negative once it became apparent that, although smaller jurisdictions may be less likely to have cases, many of them presented extremely interesting cases. This is mostly due to the fact that despite economic globalisation many markets for cultural products are still highly national in character. This is true for most TV markets and especially newspaper markets. Therefore, smaller jurisdictions are even more likely to have to deal with high levels of concentration. In contrast, larger jurisdictions are more likely to see cartel-like behaviour among local economic players that strive to prevent works from outside from entering the local or domestic market.[8] Hence, the Report will present case-law from all different kinds of jurisdictions, more or less economically developed jurisdictions and smaller and larger ones.

[8] An example is provided by the regional film industries in India that colluded to limit access for both Bollywood films produced in Hindi or English and films from abroad to local cinemas. See at 8.4, below.

Special consideration has to be given to the situation within the European Union. The European Commission and the European courts themselves have produced a considerable volume of cases relating to copyright-related markets. This includes very interesting cases on refusal to license and on CMOs in particular. Yet competition law enforcement through national agencies remains highly relevant, and may even be more relevant now than it was 10 years ago. There are several reasons for this: first, with the entry into force of the so-called Implementation Regulation No. 1/2003 on 1 May 2004,[9] the national competition agencies are now also obliged to apply EU competition law. Therefore, it is now less likely that the Commission will intervene if national competition agencies pick up cases that are limited to national circumstances, such as cases relating to the control of national CMOs, although EU competition law is applicable. For the purposes of this Report, it does not matter whether national agencies apply national or European competition law. Second, during the last 10 to 20 years, many EU Member States have experienced a large wave of liberalisation in the very important broadcasting markets. While, previously, many Member States provided for legal monopolies for public broadcasters, many private media operators have now emerged in the audiovisual field. In addition, technological progress has led to the emergence of new technologies that allow for multiple ways to distribute broadcasting signals – including cable, satellite and digital transmission over the Internet. In addition, the service providers to the media companies are no longer exclusively public utilities but often private companies that provide multiple telecommunication services for the distribution of works. The related media and telecommunication markets have hence become more competitive. But, at the same time, the conduct of the undertakings in these markets produces competition case-law. Since these markets are also predominantly national in scope, these cases are largely dealt with by national agencies and courts. Third, competition law issues can also arise before national courts, either in form of independent competition law claims or as incidental issues in the framework of copyright infringement proceedings.

3 Methodology

This study builds on a large case-finding mission that was conducted with regard to the different competition law jurisdictions of the world. This mission was undertaken with the help of a team of researchers at the Max Planck Institute and was co-funded by WIPO and the Max Planck Society. This mission was for the most part implemented during the last four months of 2012.

Various tools were used to gather the relevant information:

[9] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ No. L 1/1.

First and foremost, the Max Planck Institute prepared a Questionnaire, which was discussed and shared with WIPO before its distribution. This Questionnaire was conceived in such a way as to capture the perspective of competition agencies. Yet, the Questionnaire was sent not only to many of the agencies but also to a number of competition law scholars abroad, who either responded to the Questionnaire themselves or helped the Institute to establish contacts with the agencies and sometimes even cooperated with representatives of the agencies in responding to the Questionnaire.

The Questionnaire, which is attached as an Annex to this Report, was not used for all jurisdictions. It proved to be most important for those jurisdictions where the agencies did not provide enough information on their websites, or from where no information is available in languages spoken by members of the Institute's research team. From the very beginning, several jurisdictions were excluded from this survey based on the Questionnaire in the light of the enormous volume of practice and due to the fact that their practice is very accessible. But also in these cases, the research team was able to enter into contact with competition law scholars in the respective countries to provide information and to cross-check the information that was otherwise assembled by the research team.

In no instance did the research team rely exclusively on the responses provided by the competition agencies. Indeed, the research team screened the websites of all competition agencies of the world for relevant material in search of relevant decisions or at least press releases. This work proved most important in the analysis of the agencies' responses, since in many instances the responses led to inconsistencies with the Institute's own analysis of the cases found on the Internet. Hence, once the responses were delivered, the research team often sent additional questions for clarification, and in some instances even conducted phone interviews with the resource persons at the agencies. Indeed, it was initially planned to have more of these phone interviews. However, in a number of cases, it took a lot of time and effort to enter into contact with the agencies and to convince them to respond to the Questionnaire. Also, due to limited human resources and the complexities of the issues dealt with, many agencies were in need of more time than expected to respond to the Questionnaire. Many of the responses only arrived in December 2012, when no time was left to conduct additional interviews.

Depending on the individual jurisdiction, the survey based on the Questionnaire, both quantitatively and qualitatively, produced very different results. In general terms, this survey was extremely important for the study, although it is by far not the only source of information on which this Report relies. The Institute is indeed very grateful to all the competition law agencies that agreed to participate in the survey. Many of them participated with great enthusiasm, and only a very few declined to send responses for good reasons. Even more rarely, it was not at all possible to establish contacts with the agency. In all the instances where the research team did not get any response from the agencies, it tried to rely as best it could on the available sources and contacts with competition law scholars in the individual countries.

This Report refrains from specifying which country-specific information contained within it is more or less reliable. In any instance, due to the need to limit its volume, the Report can only present a selection of interesting and valuable cases. Hence, the gratitude of the Max Planck Institute goes to all the competition agencies that participated in the survey and the many scholars who helped to provide information, without mentioning these persons individually. Yet the Pakistani agency deserves to be mentioned in particular, since it was this agency that agreed at an initial “pilot” stage of the survey to provide its responses to the Questionnaire and thereby helped to improve the Questionnaire considerably.

4 The Survey Based on the Questionnaire

The purpose of the Questionnaire and the survey was to collect information about practice with a focus on the practice of the competition agencies. For the purpose of conducting the survey, the structure of the Questionnaire worked well, but it also became clear that the structure of the analysis in this Report would have to be different from that of the Questionnaire. Hence, before entering into the detailed analysis of the data, this section of the Report will explain the background and the general results of the survey based on the questions. It will thereby follow the structure of the Questionnaire.

4.1 Legislation

The questions under No. 1 related to the current situation of the legislation. In this context, it was of interest in particular whether the individual competition laws contain provisions that address issues of intellectual property or even copyright in particular. While most of the statutory provisions were accessible over the Internet, it was still important to get further information on how the competition agencies and the courts deal with such provisions.

Indeed, already with regard to legislation, the survey provided a broad variety of approaches. At the one extreme, there are jurisdictions that have general clauses exempting intellectual property or the use of intellectual property rights from the application of the competition law. At the other end of the spectrum, many national laws do not address intellectual property at all, thus leaving the question of applicability of competition law to intellectual property to the practice. In between the two extremes, there are a few laws that address intellectual property in the context of formulating specific prohibitions, such as essential-facility provisions that mention intellectual property as one sub-category of essential facilities. Yet even with regard to the first group of jurisdictions it became apparent that the more experienced jurisdictions among them preferred a narrow reading of the exemption provisions with the clear objective of protecting competition also in cases in which intellectual property rights are involved.

Copyright is practically never addressed in specific provisions. A considerable number of jurisdictions have adopted specific regulations or guidelines that deal with certain aspects of intellectual property from a competition law perspective. What is typical about such sub-rules is that they focus more on trademarks, namely, trademark licences in the framework of vertical distribution agreements such as franchising agreements,[10] or on agreements that are technology-oriented such as technology transfer agreements[11] or research-and-development (R&D) agreements.[12] Copyright issues may be covered by such rules to the extent that especially technology transfer rules also apply to software copyright licences. This is so, for instance, in the case of the European technology transfer rules.[13] However, in the Technology Transfer Guidelines, the European Commission also explicitly states that it will not apply European technology transfer rules to other copyright licences, including those that deal with the performance or the reproduction and sale of works.[14] In contrast, the IP Licensing Guidelines of the US antitrust agencies also apply to copyright licensing in general.[15] Similarly, in the European Guidance Paper on Abuse of Market Dominance, which among other things covers the specific conduct of refusal to license, no distinction is made

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10 See, for instance, the European Vertical Agreements Block Exemption Regulation and the Vertical Agreements Guidelines: Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, [2010] OJ No. L 102/1; Commission notice – Guidelines on vertical restraints, [2010] OJ No. C 130/1.

11 See, for instance, the European Technology Transfer Block Exemption Regulation and the Technology Transfer Guidelines: Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, [2004] OJ No. L 123/11; Commission Notice - Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, [2004] OJ No. C 101/2.

12 See, for instance, the European R&D Block Exemption Regulation: Commission Regulation No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of research and development agreements, [2010] OJ No. L 335/36. R&D agreements are also dealt with in the Horizontal Agreements Guidelines: Communication from the Commission - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, [2011] OJ No. C 11/1, chapter 3.

13 See Article 1(1)(b) of the EU Technology Transfer BER (*supra* n. 11).

14 Technology Transfer Guidelines (supra n. 11), para. 52.

15 See US Department of Justice and US Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property, April 6, 1995, para. 1.0, *available at:* http://www.justice.gov/atr/public/guidelines/0558.htm#t1.

between the refusal to license patents and copyrights,[16] which is obviously explained by the fact that most important refusal-to-license cases under EU law relate to copyright.[17]

In sum, the survey demonstrates that competition law enforcers general apply competition law to copyright-related cases. Where there are general exemption rules, these rules tend to be interpreted in a narrow sense in order to allow an individual assessment of the pro and anti-competitive effects of the case. Yet some younger jurisdictions in particular hinted at such general exemption provisions to explain why they have not had any copyright-related cases.

The assessment of IP-related cases may be spelled out more specifically in sub-rules – regulations and guidelines. Both with regard to the general exemption rules and the more specific rules on the assessment of IP-related cases, there exists a tendency to deal with copyright the same way as with patent law. Or to put it differently: there seems to be a general assumption that the patent and innovation paradigm can also guide the application of competition law to copyright-related cases. This general assumption will be tested in further detail in this Report (at 5.2, below). Only where the rules become very detailed and focused, such as in the case of the European technology transfer rules, do legislatures and agencies seem to hesitate to over-generalise the patent and innovation paradigm.

4.2 Practice in general

The questions under No. 2 were designed to produce a general picture of the practice of competition law concerning intellectual property and copyright, including copyright-related markets. Thereby, these questions also addressed the institutional dimension, namely to what extent there is also an interface of enforcement regarding copyright and competition law.

In most jurisdictions, the situation is characterised by a focus on administrative enforcement of competition law through competition agencies and private enforcement of intellectual property through the courts. However, there are also important exceptions, such as in many Latin American countries and some Asian countries, where IP offices sometimes also have administrative enforcement power. In some very few instances, such as in Peru (INDECOPI), the competition agency and the IP agency are even divisions of the same government body.

One question (Q 2.4) was whether IP infringement courts could also decide on competition law issues. A footnote explained that such an issue can particularly appear when the

[16] Communication from the Commission: Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, [2009] OJ No. C 45/7.

[17] See the above-cited *Magill* and the *IMS Health* case, *supra* n. 2. In its Guidance Paper, the Commission relies specifically on these two decisions in the context of refusal to license at large. Guidance Paper, *supra* n. 16, para. 78 (footnote 4).

defendant tries to rely on competition law as a defence against the infringement claim by arguing that there was no violation of copyright law since the right-holder was under a duty to license as a matter of competition law. This question of whether such a defence may be brought at all and, if so, under which conditions, has recently attracted considerable attention in some European countries. However, these cases typically relate to patent litigations.[18] Despite the explanatory footnote, many competition agencies seemed to be puzzled by this question, most likely because they may not be sufficiently familiar with IP infringement proceedings. What needs to be highlighted in this regard is that exclusive jurisdiction of competition agencies and specialised competition courts can make it impossible for infringement courts to apply competition law in such circumstances – notwithstanding the possibility for the infringement court to stay proceedings and to wait for a decision of the competition agencies and courts.

Another question (Q 2.6) required the agencies to provide the decisions of their jurisdiction to IP-related, not only copyright-related, cases. It was important to include this question so as to discover decisions regarding other IPRs that have to be considered as precedents for copyright-related cases.

Yet, quite understandably, another question created problems for the agencies. On the question (Q 2.8) relating to the impact of the decision on the market, many agencies had to report that they simply do not monitor how the market develops after the agency has handed down its decision.

Most instructive and important are the agencies' responses to the question relating to the institutional challenges they encountered when dealing with IP-related cases (Q 2.9). Here, a very high number of agencies and resource persons reported on the lack of experts who know enough about the interface of competition and intellectual property in their countries and even more so among the staff of the agencies. Such responses came not only from younger, less experienced jurisdictions of developing and emerging economies, but also from economically and academically highly developed but smaller jurisdictions such as Sweden or Switzerland. This challenge is explained by the enormous complexities that characterise cases relating to IP-related markets. It also confirms that this Report can be very useful for all jurisdictions of the world.

The last sub-question relating to the reasons for a lack of copyright-related cases also produced important insights (Q 2.10). Simply asking the question demonstrates the assumption that many jurisdictions will not provide much practice or even no practice at all. This assumption did not hold true for all jurisdictions. For instance, within a very few years,

[18] See, in particular, the judgment of the German Federal Supreme Court (*Bundesgerichtshof*) of 6 May 2009, Case KZR 39/06, *Orange Book Standard*, (2010) 41 *Int'l Rev. IP & Comp. L.* 369 (English translation). At the beginning of 2013, a German court questioned the conformity of this case-law with EU competition law by referring to the ECJ questions regarding a refusal to license a standard-essential patent at FRAND terms. See Case C-170/13 *Huawei Technologies*.

the Competition Commission of India (CCI) has produced an impressive number of cases relating to the film industry but also other copyright industries such as scientific publishing and the software industry, a record that can hardly be found in more experienced and well-established competition jurisdictions.

Indeed, the volume of practice and also the kinds of cases dealt with are largely influenced by the specificities of individual jurisdictions. In jurisdictions with no or very little practice, the resource persons often explained this by institutional constraints, such as the lack of staff that knows about IP or the need to concentrate on more important cases. A most important explanation came from some developing and emerging economies, namely, that copyright-related cases will not arise before the agencies as long as the enforcement of copyright remains weak. This sounds quite intuitive and convincing. Yet the respect and enforcement of copyright may well improve in many countries in the not so distant future. Hence, even these jurisdictions could experience more of these cases very soon. Also, as demonstrated by the experience in other comparable jurisdictions, low levels of enforcement do not necessarily prevent copyright-related industries – notably in the music, film and media sector – from developing, which consequently can give rise to competition law cases. Yet, with regard to collective rights management, it is to be noted that the assumption is certainly correct that competition agencies will not be asked to control CMOs as long as CMOs still need to be built up as efficient organisations for copyright enforcement and licensing. This explains why most CMO-related cases are still provided by EU law and European jurisdictions.

A most worrying explanation for a lack of practice was provided for some jurisdictions where resource persons referred to general exemption clauses preventing enforcers from applying competition law to IP-related cases. As can be seen from the experience of other jurisdictions, such rules are usually not applied as absolute exemptions. Rather, when important IP-related cases appear, the agencies and courts either prefer a very narrow reading of such provisions or even seem to ignore them. Hence, such exemption provisions can have a counterproductive effect in younger jurisdictions by providing enforcers either with wrong guidance or with a readily available justification for shying away from complex IP cases for which they do not have sufficient expertise.

On the other hand, many agencies stressed the importance of competition law enforcement in the copyright field despite the fact that practice may be limited so far. This was mostly explained by the growing importance of certain cultural industries in individual countries or the high level of concentration in rather isolated small national markets. Some resource persons also referred to the growing number of complaints that reach the agency, such as about the conduct of domestic CMOs in particular.

4.3 Practice regarding copyright-related markets

For the survey and, hence, the Report, the third block of questions was considered as, and in the end turned out to be, most important. Under No. 3, the Questionnaire requested the agencies and the other resource persons to report and analyse in more detail the relevant cases from a competition law perspective.

In a preliminary note to No. 3, the Questionnaire listed the different copyright-related markets that could and should be considered. This was very important, since the resource persons, especially at the agencies, may not necessarily have a clear understanding of the different categories of copyrighted works. At the same time, the preliminary note also clarified that information was sought not only with regard to the upstream markets for copyright licences but also with regard to downstream product and distribution markets.

The questions themselves then consisted of two groups: the first three sub-questions related to general features of the different markets, namely, how important they are for the national economy, how concentrated they are and whether there exists, such as in the broadcasting sector, specific regulation.

The answers produced with regard to the importance of certain industries varied extremely among jurisdictions. What seems most important in this regard are two findings: first, the relative importance of the copyright industries as compared to other sectors, as well as the importance of individual copyright-related industries, apart maybe from the software industry, is not dependent on the level of economic development but often on cultural specificities of the given jurisdiction. For instance, in India and Egypt, the film industry is nowadays of very high importance for the national economy, while this may not be the case at all for the large majority of European countries or Canada and Australia. Yet, countries even of the same region may have developed their peculiar strengths in specific sectors of creativity. For instance, Columbia is known for music, while Chile may be more famous for fiction. Also, Sweden has in recent years developed as an exporting country for fiction, not least crime stories and related TV productions, while the traditionally very successful music business has mostly emigrated abroad for tax reasons. Second, the specific importance of the industry may have an impact on the volume of practice a jurisdiction develops in a given sector. Yet a perhaps even more important factor for this is the level of concentration. Many of the cases reported from the copyright-related markets arise from the media sector, which in the majority of jurisdictions is characterised by a very high level of concentration. Whether the given country is also a very important production site for audiovisual works does not matter in this regard. In general, what can be seen from the survey is that competition enforcers should have an eye especially on the distribution of cultural and creative content in the media and publishing sector. For instance, the Hellenic Competition Commission discovered a very high level of concentration on the wholesale level of foreign educational books, which play a major role in university education in the country. In this market, the two major firms were found to have a combined market share between 55.8

and 61.7%.[19] Similarly, in Greece there are only two companies that control the market for the distribution of newspapers.[20] In general, the Bulgarian competition agency displayed a high awareness of competition problems in copyright-related markets. This is demonstrated in particular by the fact that it is currently conducting a sector inquiry in the newspaper market.[21]

The second group of questions serves to provide information on the individual cases regarding copyright-related markets. The analysis of these cases constitutes a major part of this Report. What deserves to be reported here is that most cases before the agencies were initiated by private informants and complainants. This seems to hold true especially for cases that were directed against CMOs, but also other dominant undertakings. The question regarding their enforcement priorities (Q 3.11) was rejected by a large number of agencies, which argued that they are under an obligation to enforce the law against all restraints of competition. This may be explained by a mostly reactive approach of many agencies that do not necessarily search for cases, but investigate cases based on complaints. This does not rule out the possibility that such complaints may lead to a series of important decisions regarding very similar cases. This has probably happened in India, where the Competition Commission has recently decided a series of cases regarding the practice of several regional film business associations that restricted the access of outside film producers to local cinemas and imposed unreasonable conditions on the exploitation of films, such as unreasonably long holdback periods for the exploitation of films in the form of DVDs.[22]

4.4 Markets for collective rights management

As expected, the Questions under No. 4 relating to collective rights management were most challenging for the competition agencies. While many jurisdictions turned out to have an unexpectedly high number of cases relating to CMOs, many agencies saw themselves unable

[19] See Press release of 4 November 2008, Case HCC 452/V 2009, *Apollon S.A. and Efstathiadis Group*, *available at:* http://www.epant.gr/news_dedails.php?LangOen&id=89&nid=178. The Commission reported the market share in its response to the Questionnaire. The two distributors had concluded exclusive distribution agreements with the publishers.

[20] Hellenic Competition Commission, judgments in Cases 252/III/2003 and 519/VI/2011, *Argos SA and Europi SA* (reported by the Commission).

[21] The Croatian competition agency has also prepared a study, not available in English, on the concentration in the newspaper industry and states that it is observing the development of concentration in this industry. However, this study was not conducted in the framework of a full sector inquiry.

[22] On the most important cases in this regard, to which later cases refer, see: Order of the Competition Commission of India of 16 February 2012, Cases No. 25, 41, 45, 47, 48, 50 and 69 of 2010, *Reliance Big Entertainment Ltd. v Karnataka Film Chamber of Commerce*, *available at:* http://www.cci.gov.in/May2011/OrderOfCommission/25-2010%20%28Majority%20Order%29%20feb%202012.pdf; Order of the Competition Commission of India of 16 February 2012, Cases No. 52 and 56 of 2010, *Eros Int'l Ltd v Central Circuit Cine & Others, available at:* http://www.cci.gov.in/May2011/OrderOfCommission/CaseNo52and56of2010MainOrder.pdf.

or insufficiently capable to answer all the questions. Indeed, these questions were also designed to provide information on specific regulation of CMOs in the framework of copyright law. While most competition agencies were aware of the existence or non-existence of such regulation, they still warned that their answers might not be sufficiently reliable and therefore often referred to other government bodies, such as general IP agencies that fulfil a supervisory function regarding CMOs.

In order to improve the study and the Report with regard to CMOs, in a few cases the Questionnaire was also sent to such agencies or to law scholars knowledgeable in this field in the respective jurisdictions.

In substance, many competition agencies proved to have only a very superficial idea of what the competition-related problems of the markets for collective right management services are. This became most obvious from the answers given to the question of whether specific regulation of CMOs contains rules that take into account the goal of protecting competition.

It is very clear that this Report could further be developed and improved with regard to specific regulation of CMOs through copyright law. Yet, for preparing this study, at least the relevant legal provisions were taken into account. This, however, does not prove that all jurisdictions that provide for such regulation also implement these rules in a very effective way. Yet deepening the study with regard to specific regulation of CMOs in the framework of copyright law would have partially redirected the study and the Report. The Report aims to provide guidance for the application of competition law only; it is not about reforming sector-specific national regulatory systems regarding CMOs.

Despite this limitation, it is not possible to analyse the practice of individual jurisdictions on collective rights management without taking into account the existence or non-existence of specific regulation. According to the results of the survey, practically all jurisdictions apply competition law to CMOs.[23] Still, it seems that competition agencies are more likely to receive complaints on alleged violations of competition law by CMOs if there is no or insufficient regulation of CMOs through copyright law. For instance, a jurisdiction that provides for special judicial procedures for the control of the copyright royalties imposed by CMOs on users will shield the competition agency from receiving complaints of users alleging that CMOs impose excessive prices and thereby abuse their market dominance in terms of competition law. Conversely, the survey produced evidence that in jurisdictions where no such mechanisms exist, the competition agencies are regularly confronted with such complaints. A very clear example of this phenomenon is provided by Turkey, where in absence of special regulation of the royalty rates under copyright law, the competition

[23] Yet there are jurisdictions with sector-specific exemptions. This is the case, for instance, in Russia, where the copyright law explicitly exempts CMOs that have been accredited for the administration of rights of persons who have not concluded a contract with the CMO from the application of the Competition Act. See Article 1244(3)(3) of the Russian Civil Code.

agency has frequently been requested to act against the royalty rates imposed by the collecting society and has always rejected such claims since it found itself unable to define criteria for the reasonableness of the royalties (see at 11.3, below). Yet, even in jurisdictions where specialised mechanisms of control exist, the competition agency may come in to fill certain gaps. This is illustrated by the Australian example in particular (see at 11.5, below).

This very short analysis already leads to a very important conclusion. Specific regulation of the activity of CMOs under copyright law on the one hand and control of CMOs through competition law on the other hand need to be considered as two complementary elements of an integrated regulatory system. In this regard, competition law plays a major role in complementing insufficient regulation by "filling gaps" left by sector-specific regulation. It is no surprise that especially US antitrust law and EU competition law have produced most valuable insights in the control of CMOs through competition law, since specific regulation of CMOs exists neither in the US nor on the level of European law. It was only in 2012 that the European Commission finally proposed a Directive that would partially harmonise the law of the Member States on collective rights management.[24] At the same time, special regulation of CMOs as part of copyright law can provide a more effective means of control and a mechanism for solving disputes, especially as regards the control of excessive royalty rates. Hence, special regulation of CMOs may generally be the better way forward for regulating CMOs. But special regulation of CMOs should be in conformity with competition law principles. Hence, in the framework of reforming sector-specific regulation of CMOs, legislatures are well advised to look into the case-law of those jurisdictions that have applied and continue to apply competition laws to CMOs to learn more about pro-competitive regulation.

In addition, the survey has not produced any justification for excluding the application of competition law in jurisdictions where special regulation of CMOs exists as part of copyright law. Rather, even in such jurisdictions, competition agencies have had to deal with restraints of CMOs, because special regulation did not foresee and provide remedies for all restraints of competition. In this perspective, competition law can always serve as a second layer of regulation, like a safety net that becomes relevant whenever special regulation fails to provide sufficient protection of competition. At the same time competition law is the platform on which copyright law can build and develop mechanisms that are more effective in protecting competition in the markets of collective rights management services. Moreover, some overlap of the two sub-systems may also be beneficial, because the institutions created for the control of CMOs as a part of specific regulation may fail to protect competition appropriately. Such institutions are often notoriously understaffed or do

[24] Proposal of the Commission of 11 July 2012 for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, COM(2012) 372 final. See also the critical comments of the Max Planck Institute on this Proposal, *available at:* http://www.ip.mpg.de/files/pdf2/Max_Planck_Comments_Collective_Rights_Management.pdf.

not dispose of sufficient resources to fulfil their supervisory functions. Also, the staff of these institutions may lack sufficient awareness of the competition dimension of collective rights management and the specialised agencies may be more prone to be captured by the special interests involved in the field of collective rights management. Furthermore, competition agencies have different and additional remedies at their disposal. While copyright tribunals can only decide disputes and supervisory agencies may only threaten to withdraw the authorisation from a CMO, but will rarely do so, competition agencies can impose fines on CMOs and, as the survey shows, also make use of this power when CMOs violate competition law.

4.5 Traditional cultural expressions, expression of folklore, especially of indigenous peoples

The questions under No. 5 refer to the protection of traditional cultural expressions and expression of folklore, which has evolved and has been recognised in recent years in the legislation of many developing countries in particular, with a focus on the protection of indigenous people, and has also become an important international topic for the work of WIPO.

Most competition agencies may have been particularly puzzled by these questions. The reason for thinking of the competition dimension of this form of protection mostly derives from the fact that such protection systems create a form of collective right and require some form of central administration. Although many of the agencies were aware of this form of protection and also highlighted the importance of forms of traditional cultural expressions and folklore for their national economies, none of the competition agencies was able to report any practice in this regard.

One reason for the lack of practice may consist in the fact that most copyright-related cases relate to problems of distribution, and only very rarely do competition law concerns arise from the exclusivity of a given right. Hence, even future cases relating to these new forms of protection may not be substantially different from the copyright-related cases that have entered into this Report. Hence, in the Report’s analytical part, there is no need to address traditional cultural expression and folklore any further.

4.6 Concluding questions

The concluding questions, No. 6, were meant to allow the competition agencies and the other resource persons to bring up any other issue that they considered relevant for the study. In sum, the responses to these questions confirmed that the Questionnaire indeed addressed all relevant issues. What is most important from the perspective of this study is that, in the light of the complexity of the issues, practically all competition agencies expressed the need for further guidance on the application of competition law to copyright-related markets.

5 On the Relationship between Copyright and Competition

As a basis for the analysis of the case-law in the subsequent chapter (at 6 through 11, below), it seems highly advisable to provide a few ideas on the current state of economic theory regarding the interface of copyright and competition. Thereby, two major problems need to be resolved. The first problem relates to the question of whether copyright law by its very nature conflicts with the goal of competition and to what extent the recognition of copyright law therefore mandates an exemption from competition law application. This issue has broadly been discussed with regard to the relationship of intellectual property in general and competition law. The discussion of this issue is mostly inspired by the ideas of innovation economics (at 5.1, below). The second problem relates to the appropriateness of the innovation/patent paradigm for defining the relationship of copyright with competition and more specifically for identifying and better understanding the economic impact copyright has on competition (at 5.2, below). As a result of the discussion of these two problems, it will be possible to identify two dimensions of the role of competition with regard to copyright law (at 5.3, below). The first dimension consists in a *restrictive* role of competition law, in the sense that competition law can restrict the use of the exclusivity of copyright. This largely corresponds to the traditional understanding that there is a tension between intellectual property and competition law. The second dimension adds the *proactive* role of competition law, which so far has largely been overlooked, namely, the role of establishing and maintaining competitive markets for the production and distribution of copyrighted works to consumers. In this regard, competition law contributes very much to the objectives of copyright law, which consist in creating incentives for creativity. In the light of the survey there is sufficient evidence that the second, *proactive*, role of competition law is of much higher importance in quantitative terms alone, namely, measured by the number of cases. But also in qualitative terms, cases relating to the proactive role may be more important, given that cases in which competition agencies have had to restrict the exclusivity of the right, although they attract much attention, are extremely rare and are regularly very atypical.

5.1 On the relationship of intellectual property and competition law

There are two ways to conceive of the relationship between intellectual property and competition law.

In the past, intellectual property and competition law were perceived as conflicting fields of law. This is explained by the exclusive character of intellectual property rights, which excludes third parties from using the subject-matter of protection. Accordingly, IPRs appear as exemptions from the application of competition law. This explains why even recently adopted competition laws contain rules that exclude the application of competition law to intellectual property rights. The only question that remains is how far this exemption should go. It was first for the courts in the US to answer this question with the adoption of the so-called "inherency doctrine".[25] Pursuant to this theory, patents in particular were conceived of as monopolies that are irreconcilable with the principles of competition law. Accordingly, the courts recognised unlimited freedom to use the patent right as long as the right-holder, especially in the framework of licensing clauses, did not extend the right beyond the legally recognised scope of the monopoly. While this theory has never been enacted in the antitrust laws of the US or in EU competition law, the theory has gained entry to many competition laws of the world. One of the many examples can be found in the former German Act against Restraints of Competition, which prohibited the sale or the licensing of patents, utility models, the topographies of semiconductor chips and protected seed varieties insofar as such agreements imposed restrictions on the acquirer or the licensee that went beyond the scope of the protected right.[26] Although this inherency doctrine is today generally rejected, courts still sometimes rely on the inherency doctrine in order to insulate the use of intellectual property rights against competition law application.[27]

Today, it is generally agreed that there is no inherent conflict between the two fields of law. Rather, intellectual property law and competition law are held to pursue complementary goals by applying legal instruments that are specific to the two fields of law. This "theory of complementarity" was first described in the US IP Licensing Guidelines of 1995:

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[25] See *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 F. 288 (6th Cir. 1896); *Standard Sanitary Mfg. Co. v United States*, 226 U.S. 20 (1912).

[26] Former Sec. 17(1) German Act against Restraints of Competition. The German rules on licensing agreements were deleted from the act when Germany harmonised its law on restrictive agreements with European law in 2005. As of this reform, the European rules on technology transfer are declared to be applicable also as part of German law (Section 2(2) of the Act).

[27] One example of this is the annulment of the order of the Italian competition agency (AGCM) of 28 March 1996, Case I195, *Associazione Italiana Calciatori–Panini*, Boll. No. 13/1996, *available at:* http://www.agcm.it/concorrenza/concorrenza-delibere/open/41256297003874BD/77E2876252379FA54125630A005B844D.html. In its order, the AGCM confirmed a violation of Article 2 of the Italian Antitrust Law in the case of bundled licensing of the photographs of Italian football players in favour of a single undertaking. Thereby, the AGCM, obviously inspired by the European distinction between the existence and the use of a right, distinguished between the grant of the right as such and the modalities of the use of the right, which can be controlled under competition law. On appeal, the Regional Administrative Court (TAR) of Lazio annulled the agency order based on the argument that the right-holders had only made use of their legally granted exclusive rights in intangible assets. According to the court, the transfer of the exploitation of exclusive right constitutes the very core of the exclusive right and can therefore not be considered anti-competitive. On further appeal, however, the Consiglio dello Stato (decision 349/97 of 18 March 1997) annulled the judgment of the TAR and reconfirmed the agency order.

> The intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare. The intellectual property laws provide incentives for innovation and its dissemination and commercialization by establishing enforceable property rights for the creators of new and useful products, more efficient processes, and original works of expression. In the absence of intellectual property rights, imitators could more rapidly exploit the efforts of innovators and investors without compensation. Rapid imitation would reduce the commercial value of innovation and erode incentives to invest, ultimately to the detriment of consumers. The antitrust laws promote innovation and consumer welfare by prohibiting certain actions that may harm competition with respect to either existing or new ways of serving consumers.[28]

This idea of complementarity is even more clearly spelt out in the EU Technology Transfer Guidelines:

> The fact that intellectual property laws grant exclusive rights of exploitation does not imply that intellectual property rights are immune from competition law intervention. Articles 81 and 82 are in particular applicable to agreements whereby the holder licenses another undertaking to exploit his intellectual property rights. Nor does it imply that there is an inherent conflict between intellectual property rights and the Community competition rules. Indeed, both bodies of law share the same basic objective of promoting consumer welfare and an efficient allocation of resources. Innovation constitutes an essential and dynamic component of an open and competitive market economy. Intellectual property rights promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes. So does competition by putting pressure on undertakings to innovate. Therefore, both intellectual property rights and competition are necessary to promote innovation and ensure a competitive exploitation thereof.[29]

Such wording has also entered the IP Guidelines of younger competition agencies. A good example is provided by the IP Guidelines of the Competition Commission of Singapore.[30]

According to this theory of complementarity, intellectual property rights are part of a competitive system. They certainly restrict competition to some degree by preventing competitors from competing by imitation. This, however, is done for the very purpose of promoting dynamic competition by substitution. Hence, from a competition perspective, intellectual property leads to a trade-off: it is expected that the pro-competitive dynamic effects outweigh the anti-competitive effects. This argues against insulating intellectual property against competition law application, since IP owners as well will only invest in innovation if they feel competitive pressure. Accordingly, the theory of complementarity

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[28] IP Licensing Guidelines, *supra* n. 15, para. 1.0.

[29] TT Guidelines, *supra* n. 11, para. 7

[30] CCS Guidelines on the Treatment of Intellectual Property Rights, para. 2.1, *available at:* http://www.ccs.gov.sg/content/dam/ccs/PDFs/CCSGuidelines/IPR_Jul07FINAL.pdf.

emphasises that solving the tension between the rules on intellectual property and competition requires an assessment of the pro and anti-competitive effects in individual cases. Hence, competition law should not exempt intellectual property by limiting its own scope of application, but should instead offer convincing rules and disciplines that can guide the most complex assessment of individual cases in the process of applying competition law.

5.2 Transfer of the innovation/patent paradigm to copyright law

As can be seen from the quotes from the US and EU guidelines, the theory of complementarity is largely inspired by the innovation/patent paradigm according to which patent law aims at creating incentives for innovation. With the particular exception of software, copyright protection is not granted in view of promoting innovation but so as to create incentives for creativity. The question therefore is whether the theory of complementarity can also be transferred to the copyright world.

By making a general statement on the relationship between "intellectual property" and competition, the passages of the guidelines quoted above seem to assume that such a transfer is possible. And, indeed, this view deserves to be supported, albeit with certain modifications. Copyright certainly equals patent law in that it excludes free-riding by competitors on the achievements of the right-holder and, thereby, allows the right-holder to charge a price for the use and consumption of these achievements by third parties. Copyright protection, just like patent protection, is therefore a condition for the creation of markets for the intangible assets protected by these property rights. The exclusivity of the right "privatises" these assets as originally public goods. Yet, what is less obvious in terms of competition policy is whether copyright is only about static competition, namely, guaranteeing the production of a maximum number of creative goods at lowest prices, or also about dynamic efficiency. Whereas patent law is about bringing new and better products to the market, creative works seem to be less accessible for such statements of quality and innovation. However, the concept of innovation can be adapted for the purposes of copyright and creative goods. In the field of copyright as well, the exclusivity of the right excludes competition by imitation. This forces the investors in creative production to rely on their own creativity, or the creativity of people they employ, to come up with different products that may please consumers more. In this regard, innovation as a goal of patent law is equalled by cultural diversity in copyright law. From a competition law perspective it is therefore possible to apply the concept of dynamic efficiency and dynamic competition also to cultural goods protected by copyright law.

5.3 The two dimensions of the role of competition law regarding copyright-related cases

5.3.1 The "restrictive" role of competition law

While the abovementioned view of complementary goals of intellectual property law and competition law is nowadays broadly accepted, there is also consensus that there is a tension between the specific rules and disciplines of the two fields of law. Or to put it more concretely: the exclusivity of intellectual property law excludes others from using the subject-matter of protection. In contrast, competition law with its rules on monopolization and abuse of market dominance may specifically be applied with the effect of imposing a duty to license on the right-holder. Competition law therefore has a tendency to question the very essence of intellectual property rights, namely, the right to exclude others. It is above all with regard to the question of whether and under what circumstances competition law can be applied to cases of a refusal to license that the relationship of competition law and intellectual property law is most hotly debated. Applying competition law to such cases would amount to the recognition of a compulsory licensing system in the framework of the unilateral conduct rules of competition law. Competition law in this regard serves a specific purpose, namely, to "restrict" the exclusivity of the right in cases where exclusive protection appears excessive.

Yet the attention given to such cases especially with regard to copyright has the potential of distracting us from the fact that competition law serves yet another, proactive, role with regard to copyright. It is certainly true that EU courts have developed European rules on refusal to license predominantly through copyright-related cases, namely, in the judgements of *Magill* and *IMS Health*.[31] Both cases, however, were about very atypical kinds of works; in the *Magill* case, copyright protection was granted by the courts in the UK and Ireland for the listings of TV programmes, which, because of the apparent lack of creativity, would not have been held copyrightable under the law of the continental EU Member States. In *IMS Health*, the question was whether the holder of the copyright in a database work consisting of a map of Germany subdivided in 1860 sectors (so-called "bricks") had to share the use of this "brick structure" with competitors for the collection of marketing data on the sale of pharmaceuticals in Germany.

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[31] *Supra* n. 2. A more recent and very important judgment is that of the Court of First Instance (now General Court) in Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601. Although the case related to computer programs protected by copyright, the question was more specifically whether EU competition law required Microsoft to grant access to the interoperability information contained in its Windows operating system. Both the Commission in its initial decision and the Court left open whether the production of interoperable programs by competitors used creative elements of the Windows program by relying on the interoperability information. At least, the case was about a refusal to grant access to trade secrets. For further reading *see* Gintarė Surblytė, *The Refusal to Disclose Trade Secrets as an Abuse of Market Dominance – Microsoft and Beyond*, Stämpfli Publishers: Berne, 2011.

What counts more than the atypical character of the works in question is the fact that copyrights are hardly ever likely to lead to market dominance. While in the past it was often held that each copyrighted work, due to its original character, constituted a proper market, the ECJ already in *Magill* required the Commission to define the market according to the general criteria of substitutability and thereby explicitly stated that "it is to be remembered at the outset that mere ownership of an intellectual property right cannot confer such a position".[32] Yet, in *Magill*, the ECJ reached the conclusion that there was indeed market dominance of the TV stations based on the copyright for their TV listings since the copyright could be used for restricting access of independent publishers to the information as an essential input for the production of comprehensive weekly TV guides.[33] The *Magill* judgment is often seen as the recognition of the European essential-facilities doctrine. In this case, the essential facility was not the copyright, but the underlying information. Copyright, however, is not designed to protect information as such. Quite on the contrary, copyright law should abstain from the protection of information and only protect the concrete form and expression of the work (so-called idea-expression dichotomy). Only if copyright law refrains from protecting information as such will it serve its purpose of contributing to the dissemination of information.[34] Copyright principles and competition law ideally work together in establishing competitive markets. In *Magill*, domestic courts may simply have gone too far, already as a matter of copyright law, in granting copyright protection to mere TV programme listings. In *IMS Health*, market dominance was affirmed because of the very peculiar circumstances in the case. The brick structure used by the right-holder in the framework of its provision of information services to pharmaceutical companies had emerged as the industry standard. Therefore, the competitor was not able to enter the market without using this structure.

This does not mean that, apart from such atypical cases, copyrighted works always compete with each other. What has to be remembered from the outset is that copyright-related markets often lead to a most difficult definition of product markets. Copyrighted works and the mechanisms of copyright-related markets are highly diverse, which excludes ready-made generalisations. Entertainment films, for instance, are certainly original in that they differ from each other. Yet there are no doubts that members of the audience constantly make choices as to what films they prefer to see from a large number of movies that come out every week in the cinemas. Films are, however, very incomplete substitutes and whether

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32 *Magill*, *supra* n 2, para. 46. In the United States, a presumption according to which patents always lead to monopoly power as a requirement for the application of the prohibition of monopolization provided for by Section 2 of the Sherman Act was only given up by the Supreme Court in *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).

33 *Id.*, para. 47.

34 See also Article 1(2) of the EU Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, [2009] OJ No. L 111/16. According to this provision, copyright law only protects the expression of computer programs, but not the ideas and principles contained in the program.

one film is an option to another film may vary considerably among viewers according to their individual tastes and preferences. Yet there are cultural and creative products where one can seriously consider whether a certain product constitutes a proper market. One example of this may be scientific journals, access to which is indispensable both for the author of an article who depends on access to the journal for his academic career and scientific academic libraries and institutes for which the subscription of such "must-have" journals is mandatory.[35]

5.3.2 The proactive role of competition law

The "proactive" role of competition law regarding copyright-related cases is less apparent than its restrictive role. As will be seen from the further analysis, only relatively few cases can be characterised as those where competition law is applied with a restrictive tendency and the objective to outbalance overly-broad copyright protection. Even in cases where the restraint of competition originates from right-holders, competition law does not necessarily interfere with the exclusivity of copyright protection. This can be illustrated, for instance, by price cartels concluded among different right-holders, such as the recently discovered price cartel among publishers for eBooks initiated by Apple, which is currently being dealt with by several jurisdictions including the US and the EU.[36] Copyright exclusivity enables the publishers to enter into licensing agreements and to charge prices for the distribution of their eBooks. But copyright law does not authorise the competing copyright owners to fix prices by entering into a price cartel.

Therefore, application of competition law to such cases falls outside the sphere of "restrictive" application of competition law. But this does not suffice to declare such cases "proactive". This is in need of further explanation, which again is best provided by reliance on the innovation/patent paradigm.

In the context of patent law, it would be fundamentally wrong to confuse the subject-matter of protection with innovation. Patent law protects inventions and not innovation. What is hoped for is that by protecting inventions societies will enhance innovation. According to international law, inventions are entitled to patent protection "provided that they are new,

[35] See, however, the recent order of the Competition Commission of India (CCI) of 3 July 2012, Case No. 10 of 2010, *Prints India v Springer India*, *available at:* http://www.cci.gov.in/May2011/OrderOfCommission/CaseNo16of2010MemberD.pdf. In this case, the Commission discussed and rejected such a narrow market definition. Yet, the case was not so much about market dominance of scientific journals vis-à-vis authors and subscribers as market dominance in the market for publication and distribution services for scientific publications. In this regard, the Commission also took into account emerging online distribution and scientific publications in English imported from other countries to India.

[36] See the most recent decision: *US v. Apple, Inc., et al.* (S.D. N.Y. July 10, 2013).

involve an inventive step and are capable of industrial application".[37] Most importantly, the novelty and inventive-step requirements do not guarantee that the invention indeed leads to a product that serves consumer needs better than pre-existing products. Depending on the kind of products and the specific industry, such an assessment would even be impossible, since in many instances the products in which the invention will be implemented can hardly be foreseen at the time of the patent grant. This fact is also evidenced by patent data. Many patents never make it to the markets (unused patents), because there is not sufficient consumer demand for the respective products. Hence it is the market and competition in the market that will decide whether a particular invention indeed leads to innovation by serving consumer needs better than previous products.

This idea according to which competition, and not patent law, identifies innovation corresponds with the general definition of innovation in economic theory. According to this theory innovation describes a process from the initial idea to bringing a product to consumers. Hence, innovation cannot be thought of without the market and the dissemination of innovation to consumers. This process typically includes the stage of research and development, the implementation of the new technology in marketable products and the distribution to consumers. Also, such a process does not have a fixed starting and ending point. Rather, innovations can be further developed in the process of follow-on innovation.

Hence, competition plays a major role in promoting innovation, namely by producing information about what consumers actually want and by making the process of innovation, including the distribution of new products, more efficient. Thereby, innovation can take two forms, namely, process innovation, which helps to make the manufacturing and distribution process more cost-efficient, while the products sold to consumers may remain essentially the same, and product innovation, relating to new and better products. In both cases, innovation serves the interest of end-consumers. In order that patent law can actually reach its goal of bringing innovation to consumers, it has to rely on competitive markets. Markets are therefore in need of protection against restraints of competition in view of preventing them from harming this process of innovation.

In this sense, a price cartel among the holders of patented pharmaceuticals conflicts with the very goals of patent law itself. Such a cartel, as any other price cartel, will reduce output and increase price and thereby restrict access of patients to the pharmaceuticals. Such a cartel has recently been prosecuted by the Indonesian competition agency[38] despite the provision

[37] See Article 21(1) of the TRIPS Agreement. Footnote 5 to this provision clarifies that the US requirements of "non-obviousness" and "utility" can be deemed to be synonymous with the terms of "inventive step" and "industrial application".

[38] Pfizer and Dexa Medica were accused of fixing the prices for their respective amlodipine tablets used for the treatment of hypertension. According to the agency's findings, the cartel made the respective drugs 14.6 respectively 13.6 times more expensive than the average international price. However, both the Central District Court of Jakarta and finally the Supreme Court annulled the agency decision for lack of sufficient

in the Indonesian Competition Act according to which competition law does not apply to intellectual property agreements.[39]

These considerations can also be transferred to copyright-related cases. Restraints of competition that harm the functioning of copyright-related markets are opposed to the very objectives of copyright itself whether such restraints are initiated by the right-holders or the distributors of works in downstream markets. The often very immediate negative effects of such restraints of competition on copyright can be well illustrated by the recent decisions of the Competition Commission of India relating to the practices of regional Indian film business associations that restricted access of outside producers to local cinemas in particular.[40] Thereby the Competition Commission of India did not accept the argument of some local associations that such restrictions were needed to protect films produced in local languages against more popular Bollywood movies produced in Hindi or English. Rather, the Commission held that the associations prevented consumers from seeing the movies they prefer. In the light of on-going complaints about the high level of piracy and the results of a recent empirical study conducted at the Max Planck Institute on the attitude of young Indians toward movie piracy that has identified problems of access to popular movies through cinemas at affordable prices as a major reason for consuming pirated movies,[41] it is possible to conclude that such anti-competitive restraints that are initiated from within the film industry also have the potential of aggravating the problem of piracy. Conversely, application of competition law can contribute "proactively" to fighting piracy and, hence, to protecting copyright as part of a more holistic government policy that does not purely rely on the prosecution of copyright infringement and sanctions imposed on infringers.

6 Competition Law Provisions on Intellectual Property

In the following parts, 6 through 11, this Report will analyse the data that has been produced by the survey of the law and practice in the different jurisdictions. In doing so the Report follows a competition-law-oriented approach by assembling the data according to the way competition law enforcers typically group and assess individual cases. In Part 6, this Report analyses the provisions that can be found in competition laws that explicitly address the interface with intellectual property.

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evidence of the cartel. The Indonesian authority can still win the case by submitting additional evidence. See Ed Silverman, "Pfizer Wins Price Fixing Case in Indonesia", *Pharmalot.com*, July 19th, 2012, *available at:* http://www.pharmalot.com/2012/07/pfizer-wins-price-fixing-case-in-indonesia/.

39 See Article 50(b) of Law No. 5 of 1999.

40 *Supra* n. 22.

41 See Arul G. Scaria, *Copyright and Cultural Consonance – Insights from an Empirical Legal Study on Piracy in the Indian Film Industry* (forthcoming).

6.1 Exemption clauses and their application

As indicated above (at 4.1), there are a number of jurisdictions where the law provides for a statutory exemption for intellectual property and thereby limits the scope of application of the competition law provisions to IP-related cases. The very wording of these rules varies considerably. What seems more important than the wording, however, is that competition law enforcers and courts need to develop theories that allow them to define with more precision when competition law applies. Accordingly, a clear distinction has to be made between the wording of such provisions and how jurisdictions define the scope of application in practice. For the latter purpose, some competition agencies have drafted additional guidelines that allow them to apply such provisions with more legal certainty.

6.1.1 General exemptions of IP from competition law

There are some jurisdictions that contain statutory provisions that generally exempt intellectual property from the application of competition law.

Even for EU law, the existence of such an exemption was discussed. Indeed, Article 345 of the Treaty on the Functioning of the European Union (TFEU) states, without any distinction between real property and intellectual property, that the Treaties “in no way prejudice the rules in Member States governing the system of property ownership”. Yet, already in the early *Consten and Grundig* case,[42] the European Court of Justice rejected an overly broad reading of this provision in its initial version of Article 222 EEC Treaty by distinguishing between the “exercise” of the right, which can be controlled, and the “grant” of the right.[43] Following this judgment, EU practice has never found that an individual IP-related case was exempted *ex ante* from the application of European competition law. Rather, it has always been by applying the specific provisions of competition law that the Commission and the courts tried to seek a balance between the protection of IP laws and competition law.

There are other jurisdictions that seem to provide for complete exemptions of intellectual property from the scope of application of competition law. In Poland, Article 2(1) of the Competition and Consumer Act (2007) provides that the Act is “without prejudice” to IPRs including copyright. Yet Article 2(2) clarifies that the Act applies to licensing contracts and contracts relating to the “principles of organisation and management”. As a result, the Polish agency obviously did not see any obstacle to applying the Act to issues of collective rights management in particular.

In Mexico, Article 28 of the Constitution prohibits all monopolies. But Article 5(2) of the Competition Act (Ley Federal de Competencia Económica) provides that temporary

[42] Joined Cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299.

[43] *Id.*, p. 345.

privileges granted to authors, artists and inventors for exclusive use do not constitute a monopoly. While this exemption seems to be extremely broad, it is immediately limited again by Article 5(3), which provides that the Act nevertheless applies to the right-holders and their acts. As a consequence, application of Mexican competition law to IP-related cases does not seem to be limited in any way. This is also supported by Article 12(3) of the Competition Regulations,[44] which establishes that IPRs can give rise to entry barriers and, therefore, have to be considered in the framework of Article 13(2) of the Competition Act for the assessment of market dominance.

An extremely broad exemption provision is also to be found in Peru, where the Competition Law (Decree No. 1034 of 2008) in Article 3(1) places any conduct that is the result of a legal provision outside the scope of application of the competition law. Yet the Peruvian competition agency INDECOPI has applied competition law to a refusal to license without even mentioning Article 3(1) of the Decree.[45] The reason for this may be that Article 3(1) refers to legal provisions in general without mentioning intellectual property more specifically.

A very broad exemption rule is also provided by Article 7 of the Jordanian Competition Law, which provides that practices arising out of a law shall not be considered anti-competitive practices in the sense of competition law. Whether this also includes IP laws, however, is quite unclear, and practice is missing in this regard.[46] Above all, it is not the IP law as such that restricts competition, but the right-holder who uses and relies upon the exclusivity of the right.

Another example of extremely broad exemption provisions can be found in Russia. There, the Federal Competition Act (2006) contains two provisions which exempt intellectual property and the exercise of IPRs from the prohibition of abuse of dominance (Article 10(4) of the Act) and the prohibition of restrictive agreements (Article 11(9) of the Act), respectively. The two provisions read as follows:

> The requirements of this Article do not apply to actions of *exercising exclusive rights* as results of intellectual activity and, equal to them, means of individualization of a legal person, as well as to means of individualization of products, works or rendered services.[47]

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[44] *Reglamento de la Ley Federal de Competencia Ecónomica* (2007).

[45] See Resolution 005-2003-INDECOPI/CLC, 14 May 2003, *Tele Cable S.A. v. Fox Latin American Channel, Inc.*, *available at:* http://aplicaciones.indecopi.gob.pe/ArchivosPortal/publicaciones/5/2003/1-99/7/9/Resol005-2003.pdf. See also at 6.5.3 (iv), below.

[46] Indeed, in the responses to the Questionnaire, the Jordanian competition authority argued that Article 7 would indeed exempt intellectual property from the scope of application of the competition law.

[47] Art. 10(4) of the Federal Competition Act. Emphasis added.

> The requirements of this Article do not apply to *agreements for the transfer and (or) assignment of the rights to use the results of intellectual activity* or the means of individualization of a legal entity, the means of individualization of products, works or services.[48]

In the process of reviewing competition law in the framework of Russia's accession to the WTO, the country's competition agency, the Federal Antimonopoly Service (FAS), suggested repealing these exemption provisions.[49] Yet this proposal was not accepted by the Ministry of Economic Development, which saw such a reform in conflict with the very purpose of protecting intellectual activity. IP-related cases have remained rare in Russian practice. Yet FAS was requested to make a decision on the application of competition law in the *Microsoft* case.[50] In this case, Microsoft was charged of having violated competition law by (1) charging discriminatory prices for its software and (2) refusing to sell copyright-protected software to consumers. Indeed, in 2008, Microsoft had announced that it would no longer sell its Windows XP operating system program in Russia, although there was still consumer demand. Also, Microsoft charged different prices for the use of its programs on different kinds of computers. FAS dismissed the case. Yet FAS did not simply rely on the exemption clauses of the Act, but went into the assessment of the case in the light of the concrete prohibition provisions. On the one hand, FAS justified the refusal-to-license practice by the fact that Windows continuously updated its operating systems with better versions. On the other hand, FAS allowed the price discrimination in the light of the fact that certain types of computers, such as netbooks and low-productivity portable computer equipment could only use a smaller part (30%) of the software.[51]

The anti-monopoly law of Azerbaijan seems to be influenced by the legislative situation in Russia. In defining its scope of application, Article 2(3) of the Anti-Monopoly Law (1993) provides that the Law is "not applicable to relationships that result from the rights of economic subjects to inventions, trade marks and authorship *except cases of deliberate use of such rights with the aim of restricting competition*".[52] The second half of this provision provides considerable room for interpretation. Indeed, other provisions of the Law bring more precision to it. Article 12 provides for a special rule for patents and patent licences. This also includes a prohibition according to which a groundless refusal to license can be considered an abuse of the patent right if the refusal has the objective of restricting or eliminating competition in some markets (Article 12 No. 1). In such case, the Law provides power to the competent administrative body to order a compulsory licence according to

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48 Art. 11(9) of the Federal Competition Act. Emphasis added.

49 This proposal was submitted as part of the so-called "Third Antimonopoly Package" in January 2012.

50 FAS decision of 21 September 2009, *FAS v Microsoft Corp*., Case No. 1 10/96-09,

51 See also "Russian Federal Antimonopoly Service is at law with Microsoft", June 5, 2009, ParAEMENIAN.Net, http://www.panarmenian.net/eng/it_telecom/news/32520/.

52 Emphasis added.

Article 14 No. 7 of the Law. In contrast to patents, the Anti-Monopoly Law does not contain any specific rules on copyright licences and the refusal to license a copyright. It is still to be seen, how Article 2(3) will be applied to copyrights, or whether enforcers of the Anti-Monopoly Law will apply the rules on patents by analogy also to copyright. During the time of preparation of this report in 2012, a new Anti-Monopoly Law was in the process of being adopted. Hence, the legal situation may have already changed by the time of the adoption of this Report.

In Belarus, a general exemption rule for IP can be found which is very similar to the one in Azerbaijan. Article 3(2) of the Competition Act (1992) provides that the Act "does not apply to the relations regarding protection of inventions, production prototypes, IC topologies, secret information, trademarks and copyrights, excluding cases when such rights are used by their owners to restrict competition, as well as relations concerning goods withdrawn from circulation in the Republic of Belarus". No practice was reported by the Belorussian agency on this provision. In Belarus as well a new Competition Act is in the process of being adopted.

In Georgia, Article 5(1) of the former Law on Free Trade and Competition (2005) very broadly provided that this Law "does not concern the relations connected with copyright, inventor's right, trademarks and industrial patterns". However, on 8 May 2012, a new Law on Free Trade and Competition was adopted in Georgia which, according to the agency information, has the purpose of harmonising Georgian competition law with the EU law. It was not possible to get access to an English version of the new Law.

In Tajikistan, according to its Article 2, the Law on Competition and Constraints of Monopolistic Activities on Commodities Markets (1993) does not apply to relationships regarding intellectual property, except when agreements on the use of intellectual property intend to restrict competition. Such a general exemption of intellectual property from competition law can also be found in Article 3(2) of the new Competition Law of Uzbekistan adopted in 2012.

6.1.2 The "exercise" of IPRs as a criterion

In the EU, as we have just seen, the criterion of the "exercise" of an IPR was used to justify the application of competition law in IP-related cases. It is to be noted that there are other jurisdictions that, conversely, exempt the "exercise" of an IPR from the application of competition law. This includes the Russian exemption of the "exercise of exclusive rights" from the prohibition of abuse of market dominance.[53] Other examples are provided by some Asian laws in particular.

Article 21 of the Japanese Antimonopoly Act provides as follows:

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[53] *Supra* n. 47.

> The provisions of this Act shall not apply to such acts *recognisable as the exercise of rights* under the Copyright Act, Patent Act, Utility Model Act, Design Act or Trademark Act.[54]

Article 45 of the Taiwan Fair Trade Act (2011) provides:

> No provision of this Law shall apply to any *proper* conduct in connection with the *exercise of rights* pursuant to the provisions of the Copyright Law, Trademark Law, or Patent Law.[55]

Article 59 of the Fair Trade Act of the Republic of Korea provides:

> The provisions of this Act shall not apply to any act *deemed to be an exercise* of rights under the Copyright Act, Patent Act, Utility Models Act, Design Act, or Trademark Act.[56]

Yet all of these provisions contain wording that allows for flexibility in applying competition law. Under the Japanese law, the question is under which conditions a specific conduct is "recognisable" as the exercise of an IPR. Under the law of Taiwan, the question is what can be considered as "proper" conduct. And under the Korean law, the question is what kind of conduct can be "deemed" to be an exercise of rights. The Japanese IP Guidelines[57] prove that the Japanese Fair Trade Commission (FTC) is prepared to use this flexibility to its best ability. In interpreting Article 21 of the Japanese Antimonopoly Act, the IP Guidelines state in particular:

> An act by the right-holder to a technology to block other parties from using its technology or to limit the scope of use may seem, on its face, to be an exercise of rights. The provisions of the Antimonopoly Act apply even to this case if it cannot be recognized substantially as an exercise of a right. In other words, any act that may seem to be an exercise of a right cannot be "recognizable as the exercise of the rights" provided for in the aforesaid Article 21, provided that it is *found to deviate from or run counter to the intent and objectives of the intellectual property systems*, which are, namely, to motivate enterprises to actualize their creative efforts and make use of technology, in view of the intent and manner of the act and its degree of impact on competition. The Antimonopoly Act is applicable to this kind of act.[58]

This Japanese standard of relying on the "intent and objectives of the intellectual property systems", which has also found support by Japanese courts,[59] achieves a conversion of a

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[54] Emphasis added.

[55] Emphasis added. The provision dates of the FTA 1992.

[56] Emphasis added.

[57] Guidelines for the Use of Intellectual Property Under the Antimonopoly Act, http://www.jftc.go.jp/en/legislation_guidelines/ama/pdf/070928_IP_Guideline.pdf.

[58] *Id.*, Part 2(1). Emphasis added.

[59] See Japan Intellectual Property High Court of 20 July 2006, *Hinode v. Roppô*, (2009) 40 *Int. Rev. Intell. Prop. & Comp. L.* 617, 618 (English translation) (confirming that the Antimonopoly Act applies despite Article 21 if the exercise of the patent deviates from the purpose of the patent system).

statutory provision that was inspired by the misguided inherency doctrine in the light of the modern theory of complementarity. By assuming that IP laws and competition law indeed pursue complementary goals, the Japanese approach allows for full application of the competition law to IP-related cases where the conduct turns out to be anti-competitive. Or to put it differently: following this reading, Article 21 of the Antimonopoly Act in no way limits the scope of application of competition law to IPRs but turns the issue of the application of competition law to IP-related cases into one of the application of the specific prohibition provisions of the Act.

In 2010,the Korean Fair Trade Commission (KFTC) also adopted IP Guidelines that allow a flexible and rational application of competition law to intellectual property.[60] These Guidelines explain the application of Article 59 FTA as follows, by making a distinction between a "just" exercise and an "undue" exercise of rights:

> A. The *just* exercise of intellectual property rights is excluded from the application of the Act in accordance with Article 59 of the Act. However, any *undue* exercise of intellectual property rights shall be subject to the Act.[61]
>
> B. Whether an exercise of intellectual property rights is just is determined by (i) whether it satisfies the original purpose of the intellectual property rights which is to facilitate industrial development by protecting and encouraging invention and promoting the use of related technology and (ii) how it affects competition and fair trade order in the relevant market. However, whether the exercise of intellectual property rights breaches the Act shall be determined after separately reviewing the conditions of illegality prescribed in the provisions of the relevant provisions.
>
> C. In the event that the exercise of intellectual property rights produces the effects of impeding fair trade and improving efficiency at the same time, such exercise shall, as a principle, be reviewed by comparing its positive and negative effects to determine whether or not the exercise is contrary to the Act. If the effect of improving efficiency outweighs the effect of impeding fair trade, it may be determined that the said exercise is not a breach of the Act.[62]

Like the Japanese Guidelines, the Korean Guidelines transfer the exemption provision of the Act into an application of the Act based on a balancing of the pro and anti-competitive effects of intellectual property on competition.

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60 Korean Fair Trade Commission, Review Guidelines on Unfair Exercise of Intellectual Property Rights, 31 March 2010.

61 Emphasis added.

62 Korean Fair Trade Commission, Review Guidelines on Unfair Exercise of Intellectual Property Rights, 31 March 2010, at II.2.

Another Asian law that relies on the "exercise" of rights for defining the scope of application of its competition law is that of the People's Republic of China. Article 55 of the Anti-Monopoly Law (2007) provides as follows:

> This Law does not govern the conduct of business operators to *exercise* their intellectual property rights under laws and relevant administrative regulations on intellectual property rights; however, business operators' conduct to eliminate or restrict market competition by abusing their intellectual property rights shall be governed by this Law.[63]

As can be seen from the second part of this provision, the Chinese legislature tried to make clear that the right-holders should not generally be allowed to rely on the exemption whenever they use IPRs. The question is of course how to draw the line between legitimate "exercise" of IPRs and "abuse" of IPRs, which will not escape the application of the Law.[64] If one reads "abuse" in the sense of "anti-competitive use", Article 55 would be fully in line with the modern theory of complementarity. Yet this reading would require an assessment of whether there is a restraint of competition already at the stage of clarifying whether the Law is applicable in the first place. Accordingly, Article 55 could even be deleted with the effect that the specific rules prohibiting anti-competitive conduct would apply to conduct relating to IPRs. The State Administration for Industry and Commerce (SAIC) – the Chinese agency that has power to apply the Anti-Monopoly Law to non-price-related restraints – is currently working on guidelines on the application of the Law to IPRs. According to most recent reports on the fifth draft of these guidelines, it seems that SAIC will follow modern standards of applying its competition law inspired by the theory of complementarity and also inspired by practice known from EU law.[65]

Panama is an example of a Latin American jurisdiction that generally exempts the exercise of IPRs from the scope of application of its competition law. According to Article 4, No. 2, Competition Law No. 45 (2007), "the *exercise* of the rights of intellectual and industrial property that the law recognises to their holders, the grant for a certain time to the holders of the copyright and related rights for the exercise of their rights and the granting to inventors for the exclusive use of their inventions" is not considered a monopolistic practice in the sense of the Law.[66]

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[63] Emphasis added.

[64] On the interpretation of Article 55, see also Yijun Tian, "The Impacts of the Chinese Anti-Monopoly Law on IP – Commercialization in China & General Strategies for Technology-Driven Companies and Future Regulators", (2010) *Duke L. & Tech. Rev.* No. 4, paras 19-25, *available at:* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1199&context=dltr.

[65] See Margaret Wand and Richard Bird, "IP and competition in China", 16(1) *Global Comp. Rev.* 43 (2013). The Draft Guidelines contain rules on both licensing agreements and refusal to license in particular. Both sets of rules confirm that SAIC intends to apply the Anti-Monopoly Law to IP-related cases despite Article 55. As regards refusals to license, SAIC's Draft Guidelines may allow for more intervention than EU law (*id.*, at 45).

[66] Emphasis added.

In more general terms, Article 2(4) of the Competition Law of Uruguay provides that the "exercise of rights recognised by law", which should also include intellectual property rights, is not deemed to be an anti-competitive practice.

6.1.3 The "effects on competition" as a criterion

Other jurisdictions seem to come closer to the theory of complementarity by restricting the scope of application of the competition law by using the criterion of the "effects on competition" that the specific conduct produces on the market. An example of this approach is provided by the Swiss Competition Act (*Kartellgesetz*). Article 3(2) of the Act provides:

> This Act does not apply to *effects on competition* that result *exclusively* from the legislation governing intellectual property. However, import restrictions based on intellectual property rights shall be assessed under this Act.[67]

Swiss courts have on occasion been required to interpret this clause. Indeed the second sentence on import restrictions was introduced in the Act after the *Kodak* judgment of the Swiss Federal Court, where the Court confirmed the principle of national exhaustion for patent law. Yet the Court also stressed that, although patent law allows right-holders to act against parallel imports, such use of a patent may be banned pursuant to the competition-law prohibition of abuse of market dominance.[68] In contrast, the Commercial Court of the Canton Berne stated that the exclusive rights of a patent holder as such are exempted from competition law pursuant to Article 3(2) of the Competition Act.[69] Due to still limited case-law, it is not yet clear how Article 3(2) is to be applied in general. What seems more important is that the Swiss Competition Commission (*Wettbewerbskommission*) has confirmed the application of the Competition Act to IP-related cases in several instances.[70] In 2008, the report of a commission that was established to evaluate the working of the Act criticised Article 3(2) and expressed its preference for the abolition of this provision in its entirety. Yet, this commission also pointed out that the abolition of the provision, due to the resistance of stakeholders, would not be possible for the time being.[71] A most convincing criticism is expressed in legal writing, which is clearly inspired by the modern theory of complementarity. According to this criticism, Article 3(2) wrongly requires competition law

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67 Emphasis added.

68 Federal Court (*Bundesgericht*) of 7 December 1999, *Kodak SA v Jumbo-Markt AG*, BGE 126 III 129, also *available at:* http://www.unilu.ch/files/126_iii_129_-_kodak.pdf. See also the more recent decision of the Swiss Competition Commission in the *IFPI Switzerland* case at 8.4, below.

69 Commercial Court (*Handelsgericht*) of the Canton Berne of 6 July 2005, *Anschlaghalter III*, (2006) *sic!* 346, at 353 et seq.

70 See, for instance, Competition Commission decision of 29 November 2010, Case 32-0205, *SIX/Terminals mit Dyanmic Currency Conversion (DCC)*, paras 107-112 (holding that in the light of the outdated character of the provision, it stands to reason that the peculiar character of IPRs needs to be taken account of in the process of applying the specific provision of the Competition Act).

71 Evalutionsgruppe Kartellgesetz, Synthesebericht, 5 December 2008, paras 345-360, *available at:* http://www.weko.admin.ch/dokumentation/00216/01035/index.html?lang=de#srpungmarke0_14.

enforcers to assess the effects of IP on competition already at the stage of deciding whether the Act can be applied in the first place, while the assessment of the potential anti-competitive effects should better be effected in the framework of applying the individual prohibition provisions.[72]

The competition law of Yemen exempts intellectual property in principle, but also clarifies that the law applies if the use of the rights leads to harmful effects on competition and freedom of trade, which, however, has not yet produced any practice. Article 4(2)(b) Competition Act 1999[73] reads:

> The application of this law shall not lead to restrictions on the rights that are covered by protection of intellectual property rights, trade marks, inventions' patents rights, and publishing rights; however, its provisions shall apply whenever the use of such rights leads to harmful effects on competition and freedom of trade.

Similarly, in Barbados, the Fair Competition Act of 2001 contains broad exemption provisions on IP. Foremost, Section 3(1)(c) Fair Competition Act CAP.326C exempts any "arrangement insofar as it contains a provision relating to the use, licence or assignment of rights under or existing by virtue of any copyright, patent or trademark." Yet this provision, which obviously is designed to insulate licensing agreements from competition law intervention, also subjects the exemption to Section 16(4), a more specific provision on abuse of dominance. Section 16(4)(c) Fair Competition Act CAP.326C exempts the use of IPRs, including copyright, from the abuse-of-dominance prohibition by simultaneously defining the limits of that exemption in terms of anti-competitive effects.[74] The provision reads as follows:

> An enterprise shall not be treated as abusing a dominant position … by reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue of any *copyright*, patent, registered design or trademark *except where* the Commission is satisfied that the exercise of those rights
>
> (i) has the *effect of lessening competitions substantially* in a market; and
> (ii) impedes the transfer and dissemination of technology.[75]

The two provisions read together may provide a sufficient basis for controlling licensing agreements where the licensee is a dominant enterprise and restricts transfer of technology through clauses contained in the agreement. Copyright is explicitly mentioned in both provisions. Yet, cases in which Section 16(4)(c) could allow application to a dominant

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[72] Andreas Heinemann, "Demarkation von Immaterialgüter- und Kartellrecht? Eine kritische Analyse", in: Roger Zäch (ed.), *Schweizerisches Kartellrecht – an Wendepunkten?*, Zürich & Sankt Gallen, 2009, p. 43.

[73] Republican Decree of Law No. 19 of 1999, Concerning Competition Promotion, and Prevention of Monopoly and Commercial Deception.

[74] A third provision of IP is to be found in Section 26. There the Act provides for certain limitations on the prohibition of resale-price maintenance in Section 25 of the Fair Competition Act to the extent patents are involved. This does not exclude applying the law to resale-price maintenance for books.

[75] Emphasis added.

copyright holder will probably arise extremely rarely. Dominance could however be argued in the case of CMOs. Yet, Barbados has neither gathered any practice on the provision in general nor on applying competition law to CMOs in particular.[76]

The legislative situation in Zambia is similar to that in Barbados. Article 3(a) of the Zambian Competition and Consumer Protection Act (2010) provides that the Act "shall not apply to an agreement or conduct insofar as it relates to the protection, licensing or assignment of rights under, or existing by virtue of, a law relating to copyright, design rights, patents or trade marks."[77] However, Section 3(4) limits this exemption by stipulating that the Commission can apply the Act where it has reasonable grounds to believe that the agreement or conduct involves a violation of Section 9(1), containing a *per se* prohibition of some horizontal agreements, or Section 10(1) on resale-price maintenance or "disproportionately restricts or prevents competition." Accordingly, the Zambian Act should give enough room for a balanced approach to applying competition law to IP-related cases.

6.1.4 Exemptions from individual prohibitions

Some laws contain exemption provisions that only relate to specific prohibitions of the competition law. Such an example is found in India, where Section 3(5) of the Competition Act on restrictive agreements exempts conduct that relates to the protection of IPRs. This provision reads:

> Nothing contained in this section shall restrict—
>
> (i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under— (a) the Copyright Act, 1957 (14 of 1957); (b) the Patents Act, 1970 (39 of 1970); (c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999); (d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999); (e) the Designs Act, 2000 (16 of 2000); (f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000).

This clause was interpreted by the Competition Commission of India in the *FICCI Multiplex* case.[78] The Commission argued that also in the light of Section 5(1)(i) of the Competition Act copyright has not the effect of generally overriding competition law.[79] The Commission thereby managed to sanction collusive behaviour of film producers as right-holders

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76 On CMOs in Barbados see at 11.5, below.

77 By exempting not only agreements but any conduct, the Zambian law arguably creates a broader exemption than the competition law of Malawi or Mauritius, which contains rules with similar wording but limited to agreements (see at 6.1.4, below).

78 *FICCI and Multiplex Association of India v. United Producers/Distributors Forum*, Case No. 01/2009 – CCI Decision of 25 May 2011, *available at:* http://www.cci.gov.in/May2011/OrderOfCommission/FICCIOrder260511.pdf.

79 *Id*., paras 23.14 and 23.30.

regarding their licensing practices vis-à-vis multiplex cinema operators. In particular, it was held that Section 3(5)(i), which relies on the concept of protection of IPRs, would not prevent the application of competition law since the multiplex cinema operators did not violate the copyrights of the producers.[80] Based on these arguments, it can hardly be imagined that Section 3(5)(i) would ever exclude the application of the Act. Competition law as a defence for a "violation" of intellectual property rights typically occurs in circumstances of a refusal to license. Yet refusals to license constitute unilateral conduct and, therefore, have to be assessed in the framework of the rules on abuse of market dominance, to which Section 3(5)(i) does not apply in the first place.

In Australia, Section 51(3) of the Competition and Consumer Act 2010 (CCA) provides for limited exemptions for certain licensing agreements and the transfer of IPRs. As far as copyright is concerned, this exemption only applies to contract clauses regarding the assignment of a copyright to the extent that this clause relates to the work or other subject matter in which the copyright exists (Section 51(3)(a)(ii) and (v) CCA). It seems that two points need to be stressed in this context: first, since Section 51(3)(a) also contains exemptions for patent licensing agreements, it appears quite clear that only the assignment of copyrights can be exempted, but not clauses contained in copyright licensing agreements. Secondly, Section 51(3) does not provide any exemption from the prohibition of misuse of market power (Section 46), the Australian equivalent to abuse of market dominance, or that on resale-price maintenance (Section 46A). Hence, in cases in which copyright agreements appear as illegal unilateral conduct by the right-holder, the exemption does not apply. Also, Australia does not allow resale-price maintenance for goods such as books. It seems that courts have not yet considered the scope of the exemption contained in Section 51(3)(a) CCA for copyright agreements.

In Malawi, Article 3(c) of the Competition and Fair Trading Act exempts "those elements of any agreement which relate exclusively to the use, license or assignment of rights under, or existing by virtue of, any copyright, patent or trademark" from the application of the Act. While the exemption relates to all provisions of the Act, it will show its effect most clearly in the field of applying the prohibition of restrictive agreements to IP contracts.

Similar to the situation in Malawi, Schedule 3 Part A Para. 2 of the Mauritius Competition Act (2009) excludes the application of the Act to "[a]ny agreement insofar as it contains provisions relating to the use, licence or assignment of rights under or existing by virtue of laws relating to copyright, industrial design, patents, trade marks or service marks". Yet the Competition Commission of Mauritius has adopted Guidelines[81] on the application of the Competition Act that also deal with the application of the Act to intellectual property. There, the Commission clearly points out that the exemption of agreements relating to intellectual

80 *Id.*, para. 23.29.

81 Competition Commission of Mauritius, Guidelines: General Provision, November 2009.

property does not imply that such agreements are generally exempted.[82] Although the Competition Commission argues in favour of applying competition law to IP-related cases under a regular competition-law-oriented analysis, it also confirms that Schedule 3 Part A Para. 2 has to be read as an exemption of anti-competitive agreements from the scope of application of competition law.[83] Also, the Guidelines point out that the Competition Commission will not require a right-holder to share its right with others.[84] But the Commission argues in favour of applying competition law in cases in which IPRs are used to lever market power to other markets.[85]

In Israel as well, a specific exemption of IP agreements can be found. Section 3(2) of the Restrictive Trade Practices Law (1988) provides as follows:

> Notwithstanding the provisions of Section 2, the following arrangements shall not be deemed restrictive arrangements:
>
> An arrangement involving restraints, all of which relate to the right to use any of the following assets: patents, service marks, trademarks, copyrights, performers' rights or developers' rights, provided that the following two conditions are met:
>
> (a) the arrangement is entered into by the holder of the above asset and the party receiving the right to use the above asset;
>
> (b) if the above asset is subject to registration by law – it is so registered.

Israeli courts have interpreted this provision and, most importantly, the scope of application of the provision was limited to vertical agreements.[86]

In Canada, Section 79(5) Competition Act (1985) exempts the exercise of IP from the prohibition of unilateral anti-competitive conduct. However, more guidance for the application of this exemption is provided by the Competition Bureau's Intellectual Property Enforcement Guidelines (2000).[87]

In South Africa, Section 10(4) of the Competition Act (1998) provides for the possibility of a firm to apply to the Competition Commission to grant an exemption from the prohibition of restrictive agreements for an agreement or practice or category of agreements or practices that relates to the exercise of intellectual property rights. This provision demonstrates that the prohibition applies in principle to agreements involving intellectual property rights.

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82 *Id.*, at 4.7.

83 *Id.*, at 5.4.

84 *Id.*, at 5.2.

85 *Id.*, at 5.7.

86 Israeli Antitrust Tribunal, Case 3574/00, *Federation of Israeli and Mediterranean Music Ltd. v. Director of the Competition Authority*.

87 *Available at:* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01286.html.

A very general exemption of licensing agreements from the prohibition of restrictive agreements can be found in Article 10(4), No. 1, of the Competition Law (2005) of Kazakhstan.

In the Ukraine, Article 9 of the Law on the Protection of Economic Competition (2001) exempts transfer of technology agreements from the prohibition of restrictive agreements by applying an inherency doctrine. This provision is not clear on the extent to which it may also apply to copyright licences.

In Kenya, in principle, the Competition Act No. 12 (2010) applies to IP-related cases without any reservation. However, according to Article 28(1), the

> Authority may, upon application, and on such conditions as the Authority may determine, grant an exemption in relation to any agreement or practice relating to the exercise of any right or interest acquired or protected in terms of any law relating to copyright, patents, designs, trade marks, plant varieties or any other intellectual property rights.

The legal situation is similar in Namibia. There, Article 30(1) Competition Act (2003) provides for the power of the Commission to grant an exemption "in relation to any agreement or practice relating to the exercise of any right or interest acquired or protected in terms of any law relating to copyright, patents, designs, trade marks, plant varieties or any other intellectual property rights".

A very peculiar exemption can be found in the competition law of Singapore, namely, regarding vertical agreements only. According to Section 8(2) of the Third Schedule to the Competition Act (2004), IP clauses that are purely of an ancillary character to a distribution agreement are exempted. This is stipulated in the form of a definition of vertical agreements in the sense of the Competition Act. Accordingly, the term of a vertical agreement

> includes provisions contained in such agreements which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that *those provisions do not constitute the primary object of the agreement and are directly related to the use, sale or resale of goods or services by the buyer or its customers*.[88]

This provision is certainly most important for assessing franchise agreements that include the licensing of trademarks. Yet, this provision does not exclude the application of competition law to copyright.

The Jamaican Fair Competition Act of 1993 contains two specific exemptions: first, Article 3(c) exempts any "agreement in so far as it contains a provision relating to the use, licence or assignment of rights under or existing by virtue of any copyright, patent or trade mark" from the application of the Act. Secondly, according to Section 20(2)(b) an enterprise must not be treated as abusing its market-dominant position "by reason only that the enterprise

[88] Emphasis added.

enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design or trade mark”.

An IP-oriented specific rule relating to abuse of dominance can be found in Section 10(1)(d) of the Competition Act (2006) of the East African Community (EAC). This rule follows the inherency doctrine by stating that a dominant undertaking must not engage in a practice whereby “[a]n intellectual property right is used in any way that goes beyond the limits of its legal protection”.[89]

An inclusion of IP-related restraints only from the provision on abuse of dominance is also provided by the Competition Act of the Seychelles (2009). Article 7(4)(c) of this Act provides that an enterprise will “not be treated as abusing a dominant position by reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design or trademark except where the Commission is satisfied that the exercise of those rights (i) has the effect of lessening competition substantially in a market; and (ii) impedes the transfer and dissemination of technology.”

6.1.5 Sectorial exemptions: Resale-price maintenance for books

Some jurisdictions provide for limited sectorial exemptions with relevance for copyright-related markets. Such rules may especially allow resale-price maintenance for books due to their cultural relevance.[90] Legislatures thereby assume that resale-price maintenance has a positive effect on cultural diversity.[91]

A very broad exemption applicable to all “published works” can be found in Article 23(4) of the Japanese Antimonopoly Act. Under this rule, books, magazines and newspapers, as well as records, music tapes and music CDs are sold at uniform prices to consumers. In its Annual Report 2001, the Japanese Fair Trade Commission recommended abolishing this provision despite the absence of a national consensus for such an amendment.[92]

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89 Note that, according to Article 43 of the Protocol on the Establishment of the East African Community Common Market, the Member States will also cooperate in the field of protection of intellectual property, including copyright law.

90 On this topic see, in general, OECD Policy Roundtables: Resale Price Maintenance, 1997, *available at:* http://www.oecd.org/competition/abuseofdominanceandmonopolisation/1920261.pdf.

91 This effect is highly disputed. For an economic analysis supporting this view see Jürgen G. Backhaus and Reginald Hansen, “Resale price maintenance for books in Germany and the European Union: A legal and economic analysis”, in: Alain Marciano and Jean-Michel Josselin (eds), *From Economic to Legal Competition: New Perspectives on Law and Institutions in Europe*, Edward Elgar: Cheltenham, UK and Northampton, MA, 2003, p. 87. Empirical studies comparing different systems in different countries, however, do not sustain such a view. See Vidar Ringstad, “On the cultural blessings of fixed book prices” 10(3) *Int’l J. Cult. Pol’y* 361 (2004) (comparing the situation in different Nordic countries); Franck Fishwick, “Le Commerce du livre au Royaume-Uni en 2004”, (2005, No. 2) *Les Cahiers du SLF* 33 (on the situation in the UK).

92 Fair Trade Commission, Annual Report on Competition Policy in Japan (January-December 2001), paras 65-74, *available at:* http://www.jftc.go.jp/en/about_jftc/annual_reports/pdf/Japan01.pdf.

Indeed, the question is whether the cultural dimension of creative works, including books, requires that resale-price maintenance be exempted from competition law application. In several jurisdictions, the system of resale-price maintenance for books was abolished once the competition agencies expressed their view that such system was contrary to competition law. These countries include, for instance, Sweden[93] and Switzerland. In Switzerland, the situation was characterised by the existence of separate markets for books in the three major official languages (German, French and Italian). Up to the 1990s, the markets for French and German books were regulated by contractual arrangements between the publishers and the retailers that created a system of resale-price maintenance, while the Italian book market was traditionally free. Also for German and French books, the system of resale-price maintenance disappeared when the Swiss Competition Commission took actions based on the Competition Act in the 1990s. In 2011, the Swiss Parliament approved a law that, following the French and German example, would have provided for a legal obligation of book retailers to charge the prices fixed by the publishers.[94] Yet the Swiss population rejected this law in a referendum in 2012. After this negative vote, the Swiss Competition Commission re-entered into investigations, which it had stayed due to the legislative developments, relating to book prices in the French-speaking part of the country.[95]

In the Member States of the European Union, the situation is considerably influenced by EU law.[96] As early as in the 1980s, the European Commission started to act against national systems of resale-price maintenance of books, but only related to cross-border trade. Accordingly, the Commission prohibited the agreement between the Dutch and Flemish book trade associations that regulated trade between the Netherlands and Belgium and that required retailers in one country to respect the prices fixed by the publishers in the other country.[97] This decision was later confirmed by the European Court of Justice.[98] Similarly, the Commission acted against the UK Net Book Agreement, which obliged retailers to respect the uniform sales conditions set by the UK Publishers' Associations and the prices set by the publishers with regard to imports from the UK to Ireland and sales in the UK and Ireland of

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93 See OECD, *supra* n. 90, p. 98 et seq. In Sweden, the system of resale-price maintenance ended in 1970 after the market courts had previously exempted the system. The OECD Report does not provide any evidence that the book production or distribution had suffered from this prohibition. Both sales of books and space in book shops went up while the concentration of publishers remained overall the same. It even seemed that distribution had improved considerably by new forms of distribution (mainly book clubs).

94 See the Federal Law on Price Fixing for Books (*Bundesgesetz über die Preisbindung für Bücher*) of 18 March 2011, *available at:* http://www.admin.ch/ch/d/ff/2011/2703.pdf.

95 Competition Commission, Annual Report 2012, (2013) 1 *Recht und Politik des Wettbewerbs* (*RPW*) 49, 55.

96 See, in general, OECD, *supra* n. 90, pp. 109-114.

97 Commission Decision of 25 November 1981, Case IV/488 – *VBBB/VBVB*, [1981] OJ No. L 54/36.

98 Joined Cases 43 and 63/82 R *VBVB and VBBB v Commission* [1982] ECR 1241.

books (re)imported from other Member States.[99] The decision was confirmed by the Court of First Instance,[100] but then annulled by the Court of Justice for lack of sufficient reasoning.[101] While in these countries the prices were fixed by vertical agreements between the publishers and the retailers, in France, the “Loi Lang” of 1982 introduced a system of statutory resale-price maintenance which obliged the retailer to respect the retail price set by the publisher.[102] The European Court of Justice was also requested to decide whether this law was in conformity with European law. Although the Court allowed a system of statutory resale-price maintenance in principle, it also held that the application of the law to books imported from other Member States violated the principle of free movement of goods.[103]

In the light of this case-law it had become clear by the 1990s that a cross-border contractual system of resale-price-maintenance would violate European competition law, while the Court of Justice would accept a purely national system of resale-price maintenance. This obviously had to create problems in Germany when Austria joined the European Union in 1995. Publishers of German books had created a contractual system of resale-price maintenance already in 1927, the so-called *Sammelrevers*, which applied to the three German-speaking countries Germany, Austria and Switzerland. In Germany, this did not violate German competition law due to a specific exemption for the sale of published material in the German Act against Restraints of Competition (former Section 16) from the *per se* prohibition of resale-price maintenance (former Section 15). When the European Commission initiated proceedings regarding cross-border sales between Austria and Germany in 1998, Germany finally changed its law. In 2002, Germany adopted a law, the Act on Price Fixing for Books,[104] that obliges retailers to respect the prices set by publishers. Consequently, Germany maintained its system of fixed book prices despite the recommendation of the German Monopoly Commission[105] to abolish it.[106] Yet this Act does not apply to the cross-border sale of books within the European Economic Area and the EU. This, however, does not mean that Germany’s competition law, the Act against Restraints of Competition, has completely deleted the previous exemption. Rather, Section 30 retains an exemption from the cartel prohibition of Section 1 regarding resale-price maintenance for newspapers and magazines.

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[99] Commission Decision of 12 December 1988, Joined Cases IV/27.393 and IV/27.394 – *Publishers Association – Net Book Agreements*, [1989] OJ No. L 22, p. 12.

[100] Case T-66/89 *Publishers Association v Commission* [1992] ECR II-1995.

[101] Case C-360/92 P *Publishers Association v Commission* [1995] ECR I-23.

[102] *Loi n° 81-766 du 10 août 1981 relative au prix du livre*.

[103] Case 299/83 *SA Saint-Herblain distribution, Centre distributeur Leclerc* [1985] ECR 2515.

[104] *Gesetz über die Preisbindung von Büchern* of 2 September 2002, [2002] BGBl. I p. 3448.

[105] The Monopoly Commission is an expert commission established under German law that has the mission to advise the government in the field of competition policy.

[106] Monopolkommission, XIII. Hauptgutachten 1998/1999, 16 August 2008, Bundestags-Drucksache 14/4002, pp. 376-409, *available at:* http://dipbt.bundestag.de/dip21/btd/14/040/1404002.pdf.

In sum, the situation regarding resale-price maintenance of books remains highly diverse within the EU and the European Economic Area. Systems of uniform resale prices imposed as a legal obligation exist in Germany, France, Greece, Italy, the Netherlands, Austria, Portugal and Spain.

In Denmark, Norway and Hungary, resale-price maintenance is based on contractual arrangements. In Denmark, resale-price maintenance is allowed by the Competition and Consumer Authority (*Konkurrenceomraadet*) in the form of an exemption from competition law. However, the Authority reduced the scope of this exemption considerably by a decision of 29 March 2006. Under the new system, publishers are only allowed to impose resale prices for 10% of their new titles. Also, the agreements can only be applied for one year and three months. Resale-price maintenance has to be suspended once the publisher decides to sell a special edition through its own book clubs.[107] Also, in Norway, resale-price maintenance is legal under an exemption from competition law granted by the Competition Authority. However, the Authority itself is trying hard to convince the public and the government that the book market would be better governed by free competition.[108] Currently, there is a bill before the Parliament that would replace the exemption by a legal obligation of retailers to respect the retail prices set by the publishers.

In contrast, retail prices for books are free in Belgium, Estonia, Finland, the UK, Ireland, Iceland, Poland, Sweden and the Czech Republic.[109]

Among European countries, the situation is most peculiar in Italy. While in the course of time many countries moved from an exemption system to competition law application, Italy went the other way. There, the competition agency had previously acted against vertical resale-price maintenance.[110] But in 2011, the legislature introduced a statutory system of resale-price maintenance. The law (*legge Levi*) fixes limits for rebates that publishers and book retailers can grant on the price printed on any press product.[111]

107 See Press Release, *available at:* http://www.kfst.dk/en/konkurrenceomraadet/decisions/decisions-2008-and-earlier/national-decisions-2006/konkurrenceraadets-moede-den-29-marts-2006/publishers-right-to-fix-book-prices-considerably-reduced/.

108 See Norwegian Competition Authority, Annual Report 2003, p. 17; Annual Report 2004, pp. 11-13.

109 Situation in 2008. See *Vorentwurf und erläuternder Bericht der Kommission für Wirtschaft und Abgaben des Nationalrates*, 13 October 2008, para. 2.1.1 (p. 4), *available at:* http://www.admin.ch/ch/d/gg/pc/documents/1713/Bericht.pdf.

110 AGCM decision 4001 of 19 June 1996, Case I157, *Associazione Librai Italiani/Editori*, Bollettino n. 17/1996, *available at:* http://www.agcm.it/concorrenza/concorrenza-delibere/open/41256297003874BD/6EC79F3129D8F14FC12563260050B63D.html.

111 "Legge Levi sull'editoria: stabilito al 15% lo sconto Massimo sui libri", *fiscalfocus.info* (7 September 2011), *available at:* http://www.fiscal-focus.info/attualita/legge-levi-sull-editoria-stabilito-al-15-lo-sconto-massimo-sui-libri,3,2641 (the law is mostly directed against online sales of Amazon that granted up to 40% discounts on books).

In Canada, likewise, no special status of intellectual property is recognised for applying competition law to resale-price maintenance. Quite on the contrary, Section 76(3)(c) Competition Act explicitly states that the prohibition of resale-price maintenance is also to be applied to a person who holds exclusive intellectual property rights such as a copyright.

An explicit statement on the application of a strict prohibition of resale-price maintenance relating to goods that are protected by intellectual property can also be found in the IP Guidelines of the Korean FTC.[112]

6.1.6 Sectorial exemptions: Collective rights management

Another area for which countries may provide specific exemptions from the application of competition law is collective rights management.

Such an exemption clause was previously contained in German competition law where, until the amendment of 2005, the Act against Restraints of Competition contained a provision (Section 30) that exempted the establishment of collective rights management organisations (CMOs) and their agreements from the prohibitions of restrictive agreements. This provision primarily responded to the concern that CMOs could be regarded as horizontal price cartels. Yet this provision had no major practical effect since German CMOs also had to respect the European prohibition of restrictive agreements under the predecessor provision to Article 101 TFEU. In addition, Section 30 did not exempt German CMOs, which traditionally hold a monopoly position in the German market, from the application of the rules on abuse of market dominance.

A jurisdiction where an explicit exemption for collective rights management can still be found is Russia. There, the law allows in principle the establishment of competing CMOs. Yet, according to the Civil Code, only one CMO that administers a specific group of rights or the rights for specific categories of works may receive accreditation and, thereby, is allowed to also administer the remuneration rights of right-holders with whom it has no contractual relationship. According to Article 1244(2)(3) of the Civil Code, accreditation has the further consequence that this CMO will be exempted from the application of competition law. This provision is surprising in two regards: first, it stipulates an exemption outside the Competition Act. Secondly, it distorts competition in the market for collective rights management. It seems that the exemption applies to all activities of the CMO that has received accreditation, hence, also with regard to the management of the rights of its members, while CMOs without accreditation have to respect the Competition Act. Such a distinction can hardly be justified in terms of sound competition policy.

Several former Soviet Republics follow the Russian example. In Azerbaijan, Article 41(1)(4) Copyright Act stipulates that the prohibitions of the anti-monopoly legislation do not apply

[112] Korean Fair Trade Commission, Review Guidelines on Unfair Exercise of Intellectual Property Rights, 31 March 2010, at II.2.C. (stating that pro-competitive effects will not be considered).

to CMOs. The same is the case in Georgia according to Article 63(7) of the Law on Copyright and Related Rights, the Kyrgyz Republic according to Article 45(1)(4) of the Law on Copyright and Related Rights and the Ukraine according to Article 48(2) of the Law on Copyright and Related Rights.

In the EU, it was, and still is, discussed whether CMOs can be regarded as undertakings "entrusted with the operation of services in the general economic interest" in the sense of Article 106(2) TFEU. Application of this provision would exempt CMOs from the application of the Treaty, including its rules on competition in particular, to the extent that such application would "obstruct the performance, in law or in fact, of the particular tasks assigned to them". The European Court of Justice denied such reliance on Article 106(2) TFEU to a Belgian CMO in the early *BRT v SABAM* decision[113] and confirmed this in its later *GVL* decision for a German CMO.[114] In *GVL*, the Court clarified that the introduction of an authorisation system and the regulation of the business activities of CMOs in a general manner do not suffice to make a CMO an undertaking entrusted with the operation of a service in the general economic interest.[115] In *BRT v SABAM*, the Court had already indicated its hesitation to privilege an undertaking that only manages private interests such as intellectual property rights.[116]

These judgments do not mean that European law does not take account of the specific needs of collective rights management in applying competition law. Such a balance between the needs of effective administration of copyrights and effective protection of competition in the markets is pursued by European competition enforcers within the framework of applying the specific prohibition provisions of competition law. The same can be said about US law, where no provision exists that limits the application of antitrust law to CMOs. The details on how jurisdictions apply competition law to CMOs will be discussed in Chapter 11 below.

In Austria, it is generally held that competition law applies to CMOs despite the intensive regulation of rights management in the Act on Collecting Societies of 2006 (see at 11.1.4, below). Yet Section 6(4) of this Act exempts CMOs from merger control under general competition law. This partial exemption is influenced by the legally guaranteed monopoly position of CMOs under Austrian law. In the case of a merger of CMOs, it is for the supervisory body under the Act on Collecting Societies to review whether the new entity can fulfil all obligations of a CMO as stipulated by the Act (Section 6(1) of the Act).

6.1.7 Rules on how to apply competition laws to IPRs

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113 Case 127/73 *BRT v SABAM* [1974] ECR 313, paras 17-23.

114 Case 7/82 *GVL v Commission* [1983] ECR 483.

115 *Id.*, paras 30 et seq. A still open question may be whether this would be different if the national legislature entrusted collective rights management activities to a specific entity, such as the SIAE under Italian law.

116 *BRT v SABAM*, *supra* 113.

Many jurisdictions, in the framework of more detailed rule-making, have adopted laws, regulations and guidelines that bring precision to the application of competition law to IP-related cases. In contrast to the abovementioned provisions (6.1.1 through 6.1.6, above), these rules do not intend to limit the scope of application of the competition law or certain parts of it, but they clarify the application of individual provisions at the interface of competition law and IP laws. Since the application of competition law to IP-related cases will be analysed further below, it suffices to address the special role of copyright law in this regard.

A very unique case of a competition law jurisdiction where the competition law itself prescribes the application of competition law to IP is provided by Canada. There, Section 32 of the Competition Act 1985 contains very detailed rules that grant power to the Federal Court to restrict the use of intellectual property rights, including copyrights, for the purpose of protecting competition in the market. The cases covered in this regard are defined very broadly as those in which use of the right is made so as to

> (a) limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity that may be a subject of trade or commerce,
>
> (b) restrain or injure, unduly, trade or commerce in relation to any such article or commodity,
>
> (c) prevent, limit or lessen, unduly, the manufacture or production of any such article or commodity or unreasonably enhance the price thereof, or
>
> (d) prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity.

In this context, Section 32(2)(c) Competition Act explicitly empowers the Federal Court to grant compulsory licences. Hence, the Canadian approach almost seems to mandate the application of competition law to IP. However, Section 32 contains an important reservation. Competition law can only be applied to IP if the right-holder makes “undue” use of the exclusive right; the provision provides no further guidance as to when and how competition law has to or can be applied. Such further guidance is provided by the Intellectual Property Enforcement Guidelines of the Canadian Competition Bureau of 2000, which also cover copyright.[117] In this regard, Canadian competition law does not substantially differ from other competition jurisdictions that do not provide for any IP-related rules in their competition laws but then provide guidance by sub-laws and rules, including regulations and guidelines, on IP.

Indeed, among those jurisdictions that have adopted IP regulations and guidelines, a distinction can be made between jurisdictions that have rather general IP guidelines that cover copyright issues among other things, and those with more detailed regulatory

[117] Available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01286.html.

systems, especially on licensing, that are cautious in applying these rules to copyright-related cases.

A very comprehensive approach is taken by the IP Guidelines of Singapore, which indeed address the application of competition law to all IPRs, including copyright, and not only address licensing agreements and the assignment of rights but also refusal to license as a case of abuse of market dominance.[118] As already indicated (at 4.1, above), the US IP Licensing Guidelines[119] also cover copyright, but do not address the application of unilateral conduct rules. Specific transfer of technology rules and guidelines can be found in the EU,[120] but also in the Japanese IP Guidelines[121] or the Taiwanese Technology Licensing Guidelines (2009).[122] These rules only apply to copyright to the extent that they also cover agreements relating to copyright-protected software.

It is noted that the EU model is also to be found in the EU Member States and countries such as Turkey that are obliged, as a matter of international agreements, to adopt the European standard in their domestic systems.[123] Within the EU, there are basically two sub-models, namely, countries that automatically incorporate the EU block exemption regulations, including the Technology Transfer BER, as part of their national law (e.g., Germany and Spain) and countries that autonomously adopt such block exemption regulations that are fully harmonised with the EU regulations (e.g., Bulgaria, Czech Republic, Denmark, Estonia Hungary, Malta, Poland). Yet, in both cases, it is to be highlighted that the Commission Guidelines – and the Technology Transfer Guidelines in particular – do not legally bind national authorities when they apply EU competition law or their domestic laws.

Jurisdictions that only address copyright in the framework of technology transfer rules seem most interesting, since they fail to provide guidance especially with regard to the application of the law to copyright licences. This is obviously the result of the cautious approach of these jurisdictions to transferring concepts that suit the licensing of technology to the large variety of copyright licences. Hence, sub-rules adopted by competition authorities that are tailor-made for copyright-related markets are extremely rare. An interesting example, however, is

118 CCS Guidelines on the Treatment of Intellectual Property Rights (*supra* n. 30).

119 *Supra* n. 15.

120 See Technology Transfer Block Exemption Regulation (*supra* n. 11) and Technology Transfer Guidelines (*supra* n. 11).

121 *Supra* n. 57.

122 Disposal Directions (Guidelines) on Technology Licensing Arrangements of 24 February 2009, *available at:* http://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=746&docid=10254.

123 Several EU neighbouring countries have recently harmonized their competition laws with EU law or are in the process of doing this. These countries include, for instance, Georgia and Moldova. Moldova adopted a new harmonized law in 2012 and will now also implement block exemption regulation in conformity with the EU regulations. In the framework of its application for EU membership, Macedonia and Serbia have adopted block exemption regulations following the EU model.

provided by the Taiwan FTC, which has adopted guidelines for the sale of school textbooks.[124] These guidelines followed the liberalisation of the market for school textbooks in 1996, which finally enabled private publishers to publish "approved textbooks", when the FTC discovered that the legal monopoly of the State as a publisher prior to 1996 was then replaced by restrictive practices of publishers of those approved textbooks. Among other things, these guidelines clarify that vertical price maintenance is illegal.

Within the European Union, the Irish Competition Authority has adopted guidelines on vertical agreements that contain principles on the assessment of the assignment to a buyer or use by a buyer of intellectual property rights. According to its Article 3, the Declaration in Respect of Vertical Agreements and Concerted Practices (2010) also applies to such arrangements provided that they do not constitute the primary object of such agreements and are directly related to the use, sale or resale of goods or services by the buyer or its customers.

In Malaysia, the Competition Commission Guidelines on Abuse of Market Dominance (para. 3.26) point out that an abuse of market dominance for a refusal to deal can also take the form of a refusal to license. The Guidelines also explain that enforcing competition law against a refusal to deal or a refusal to license can reduce incentives to invest in the product and its intellectual property rights (para. 3.27).

6.1.8 Countries with no exemption provisions

There are many jurisdictions that do not provide for any exemption or other provision clarifying the application of the competition statutes at the interface with intellectual property, including copyright. All of these countries either provide case-law on the application of their competition law to copyright-related cases or their agency confirmed, in the framework of the survey, that they would apply the law to such cases. These jurisdictions include Columbia, Chile, Costa Rica, Egypt, Greece, Italy, Pakistan, Sweden, Singapore, Tunisia and Turkey. The survey has not produced a single jurisdiction where the law remains silent on the application to IP-related markets and where competition agencies or courts have recognised a broad exemption as part of their practice. Yet, again, this does not rule out the possibility that the competition law enforcers take due account of the need for a balance between the protection of IPRs and the protection of competition in individual cases when they apply their competition law provisions.

6.1.9 Conclusion

The analysis of the large diversity to be found in exemption provisions around the world provides useful guidance for both legislatures and competition law enforcers. From the

[124] Disposal Directions (Guidelines & Policy Statements) on the Sales of Elementary and Junior High School Textbooks of 5 March 2012, *available at:* http://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=746&docid=11058.

experience in jurisdictions that have rules that limit the scope of application of competition laws to intellectual property, enforcers in younger jurisdictions with similar rules should learn that such rules should not prevent them from monitoring copyright-related markets. In the light of the modern theory of complementarity, such rules should be applied flexibly, and competition law enforcers should balance the pro and anti-competitive effects of intellectual property in the framework of applying the specific prohibition provisions of competition law. Legislatures can learn that the introduction of exemption clauses does not contribute any guidance on applying competition law correctly. Quite on the contrary, for younger jurisdictions there is a clear risk that yet inexperienced enforcers will refrain from applying competition law to copyright-related cases, while competition in the market is in need of effective protection.

6.2 Intellectual property and copyright as an element of anti-competitive conduct

In the previous sub-chapter, the Report focused on statutory provisions that rely on intellectual property, including copyright law, as a reason for exemptions. There are also some jurisdictions that provide for rules in which intellectual property is relied upon in the context of defining violations of competition law. Such provisions are less frequent than those exempting intellectual property from competition law.

There are a few laws that make a general statement about the applicability of competition law to IPRs. One example is provided by the very extensive provision of Section 32 of the Canadian Competition Act, which provides that the Act applies whenever right-holders unduly use their rights (see at 6.1.7, above). In defining "undertakings" to which competition laws apply, Article 3(1) of the Croatian Competition Act (2009) explicitly states that this term also includes the holders of copyrights and related rights. A similar provision can be found in Article 4(1), No. 2, of the Competition Act of Montenegro, which refers to "exponents of intellectual property rights", and Article 3, No. 3, of the Serbian Law on Protection of Competition (2009), referring to "holders of intellectual property rights". With probably the same effect, Article 4(a) of the Competition Law of Nicaragua[125] provides that the Act does not apply to intellectual property unless it leads to restrictive practices according to the further provisions of the Act.

Intellectual property, including copyright, by and large may appear in three kinds of more specific rules that define anti-competitive conduct, namely: (1) in the framework of essential-facilities provisions, (2) in more specific provisions on compulsory licensing systems and (3) in provisions that address IPRs as factors for market entry barriers in the framework of defining the concept of market dominance or in the framework of merger control provisions.

[125] *Ley No. 601 sobre la Protectión de la Competencia*.

6.2.1 Intellectual property as an essential facility

An example of a competition law that recognises intellectual property rights in the context of rules on essential facilities is found in Slovakia. Article 8(3), (4) and (5) of the Competition Act (2001) reads as follows:

> (3) Essential facility is a facility, infrastructure or part thereof, location or *right*, the building or acquisition of which is objectively impossible by another undertaking and without the use of which competition would or might be restricted in the relevant market.
>
> (4) Pursuant to this Act, an owner or administrator of an essential facility is also a *holder of the right* if a right is the respective essential facility pursuant to paragraph 3.
>
> (5) An undertaking that is *an owner or administrator of an essential facility abuses its dominant position* in the relevant market if such an undertaking refuses to provide access to it and, at the same time:
>
> a) the essential facility permits satisfying the undertaking's requirements regarding the utilization of the essential facility, while allowing for simultaneous satisfaction of the requirements of the essential facility's owner or administrator at the time of peak demand for its services, also taking into account the fulfilment of its long-term commitments;
>
> b) an undertaking requesting access to the essential facility with the aim of its utilization is able to ensure adherence to the respective qualitative and quantitative parameters of the essential facility resulting from its operational requirements, or if the undertaking requesting the utilization of an essential facility represented by a right is able to ensure adherence to all requirements concerning the aforementioned right as stipulated in special legislation;
>
> c) an undertaking requesting access to the essential facility is capable of providing the essential facility's owner or administrator with adequate payment.[126]

While these provisions rely on the general concept of "rights" and not "intellectual property rights" in particular, it is also clear that this concept will have its major field of application in the field of IPRs. However, this provision has not produced any practice on IP so far.

In the Czech Republic, an even clearer essential-facilities provision can be found in Article 11(1)(f) of the Competition Act (2001). This provision clarifies that the prohibition on abuse of dominance can also be applied for the purpose of enabling "the use of intellectual property or access to networks owned or used on other legal grounds by the undertaking in a dominant position, provided such use is necessary for participating in competition in the same market as the dominant undertaking or in any other market."

[126] Emphasis added.

In contrast, when the German legislature decided to include an essential-facilities provision as an example of an abuse of market dominance in its law in 1998, the legislature considered whether IPRs should be included, but finally decided against such an approach. Section 19(2), No. 4, of the German Act against Restraints of Competition[127] only applies to networks and other infrastructure facilities. Yet this limitation did not prevent the Federal Supreme Court from holding that the refusal to license a patent can be anti-competitive by relying on other provisions of the Act, namely, former Section 20(1)[128] on discriminatory conduct of an undertaking with market dominance.[129]

Estonian competition law also contains an express rule on refusal to grant access to an essential facility. Section 18(1)(1) of the Estonian Competition Act 2001 is in principle broad enough to also cover refusal to license an essential IP right, as it refers to networks, infrastructure and "other essential facilities". Yet no practice is available in respect of applying this rule to IPRs.

These examples show that essential-facilities provisions that explicitly include IPRs as potential essential facilities may have the advantage of providing some guidance. Yet, also with regard to such provisions, competition law enforcers still have to assess whether in the specific case the intellectual property right actually constitutes an essential facility. Essential-facilities provisions present one statutory approach to regulating a refusal to deal, including a refusal to license as an abuse of market dominance or, more generally, of anti-competitive unilateral conduct. The practice on refusal to license a copyright will be analysed further below (at 9.3).

Finally, Article 4(F) of the Competition Act of Uruguay contains an essential-facilities provision that leaves considerable scope for interpretation. The provision provides for a prohibition of conduct that consists in "impeding the access of competitors to *infrastructures* that are essential for the production, distribution or commercialisation of goods, services or other factors of production".[130] The term "infrastructure" is very unspecific and, therefore, could be interpreted as covering intellectual property rights. However, there is no practice on the application of this provision.

A more general affirmative provision on the applicability of unilateral conduct rules can be reported from Kenya. Article 24(2)(e) Competition Act No. 12 (2010) provides that an abuse of intellectual property rights can, without prejudice to the general requirements of an abuse of market dominance, constitute such an abuse.

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127 Revised version of 26 June 2013; former Section 19(4) No. 4 of the Act.

128 This provision has now become Section 19(2) No. 1 of the Act (version of 26 June 2013).

129 Federal Supreme Court (*Bundesgerichtshof*) of 13 July 2004, Case KZR 40/02, Standard-Spundfass, 160 *BGHZ* 67 (German original version) = (2005) 36 *Int'l Rev. Intell. Prop. & Comp. L.* 741 (English translation).

130 Emphasis added to the translation by the author.

6.2.2 Compulsory licensing regimes as part of competition law or IP laws

Jurisdictions that consider a refusal to license anti-competitive conduct thereby recognise a duty on the part of right-holders to license; thus they establish compulsory licensing schemes based on competition law. Some jurisdictions even go a step further and provide for specific rules on compulsory licensing in the framework of their competition laws. Other laws may provide for such rules in the framework of their intellectual property laws, but still require an anti-competitive effect as a condition for the grant of a compulsory licence.

An example of an explicit compulsory licensing scheme implemented in the framework of competition law is provided by Brazil. Article 36(3) of the new Competition Law No. 12.529/2011 categorises the monopolisation and the prevention of the exploitation of industrial or intellectual property rights (para. XIV) as well as the abusive exercise or exploitation of industrial or intellectual property rights, a technology or a trade mark (para. XIX) as a restraint of competition. Article 38(IV) provides for the possibility of granting a compulsory licence if the violation of competition law is related to an IPR.[131]

An example of the second case, a competition-oriented compulsory licensing system as part of the intellectual property laws, can be found in Singapore. There, Section 55(1) of the Patent Act provides that any "interested person may apply to the court for the grant of a licence under a patent on the ground that the grant of the licence is necessary to *remedy an anti-competitive practice*."[132] Argentina goes even one step further. There, the Patent Act allows for automatic use of the patent once the competent authority has established anti-competitive practices of the patent holder. Such conduct, inter alia, may consist in the charging of excessive prices or the refusal to supply the market sufficiently.[133] Section 47 of the Norwegian Patent Act empowers the Competition Authority to grant a compulsory licence if the patent is exploited in a way that restricts competition.

Indeed, compulsory licensing systems can be found in many patent laws.[134] But they are largely unknown as part of copyright laws. Therefore, competition law will often constitute the only legal basis available in a given jurisdiction as a basis for a duty to license a copyright.

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[131] According to Article 61(V) of the same law, a compulsory licence can also be ordered as part of a merger decision. In this case, however, this order does not really amount to a compulsory licence in the classical sense since the merging firms are free to merge under the condition of granting such a licence.

[132] Emphasis added.

[133] See Article 47 of *Ley 24.481 de patentes de invención y modelos de utilidad.*

[134] Note, however, that such regimes are not necessarily competition-oriented. In Germany, the Federal Supreme Court in the *Standard-Spundfass* case (*supra* n. 129) clearly distinguished between a compulsory licence based on the Patent Act and justified by public interest grounds and a compulsory license based on competition law. Also Argentinian patent law provides for a different compulsory licensing regime for situations of emergency relating to public health and national security. See Article 48 of *Ley 24.481 de patentes de invención y modelos de utilidad.*

The Brazilian competition law rules referred to above explicitly include copyright law by distinguishing between industrial and intellectual property.

6.2.3 Intellectual property as a cause of market entry barriers

For the assessment of market dominance, modern competition policy advocates a multi-factor approach.[135] Thereby, entry analysis plays a major role.[136] Intellectual property rights are one reason for barriers to market entry. This explains why some competition laws also explicitly refer to the role of IPRs in the framework of provisions that guide the assessment of market dominance.

Mexican competition law provides an example of this. Article 12(3) of the Competition Law Regulations of 2007[137] establishes that IPRs can raise entry barriers and, therefore, have to be considered in the framework of Article 13(2) of the Competition Act for the assessment of market dominance. A similar provision can be found in Article 8(h)(iv) of the Competition Regulations[138] of Honduras. The 2010 Guidelines (Section 8.2) of the Russian competition agency FAS for the Procedure of Conducting the Analysis of the Competitive Environment in Commodity Markets list IPRs as one of the entry barriers that should be taken account of.[139]

Further, the Pakistani Merger Guidelines (Section VI(62)(a)) identify intellectual property as an entry barrier for other firms.[140] The Australian Merger Guidelines (Section 7.30) list "legally enforceable intellectual property rights" as one form of legal and regulatory barriers.[141] The Korean Guidelines on Abuse of Dominance state that intellectual property

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135 See, in particular, ICN Unilateral Conduct Working Group, Dominance/Substantial Market Power Analysis Pursuant to Unilateral Conduct Rules, Best Practices, *available at:* http://www.internationalcompetitionnetwork.org/uploads/library/doc317.pdf.

136 *Id.*, p. 5.

137 *Reglamento de la Ley Federal de Competencia Económica*.

138 *Reglamento de la Ley para la Defensa y de la Promoción de la Competencia*.

139 On these Guidelines see, in general, "New Procedures for Analysing Competition on the Commodity Market", Goltsblat BLP, 21 September 2010, available at: http://gblplaw.com/news/legal/41402/.

140 Competition Commission of Pakistan, Competition (Merger Control) Regulations, 2007, *available at:* http://www.cc.gov.pk/index.php?option=com_content&view=article&id=17&Itemid=120. In more general terms, Section IV(1)(v) of the Merger Guidelines hint at the negative effect of the control of IPRs on competition in view of increasing the costs for competitors and the quality of competing products.

141 Australian Competition and Consumer Commission (ACCC), Merger Guidelines, November 2008, *available at:* http://www.accc.gov.au/publications/merger-guidelines.

rights will be considered for assessing the ease of market entry.[142] And a similar statement can be found from the British Office of Fair Trading.[143]

Moreover, Annex 1 (para. 6(3)(b)) to the Croatian Regulation on Notification and Assessment of Concentrations (2011)[144] provides that, for the purpose of identifying the relevant market, any of the parties to the concentration has to notify any market in which it "holds a market share larger than 25 % and any other party to the concentration holds important intellectual property rights for that market". In this context, the holding of important IPRs is seen as a cause for an increase of market power. Intellectual property rights are also to be taken into account as potential market entry barriers according to the Finnish Merger Guidelines.[145]

In Vietnam, Article 22, No. 6, of the Decree of Competition (2005) recognises ownership of intellectual property rights as one factor for the assessment of market dominance.

Reference to intellectual property rights as a reason for market barriers can also be found in the Guidelines on the Abuse of a Dominant Position (2012) of the Channel Island Competition & Regulatory Authorities (CICRA).[146]

As will be seen in the following analysis of the case-law, this effect of intellectual property, including copyright, is a major reason why competition law enforcers apply competition law with the effect of restricting the exclusivity of the intellectual property right. Most particularly, this effect guides the practice of merger control regimes with regard to intellectual property rights. Competition agencies will impose the licensing or the assignment of specific IPRs if such rights considerably foreclose market access for other firms and where access to such rights is essential for maintaining competition in the market.

6.2.4 General competition law provisions

While the abovementioned provisions specifically refer to IPRs, more general provisions of competition law also often include allusions to intellectual property and to the fact that IPRs

[142] Korean Fair Trade Commission, Guidelines for the Review of the Abuse of Market Dominant Position, 6 October 2009, at III.2.B.(3), *available at:* http://eng.ftc.go.kr/files/static/Legal_Authority/Guidelines%20for%20Review%20of%20the%20Abuse%20of%20Market%20Dominant%20Position_mar%2014%202012.pdf.

[143] Office of Fair Trading, Assessment of Market Power, 2004, at 5.15.

[144] English translation *available at:* http://www.aztn.hr/uploads/documents/eng/documents/legislation/REGULATION_ON_NOTIFICATION_AND_ASSESSMENT_OF_CONCENTRATIONS.pdf.

[145] Finnish Competition Authority, Guidelines on Merger Control, 2011, para. 7.2.6, *available at:* http://www.kilpailuvirasto.fi/tiedostot/Suuntaviivat-1-2011-Yrityskauppavalvonta-EN.pdf.

[146] CICRA Guidelines 5 – Abuse of a Dominant Position, July 2012, p. 20.

should be taken into account as a factor for assessing anti-competitive conduct. For instance, this was indicated by the Tunisian competition agency in its replies to the Questionnaire. This agency specifically referred to Article 5 of the Tunisian Competition Act,[147] which, as an example, prohibits "explicit or implicit agreements that have an anti-competitive object or effect by (1) … limiting production, markets, investment or technological progress".[148] In another context, the Tunisian agency stressed how important it is to apply competition law to vertical and horizontal licensing agreements. Article 5(1) of the Act, which is obviously inspired by the EU rule in Article 101(1)(b) TFEU, seems to provide a sound legal basis for such control by referring to technological progress. At the same time, the Tunisian agency also hinted at the general exemption clause in Article 6 of the Act, which, obviously phrased according to the model of Article 101(3) TFEU for EU law, also uses the goal of "technological progress" as a reason for an exemption. This structure of regulation of restrictive agreements shows that a balancing approach is needed for agreements that relate to IPRs.

7 The Role of Copyright in Market Definition

For the assessment of competition law – in particular in the fields of unilateral conduct and merger control – market definition plays a major role. Many competition law decisions therefore include an analysis of the relevant market. Copyright-related cases do not make an exception in this regard. Since market definition never comes alone, the reader of this Report will discover many issues of market definition dealt with in the subsequent chapters. In general, this case-law demonstrates that market definition can be extremely difficult in copyright-related cases. There are three particular reasons for this:

First, where cultural content is concerned, highly subjective consumer preferences are largely unreliable and weak indicators for assessing demand-side substitutability.

Second, in media markets in particular, dynamic technological developments make it very difficult to decide which technological distribution networks can be regarded as substitutable. For instance, when two cable TV operators merge, merger control agencies may have to ask the question of whether cable TV constitutes a separate market or whether other technical forms of broadcasting, such as terrestrial, satellite or Internet TV have to be included.

Third, many copyright-related cases require enforcers to take into account the phenomenon of "two-sided markets". This feature generally plays an important role in competition cases relating to intermediaries and, in particular, in media markets in which services are provided

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[147] Loi n° 1991-64 du 29 juillet 1991, relative à Concurrence et aux Prix, *available at:* http://www.jurisitetunisie.com/tunisie/codes/concurrence/menu+.html (French version). This law made Tunisia the first Arab country with a competition law and the Tunisian competition regime the most experienced one in the Arab world.

[148] Translation by the author.

to the audience for free. Such free-of-charge TV or radio operators have to attract both audience and advertising customers. Since only the latter pay for the service, the relevant market is that for advertising. But firms only pay for advertising to the extent that their commercials actually reach the audience. Therefore, the definition of the relevant advertising market correlates with the audience outreach of the specific operator. An example of what this can mean is shown by the South African merger case *Primedia*, which, due to other issues arising from this case, will be discussed further below (at 6.6.4 (ii), below).

Yet there are two general issues that deserve closer consideration in the following: first, the clarification of the relationship between the exclusivity of the copyright for the individual work and the concept of market dominance are of a general overarching interest for the application of competition law in copyright-related markets and matters, in particular in cases in which someone claims a duty to license a copyright. Second, copyright-protected works are often compiled by undertakings of the copyright industry in the form of larger repertoires. While the individual work will not create any problem for competition, things may be different for such larger repertoires as a separate product on which downstream distributors and users have to rely to enter the market.

7.1 The relationship between the exclusivity of copyright and the concept of market dominance

Intellectual property rights are often termed as "monopoly rights". In the light of the concepts of competition law, this term is however highly misleading. In competition law, a monopoly describes a situation in which a firm does not have to face any competitor in the relevant market. For defining the market, and, thereby, for answering the question of who is competing with whom, competition law enforcers rely on the concepts of demand-side substitutability and, under certain conditions, supply-side substitutability.[149] According to the concept of demand substitution, a "relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use".[150] The question is whether certain products can be viewed as substitutes by consumers.[151] Supply-side substitutability looks at whether suppliers can easily and swiftly, and without considerable additional costs, enter the relevant market in response to small and permanent changes in price. Supply-side substitutability is only taken into account if its effects are

149 See, for instance, the EU Commission's Notice on the definition of the relevant market for the purposes of Community competition law, [1997] OJ No. C 273, p. 5.

150 EU Commission Notice, *supra* n. 149, para. 8.

151 *Id.*, para. 15.

equivalent to those of demand-side substitutability in terms of effectiveness and immediacy.[152]

In the case of copyright-protected works, these principles create considerable problems on the one hand. But, on the other hand, it also becomes clear that copyright by itself does not lead to a monopoly. A monopoly may only emerge under specific circumstances.

Copyright protection excludes only one form of competition, namely, competition by imitation. Copyright protection prevents competitors from offering copies of the work in the same market without an authorisation (licence) granted by the right-holder. This however does not prevent other firms from offering other works to consumers for the same kind of use. Based on the copyright concept of originality, works are certainly different. But this does not mean that they are not substitutable in terms of competition law. This becomes very clear for many fields of copyright protection. Authors of novels compete with each other when they try to find a publisher, and, once such novels go to the market, consumers have to decide which novels they like best.[153] This does not rule out that some novels (bestsellers) – or authors (star writers) – dispose of more market power than others. Hence, publishers may compete fiercely for famous authors, while others have problems to get their works published. And sometimes readers wait outside the bookshops when the next book of a famous author comes out. To be substitutes, products do not have to be fully identical. The question rather is whether certain factors become so important that from a consumer's perspective works cannot be considered substitutable. The problem in the entertainment industry is that consumer perceptions are not defined by objective needs – as, for instance, in the case of patented pharmaceuticals – but by highly individual tastes and preferences. For some movie fans, a science fiction film may by a substitute to a love story; for others it is not. This seems to make the application of the concept of demand-side substitutability very speculative and unreliable. Yet this does not mean that each copyright-protected work constitutes a proper market in which the right-holder is a monopolist.[154] Rather, in principle, copyright only excludes competition by imitation but allows and even enhances competition by substitution. In the sense of the latter, film producers do not compete by price but by continuously investing in new films that they offer to consumers. Competition law enforcers have acknowledged this by holding that an intellectual property right as such does not lead

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[152] *Id*., para. 20.

[153] Hence, also competition law enforcers accept the concept of a book market. See, for instance, the Swedish decision of the Market Court (*Marknadsdomstolen*), Case MD 2002:5, *Svenska Bokhandlareföreningen v. Månadens Bok et al*., p. 13 et seq., *available at:* http://www.marknadsdomstolen.se/Filer/Avg%C3%B6randen/Dom02.05.pdf (defining paperback books in Sweden as the relevant market; hardcover books were excluded by the Court by mostly relying on the price difference).

[154] In contrast, the Austrian Supreme Court (*Oberster Gerichtshof*), 9 September 1997, Case 4 Ob 214/97t, *Filmverleihgesellschaft*, (1997) *Medien und Recht* 328, even considered a film distributor a "monopolist" with regard to the individual films. See the discussion of the case at 9.3.4, below.

to market dominance.[155] In the EU, this was explicitly pointed out for the application of the prohibition of abuse of market dominance (now Article 102 TFEU) in the copyright case of *Magill*. There the European Court of Justice held:

> So far as dominant position is concerned, it is to be remembered at the outset that mere ownership of an intellectual property right cannot confer such a position.[156]

The more interesting question – and the one that matters in refusal-to-license cases in particular – is whether there are circumstances in which the copyright may lead to market dominance. Indeed, such a situation was confirmed in *Magill*. There, the Court held that the three TV stations active in the Republic of Ireland and Northern Ireland at that time had abused their market dominance by refusing to license their copyright in the TV programme listings to independent publishers and thereby excluded the emergence of comprehensive TV guides and secured the market for printed TV guides for themselves. The dominant position was explained by the effect of the copyright that enabled the TV station, as the only source of the programme information, to exclude competition in the downstream market for weekly TV guides. The copyright made the TV stations "de facto monopolists" for programme information.[157]

Magill presented a very unusual copyright case. From a copyright perspective alone, copyright law should abstain from protecting access to information. Indeed, copyright protection should create incentives for spreading information by protecting the form and thereby excluding the free-riding of competitors. This is how copyright works, especially in the newspaper industry. Copyright protects publishers from the free-riding of competitors by providing protection against unauthorised copying of articles and thereby creates incentives for investing in the production of newspapers. But competitors will not be precluded from reporting on the same events. In *Magill*, the problem arose because Courts in the two jurisdictions applied a very low standard of originality. The example shows that competition can also be protected by keeping copyright law itself pro-competitive. At the time of the *Magill* judgment, European institutions only had the possibility to rely on competition law. Today, they could arguably also control the standard of originality based on harmonised standards of European copyright law.[158]

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155 Or for "monopoly power" as required in the US for the application of the monopolization prohibition of Section 2 Sherman Act. Note that the US Supreme Court for many years had still maintained a presumption according to which the holder of a patent would have monopoly power. This presumption was given up in *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).

156 *Magill*, *supra* n. 2, para. 46. This principle is nowadays widely recognised also by competition agencies. See, for instance, the British Office for Fair Trading, Abuse of Dominant Position, 2004, at 4.22 (referring to *Magill* and the principle according to which dominance needs to be assessed in the light of the criterion of substitutability).

157 *Id.*, para. 47.

158 See Case C-5/08 *Infopaq International* [2009] ECR I-6569. In this decision, the Court of Justice relied on the harmonisation of the reproduction right as stipulated in Article 2(a) of Directive 2001/29/EC of the

Another rather atypical copyright case is presented by the subsequent *IMS Health* decision, in which the European Court of Justice further developed the European standard for assessing a refusal to license.[159] In the underlying referral case from a German court, copyright protection was asserted for a map in the form of a brick structure which subdivided Germany into 1,860 sectors and which was used by the right-holder IMS Health for the service it provided to pharmaceutical companies of collecting data on drug sales in Germany. This map had emerged as the industry standard and was used by all market participants. A competitor therefore claimed a right to use this brick structure after it had failed to enter the market based on its own, different structure.

In the light of the scarce case-law on refusal to license a copyright and the atypical character of the works involved in the major European cases the heated debate on refusal to license as a competition law violation may seem somewhat exaggerated as far as copyright is concerned. But one has to note that the causes for market dominance that have been identified in *Magill* and *IMS Health* may also appear in regular copyright cases. First, with the recognition of a *sui generis* database right, the European legislation has also created a new right which is built not on the concept of originality but significant investment and, thereby, may foreclose access to the information included in the database.[160] Problems similar to the *Magill* case should therefore be foreseeable. Secondly, and in line with the situation in *IMS Health*, it has to be noted that especially markets for computer programs that are protected by copyright law can be influenced by technological standards based on network effects. Therefore, in a wider sense, the *Microsoft* case in the EU, in which the former Court of First Instance (now General Court) has re-interpreted and further developed the European standard on refusal to license, presents a more typical case.[161] However, one has to note that, as far as the question of interoperability is concerned, Microsoft only refused to grant access to interoperability information contained in its Windows operating system program that, perhaps, is not protected by copyright law but only as trade secrets.

Another question is whether there are other categories of works where the copyright as such protects a work which is, similar to the *Magill* case, not substitutable for the customer. This may be argued for scientific writings in contrast to fiction literature. While it is true that specific scientific publications cannot be substituted, also in this regard, some more

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European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, [2001] OJ No. L 167, p. 10., to develop a European standard of originality, which arguably would prevent domestic legislatures and courts to grant copyright protection to TV programme listings. On the impact of this decision in the UK see Jonathan Griffith, "Infopaq, BSA and the 'Europeanisation' of United Kingdom Copyright Law", (2011) 16 *Media & Arts L. Rev*. (also *available at:* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1777027).

[159] *IMS Health*, *supra* n. 2.

[160] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, [1996] OJ No. L 77, p. 2.

[161] *Microsoft*, *supra* n. 31.

precision is required. In the sector of scientific writings, the question is not whether the author or her home institution – a research institute or a university – holds a dominant position. Authors and research institutions are typically interested in spreading academic and scientific writing as widely as possible and nowadays often develop open-access policies and strategies. Rather, the question is whether academic and scientific publishers are market-dominant with regard to specific journals in particular. Publishers are not original right-holders but act as intermediaries in two-sided markets. In this regard, the case of scientific publications is more similar to competition cases relating to the market-dominant position of other intermediaries such as in the media sector. Publishers may hold a market-dominant position with regard to authors if they publish journals in narrow research fields in which authors need to publish in order to build up their academic reputation. At the same time they may hold a market-dominant position vis-à-vis subscribers, including scientific libraries and research institutions that cannot afford to terminate subscription contracts when the publishers increase their prices. If the market-dominant position exists in both directions, the same research institutions will even be charged twice, namely, for the publication of the articles authored by their researchers on the one hand and for the subscription on the other hand. In such a scenario, the exclusivity of the copyright turns out to lead to dysfunctional results. The digital revolution changes the situation in two regards: on the one hand, open-access formats and business models used by researchers and research institutions threaten the dominant position of the academic publishers. On the other hand, however, the migration from print publication to digital online databases strengthens the position of the publishers by increasing their bargaining power: while the subscribers acquired property in the printed version in the past, today termination-of-service contracts for online database uses by subscribers triggered by price increases would deprive the subscriber of previous publications as well.

Despite these concerns, also in the field of scientific publishing, each case needs to be assessed individually. A most interesting case on market definition in the field of scientific publishing is the Indian *Springer* case.[162] In this case, Prints India, India's former major distributor and exporter of Indian scientific journals, lodged a complaint against Springer, a publishing company that had just entered the Indian market in 2002 and convinced the 33 leading Indian research institutions in the STM (science, technology, medicine) sector to use Springer as their publisher and the sole distributor of their journals. In order to stay in the market, Prints India had to accept conditions from Springer that Prints India alleged to violate competition law. The Commission held in favour of Springer, arguing that Springer did not hold a dominant position in the relevant market. In its order the Commission confirmed that academic publishing demonstrates the characteristics of a two-sided market[163] and that journals that have gained a reputation are often indispensable to

[162] *Prints India v. Springer India*, Case No. 10/2010, Order of the Competition Commission of India of 3 July 2012, *available at*: http://www.cci.gov.in/May2011/OrderOfCommission/CaseNo16of2010MainOrder.pdf.

[163] *Id*., para. 32.

subscribers.[164] Still, the reasons for denying market dominance were basically twofold: first, the Commission took into account the growing importance of electronic publishing which accounted for an estimated 80% of all STM academic journals available on the Internet.[165] Online distribution was considered to reduce the role of traditional distributors of printed versions, which has to be reflected in the market definition.[166] Secondly, the Commission realised that this was not a case on the indispensability of access to must-have scientific journals, but on competition among distributors of academic journals. Distributors will not depend on access to individual journals even if these journals are must-have journals for libraries. Accordingly, the Commission defined the relevant market as the market for "STM academic journals in English language" including print and online.[167] In this regard, Springer was not considered dominant, since online journals and printed journals from abroad were also included in the relevant market.[168] The case demonstrates the complexities of market definition in the field of academic and scientific publishing. The *Springer* case, as a distribution case, is very different from a case of price abuse by the publisher of a must-have journal.

Market definition in the field of academic and scientific publishing was also a major issue in the European Commission's *Candover/Cinven/BertelsmannSpringer* merger assessment.[169] In this case, the two investment firms Candover and Cinven intended to purchase 100% of the shares in the academic and professional publishing company BertelsmannSpringer that belonged to the Bertelsmann group. With regard to market definition, the Commission refused to take a demand-side point of view. In the light of always existing differences in the coverage, specifically regarding comprehensiveness and content, two different publications could hardly ever be regarded as substitutes by readers as end-users. Such an approach would atomise markets to numerous monopolies and, therefore, cannot be used for assessing the impact of mergers on competition.[170] This is why the Commission relied on a supply-side perspective, considering the elements required to launch publications addressed at academic and professional readers and specific categories of such readers. Such elements are: established reputation for accuracy of the publisher, reliability and comprehensiveness of the information, copyrighted content and knowledge of the customer base and channels

[164] *Id.*, para. 33.

[165] *Id.*, paras 35-37.

[166] *Id.*, para. 44.1.

[167] *Id.*, para. 44.11.

[168] *Id.*, paras 44.15.6 et seq.

[169] Decision of the European Commission of 29 September 2003, Case No COMP/M.3197 – *Candover/Cinven/BertelsmannSpringer*, SG (2003) D/231090, *available at:* http://ec.europa.eu/competition/mergers/cases/decisions/m3197_en.pdf.

[170] *Id.*, para. 13.

to access these customers.[171] Moreover, the Commission described the markets for academic publishing in detail as very distinct product markets.[172] In particular, supply-side substitution was considered most important since access to authors, editors and peer-reviewers of repute is crucial for the economic success of the publications.[173] The Commission also considered whether distinct product markets need to be recognised along the lines of disciplines as well as according to the format of publications, by distinguishing between books and journals as well as printed and digital publications.[174] Yet, from a demand-side perspective, the Commission also recognised the "must-have" character of many academic publications for universities and libraries.[175] To identify this character, the Commission relied on the citation reports of the Institute for Scientific Information (ICI), which is also relied upon by the publishers for determining the price of their journals.[176] Therefore, academic publishers of must-have journals compete more on quality than on price.[177] The concrete merger was not unproblematic at first sight, since Candover and Cinven acquired BertelsmannSpringer through their subsidiary KAP Global BV, the parent company of the Dutch publisher Kluwer Academic Publishers (KAP). The merger put BS/KAP second, but far behind the leading academic publisher Elsevier Science in terms of market shares based on turnover as well as in the light of academic impact measured by citations. In sum, the Commission did not find any indication that the merger would lead to single market dominance of BS/KAP or collective market dominance of BS/KAP with Elsevier Science. It took into account very high price increases for journals in the previous years, but attributed this to the "must-have" characters of these journals, which, in turn, was not held to influence the effects of the merger on competition in the market.[178] Accordingly, the Commission concluded that the merger would not lead to any competitive concerns in the world-wide market for academic publishing[179] and finally cleared the merger.[180]

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171 *Id*., para. 14. Thereby, the Commission relied on its earlier Decision of 15 February 1999, Case No. IV/M.1377 – *Bertelsmann/Wissenschaftsverlag Springer*, *available on*: http://ec.europa.eu/competition/mergers/cases/decisions/m1377_de.pdf (decision only available in German).

172 *Id*., paras 16-21.

173 *Id*., para. 19.

174 *Id*., paras 20 et seq.

175 *Id*., para. 30.

176 *Id*., para. 31.

177 *Id*., para. 32. Yet, the Commission also hinted at the fact that price elasticity may depend a lot on the specialization of journals and potential customers. Hence, a high profile journal for brain surgery will be indispensable for institutions specialized in the field, while a general medical department may cancel the subscription if the price increases too much (at para. 33).

178 *Id*., para. 47.

179 *Id*., para. 48.

180 *Id*., para. 73.

7.2 Dominance based on repertoires

From the preceding analysis it is possible to conclude that copyrighted works of a cultural character or that serve for entertainment do not typically constitute a proper market and therefore do not give rise to market dominance. Yet, this changes considerably if intermediaries collect large repertoires of works that are to be considered an indispensable input for the operation of businesses in downstream markets.

Of this phenomenon, CMOs are the most important example. Typically, CMOs do not grant licences for the use of selected works but grant blanket licences for the whole repertoire they administer. Due to the economies of scale of collective rights management, CMOs most frequently hold monopoly positions for their field of activities in their respective national territories for which they grant licences. Yet, also in the US, where there are three CMOs that grant licences for the public performance for works in music (ASCAP, BMI, SECAM), this does not necessarily mean that they are competitors in the same market. In a two-sided market, they may compete for right-holders, but they do not compete for users. For users, such as radio stations, the repertoires of the different CMOs do not constitute viable substitutes. Radio stations that broadcast popular music and have to react most flexibly to changing tastes and upcoming new superstars need to have licences for the different repertoires of all collecting societies, or at least the two larger ones (ASCAP and BMI). In this regard, the repertoires of the different CMOs are complementary products and not substitutes. This makes the single CMO a monopolist in the relevant licensing market for its own repertoire.[181]

CMOs are not the only example of holders of large repertoires of works. Also, firms in the copyright industry may build up large repertoires as holders of exclusive licences. Such repertoires can be found in the music industry, with a limited number of major music publishing companies (so-called “majors”), and in the film industry, including in particular the film distributors. For licensing online uses of works of music in Europe, the two forms of repertoire monopolies – those of CMOs and major music publishers – even overlap. After the adoption of the Commission’s Recommendation of 2005 regarding multi-territorial licensing of the online uses of music,[182] some major publishing companies followed the recommendation of the Commission and withdrew their rights from the existing system of collective rights management and started to renegotiate with individual CMOs for the grant

181 Note that the same feature of complementarity of products was also present in the European *Magill* case (*supra*, at 7.1). While, in this case, the three TV stations accused of an abuse of dominance were competitors in the broadcasting markets, they were all monopolists with regard to the relevant product market consisting in the TV programme listings of their own station. This is explained by the fact that the independent publisher intended to print a comprehensive TV guide with all channels. Hence, the licence from one TV station could not substitute the licence from the other station.

182 Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services, [2005] OJ No. L 276, p. 54. Note that the date in the OJ (18 May 2005) had to be corrected later. See [2005] OJ No. 284, p. 10.

of multi-territorial licences of their individual repertoires. This led to the emergence of licensing platforms for individual repertoires, such as CELAS,[183] which offers licences for all European countries for the Anglo-American repertoire of EMI.[184] By its Recommendation, the Commission meant to promote competition among CMOs for right-holders. With regard to competition for users, this development tends to have the opposite effect. The new system allows individual negotiation of royalty rates for the important repertoires of the major companies. Such entities may also escape national regulation of collective rights management, including the application of systems that are designed to control the royalty rates. In Germany, the patent office as the agency empowered with the supervision of CMOs confirmed that CELAS is not a collecting society in the sense of German law since it does not manage the rights of a multitude of right-holders. If this view is correct,[185] control of such a licensing platform can only be effected through general competition law.

7.3 Dominance in the distribution chain

Despite the fact that copyrighted works are to be considered substitutable from the perspective of consumers, market definition produces different results if market dominance is to be assessed in cases that relate to competition with regard to two different levels of the distribution chain. This phenomenon can be best illustrated by the distribution of films in cinemas. The film market seems to be fully competitive with regard to consumers, who decide which film they prefer to watch when they go out to the cinema. However, the competitive situation is different for the cinema operator. Cinema operators compete with each other based on the attractiveness of their individual programmes. This requires that especially larger cinema operators have access to a broad selection of blockbuster movies to compete effectively. Consequently, cinema operators economically depend on individual distributors although the share of the movies in the national market controlled by such distributors is relatively small. Yet competitive concerns will arise in particular if a distributor also operates cinemas and, thereby, may be tempted to discriminate against independent cinemas by refusing to license the public performance of its movies to such competitors.

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183 See http://www.celas.eu.

184 A work belongs to the Anglo-American repertoire if the original author has entrusted his rights to a CMO that follows the Anglo-American tradition of only entrusting the public performance rights for future works to the CMO while the author retains the reproduction right. For online uses, the user regularly is in need of a licence which comprises both rights. In the past, the reproduction right was brought into the system of collective rights management by the publishers who had acquired them from the authors. Therefore, the major companies were only able to withdraw their reproduction rights and were forced to renegotiate with CMOs in order to combine the two rights. CELAS is a joint venture of the German GEMA and the British PRS for Music. The latter holds the public performance rights for the European countries that are covered also with regard to the repertoire of the US American CMOs.

185 This view of the German patent office has already been contested in German court proceedings but finally left unanswered so far. See Munich District Court I (*Landgericht München I*) of 25 June 2009, Case 7 O 4139/08, (2009) *Zeitschrift für Urheber- und Medienrecht* 788.

Several competition jurisdictions have gathered experience in this regard. For instance, Austrian courts have continuously confirmed that the copyright in blockbuster films confers a monopoly to the film distributor in relation to cinema operators (at 9.9.4, below).

8 Restrictive Agreements

In principle, copyright-related markets can be affected by the same kind of restrictive agreements as any other market. In general, horizontal agreements among competitors, including right-holders, and vertical agreements between firms on different levels of the production and distribution chain need to be distinguished. Restrictive agreements may also relate to the licensing of copyright. Licensing agreements are of a vertical nature by allowing the licensee to use the copyright as an input in a downstream market of exploitation. Yet licensing agreements may also be concluded among competitors. This, however, is more common in the patent and technology field than in the copyright field. In the following, the Report will analyse cases from a variety of jurisdictions by distinguishing between different restraints included in horizontal and vertical agreements. This chapter will not deal with restrictive agreements entered into by collecting societies. These agreements will be dealt with in another sub-chapter (at 11, below).

8.1 Horizontal price cartels

Price cartels among competitors are the standard example of restrictive agreements. Copyright-related markets, especially those for the sale of copies of copyrighted works, are not immune from price cartels. Yet copyrighted works are much less homogenous than other products that are typical candidates for price cartels (basic commodities such as cement, potash or salt).

Price cartels can arise in all different sectors of the copyright industry. They can even take an international dimension. An example of an international cartel is the recently discovered price cartel for eBooks. In this case, publishers from France (Hachette Livre), the US (Harper Collins and Simon & Schuster), the UK (Penguin) and Germany (Verlagsgruppe Georg von Holzbrinck, owner of Macmillan) were alleged to have entered into a cartel concerning the sale of their respective eBooks. An interesting aspect of the case is that the cartel was allegedly organised and co-initiated by Apple as the operator of a large eBook store (iBooks). The international dimension of the case explains why it presents one of the very few copyright-related cases in which competition agencies of different jurisdictions have taken action. In the EU, the Commission opened a formal investigation against the publishers and Apple in December 2011. It also announced that it would investigate whether there are also anti-competitive vertical agreements between the publishers and the retailers.[186] During the course of 2012, four of the five publishers and Apple offered commitments, which were finally accepted by the Commission in December 2012.[187] Finally, in July 2013, the Commission also accepted commitments by the fifth publisher (Pinguin).[188] At the time of the writing of this report, it was still open whether the Commission would settle the case with the fifth publisher (Pinguin). In the US, already in summer 2011, a class action was filed before the US District Court for the Northern District of California in which it was claimed that the deal tried to guarantee that no other retailer, including Amazon, would offer prices below those charged by Apple's eBooks store.[189] Later, the US DoJ also brought action against the same five publishers and Apple for violation of US antitrust law before the US District Court for the Southern District of New York in 2012.[190] By the beginning of 2013, all five publishers had settled the case with the DoJ,[191] while Apple still opposed allegations that it had violated US antitrust law. On 13 July 2013, the US District Court for the Southern District of New York held that Apple had indeed violated antitrust law.[192] Accusations against Apple mostly built on the most-favoured-treatment clause in the contracts with the publishers that would have allowed Apple, regardless of whether other distributors acted on a wholesale or agency model, to apply any lower price for eBooks that was charged by any other retailer. This system, while seeming to bring prices down, had the opposite effect of forcing the publishers, who wanted to maintain their revenues, to compel retailers to switch to the agency model on terms that were similar to those agreed with Apple. To compel the retailers to agree to the agency model, the publishers, at approximately the same time, told the retailers that they would otherwise no longer be supplied with eBooks.[193]

[186] Case COMP 39.847 - *EBooks*. See Commission, "Antitrust: Commission opens formal proceedings to investigate sales of e-books", Press Release IP/11/1509 of 6 December 2012, *available at:* http://europa.eu/rapid/press-release_IP-11-1509_en.htm?locale=en.

[187] See Commission, "Antitrust : Commission accepts legally binding commitments from Simon & Simon, Harper Collins, Hachette, Holtzbrinck and Apple for sale of e-books", Press Release IP/12/1367 of 13 December 2012; *available at:* http://europa.eu/rapid/press-release_IP-12-1367_en.htm. The commitment decision of the Commission has not yet been published at the time of the writing of the Report.

[188] Commission, "Antitrust: Commission accepts legally binding commitments from Pinguin in e-book market", Press Release IP/13/746 of 25 July 2013, *available at:* http://europa.eu/rapid/press-release_IP-13-746_en.htm.

[189] See Philip Elmer-DeWitt, "Why Europe's trustbusters targeted Apple's e-book 'cartel'", *CNNMoney* (6 December 2011), *available at:* http://tech.fortune.cnn.com/2011/12/06/why-europes-trustbusters-targeted-apples-e-book-cartel/.

[190] *U.S. v. Apple, Inc. et al*., Civil Action No. 12-CV-2826 (DLC).

[191] See, in particular, *U.S. v. Apple, Inc. et al*., [Proposed] Final Judgment as to Defendants Verlagsgruppe Georg von Holtzbrinck GmbH & Holtzbrinck Publishers, LLC D/B/A Macmillan, 8 February 2013, *available at:* http://www.justice.gov/atr/cases/f292600/292615.pdf.

[192] *U.S. v. Apple, Inc. et al., available at:* http://www.justice.gov/atr/cases/f299200/299275.pdf.

[193] See European Commission, Press Release IP/12/1367, *supra* n. 187.

Price cartels for books can also be found in some other jurisdictions. In Italy, the competition agency acted against a price-fixing scheme for school books.[194] In Sweden, the Market Court decided against a price cartel of paperback book publishers.[195] This latter case also had a vertical dimension since the cartel agreement consisted in an agreement to print recommended prices on the paperbacks, which, according to the Court, had the effect of fixing the retail prices.[196] In the particular case, the book publishers not only obliged retailers to charge prices fixed by the publishers. Rather, the publishers colluded among each other to keep prices high. Such practice restricts not only intra-brand competition among retailers, but more importantly inter-brand competition among publishers. Such a horizontal price agreement would also be illegal in a jurisdiction that exempts resale-price maintenance for books or provides for a statutory obligation of retailers to charge the prices fixed by the publishers.[197]

A price cartel among book publishers was also prosecuted by the Slovenian agency in 2005.[198] The Professional Association of Publishers and Booksellers of Slovenia had adopted so-called "General Conditions" for the functioning of the book market, which imposed an obligation on publishers to set resale prices applicable throughout the territory of Slovenia and a limitation of discounts to 5%. These clauses, which were designed to exclude competition both among publishers and retailers, were even approved by the Slovenian Chamber of Commerce. The decision of the agency was appealed, but no information was available as to the outcome of the appeal by the time of the writing of this Report.

Price cartels have also been known to exist in the newspaper industry. In Brazil, CADE, the country's competition agency, acted against a price cartel of three newspapers ("O Globo", "Jornal do Brasil" and "O Dia") that had increased their prices by 20% on the same day.[199] CADE imposed a fine of 1% of the turnover of the undertakings concerned during the respective year and required them to publish CADE's decision in the same newspapers.

Two price cartels in the markets of newspapers and magazines were discovered by the Croatian Competition Agency. The first case related to a price cartel for daily newspapers,

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194 AGCM decision No. 4833 of 27 March 1997, Case I232, *Associazione Italiana Editori*, Bollettino n. 13/1997, *available at:* http://www.agcm.it/concorrenza--delibere/concorrenza-provvedimenti/open/41256297003874BD/86BD1971461B44B6C125647B0046C86D.html.

195 *Svenska Bokhandlareföreningen v Månadens Bok*, *supra* n. 153.

196 *Id.*

197 On resale-price maintenance for books see also at 6.1.5, above.

198 Slovenian Competition Protection Office, Decision of 10 February 2005, reported in: Annual Report 2006, p. 17.

199 CADE, decision of 9 March 2005, Processo Administrativo no. 0812.002097/1999-81. See also "Cade condena Infoglobo, Editora O Dia e Jornal do Brasil por Cartel", portal.comunique-se.com.br (10 August 2005), *available at:* http://portal.comunique-se.com.br/index.php/editorias/3-imprensa-a-comunicacao-/48506-cade-condena-infoglobo-editora-o-dia-e-jornal-do-brasil-por-cartel.html.

which led to a simultaneous price increase by 1 Kuna for a number of papers on the 1st and 2nd of August 2008.[200] Since the publishers had very different cost structures, the Competition Agency concluded that there was no economic justification for the price increase and that the increase could only be explained by an agreement or concerted practice among the publishers. The agency suspected that the agreement had been concluded at a meeting of the newspaper publishers' association in July 2008 for which the publishers were unable to provide any minutes. The publishers challenged the decision of the agency before the Administrative Court of Croatia. This appeal, according to the information delivered by the agency, was still pending at the time of the writing of this Report. The second cartel was concluded between the publishers of the two major political weeklies "Globus" and "Nacional" and operated for more than two years before the agency issued its decision.[201] In this case, the agency had found written evidence of a concurrence of will and found that the price had immediately been increased after the agreement. Since the agency had no sanctioning power under the former competition law,[202] it presented the case to the Minor Offence Court to start criminal proceedings against the two publishing companies and the responsible persons. In this case as well, the publishers brought an appeal to the Administrative Court that was still pending at the time of the writing of this Report.

Most price cartels, however, affect the film industry and often relate to the exploitation of films in cinemas. Probably the most interesting case is the abovementioned *FICCI Multiplex* case decided by the Competition Commission of India in 2011.[203] This case arose from the attempts of the Bollywood film producers and distributors organised in the United Producers Forum to gain a larger share of the revenue generated by the large multiplex cinemas. The association of multiplex cinemas brought a complaint before the Competition Commission arguing that producers and distributors had colluded by deciding not to offer their films to the multiplexes and, thereby, creating pressure on the latter with the objective of imposing higher royalties for the screening of their movies. Consequently, the Commission held 27 producers and distributors guilty of having violated Section 3(1) of the Competition Act (2002). It imposed a penalty on each of the respondents and issued a cease-and-desist order. This is a clear case in which competing holders of copyright colluded in order to impose higher royalty rates on users. For Indian law, the case is of utmost importance in that it clarifies that the exemption provision of Section 3(5)(i) regarding the right to act against

200 Croatian Competition Agency (CCA), decision UP/I 030-02/2008-01/72 of 25 March 2010, OG 71/2010, *Slobodna Dalmacija et al.*, Annual Report 2010, pp. 19-21.

201 Croatian Competition Agency (CCA), decision UP/I 030-02/2010-01/027 of 16 December 2010, NN 20/2011, *Europapress Holding and NCL Media Grupa*, Annual Report 2010, pp. 21-22.

202 This has now changed. According to Article 9(1) No. 3 Competition Act (2009), the agency can impose fines in case of restrictive agreements.

203 *FICCI and Multiplex Association of India v. United Producers/Distributors Forum*, *supra* n. 78.

infringement of IPRs does not provide a competition law exemption to right-holders who restrict competition by entering into a price cartel.[204]

Price cartels affecting cinemas are also found in Italy. In 1998, the Italian AGCM acted against 25 cinemas in Milan and the association of the cinema operators in Lombardy for the coordination of the price for cinema tickets.[205] In 2001, the AGCM also took action against an agreement of film distributors and cinemas as well as their respective associations in which they fixed the conditions for rentals and the price of cinema tickets and agreed on information sharing.[206] Already in 1995, the AGCM had decided that the presence of the same persons in the governing bodies of competing film distributors can also be considered anti-competitive coordination.[207]

In Spain, the Competition Tribunal sanctioned a cartel among film distributors in 2006.[208] In this case, five major film distributors were held to have coordinated their pricing policies vis-à-vis cinema operators through a database on the public screening of films in Spanish cinemas that was operated by the association of film distributors and that was only accessible to its members. Given this system of information exchange, the Competition Tribunal refrained from requiring evidence of an explicit agreement on price coordination.[209] The Tribunal held the association and the five distributors liable for engaging in a horizontal agreement that restrained competition by operating a database for the exchange of strategic information. It imposed a fine of € 900,000 on the association and of € 2.4 million on each of the film distributors.

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204 On this point see the discussion of the case at 6.1.4, above.

205 AGCM decision No. 6663 of 10 December 1998, Case I329, *Associazione Nazionale Esercenti Cinematografici Lombarda, available at:* http://www.agcm.it/concorrenza/concorrenza-delibere/open/41256297003874BD/C741A61BF7567DD6C12566390039AF86.html. This decision was confirmed by the Regional Administrative Court (TAR) for the Region of Lazio (see Decision 8237/2002 of 26 September 2002) and finally by decisions of the Council of State (Decisions 295/2008 and 697/2008 of 27 February 2008).

206 AGCM decision No. 9793 of 27 July 2001, Case I363, *Accordo Distributori ed Esercenti Cinema,* Bollettino n. 30/2001, *available at:* http://www.agcm.it/concorrenza/concorrenza-delibere/open/41256297003874BD/BB64AC0AE07E2FCAC12569D700526D14.html. See also AGCM, "L'Antitrust condanna le intese tra distributori ed esercenti cinematografici", Press Release, 9 August 2001, *available at:* http://www.agcm.it/stampa/news/3299-i363-accordo-distributori-ed-esercenti-cinema-chiusura-istruttoria.html.

207 AGCM decision No. 2281 of 14 March 1994, Case I109, *Titanus Distribuzione/Cinema 5*, Bolletino n. 51-52/1994, *available at:* http://www.agcm.it/concorrenza/concorrenza-delibere/open/41256297003874BD/0107E39D01C818A1C125613B005217E0.html.

208 Spanish Competition Tribunal (*Tribunal de la Defensa de Competencia*), Decision of 10 May 2006, Case 588/05, *Distribuidores Cine*, *available at:* http://www.cncompetencia.es/Inicio/Expedientes/tabid/116/Default.aspx?sTipoBusqueda=3&PrPag=1&PagSel=1&Numero=588%2f05&Ambito=Conductas.

209 *Id*., p. 19.

In addition, Italy has also seen a cartel among its major music record companies (Warner, Polygram EMI, BMG, Sony) that involved a price-fixing scheme for CDs, records and music cassettes.[210]

A case regarding a price cartel among music publishers was also investigated by SIC, the competition agency of Columbia, in 2011. In this case, 16 publishers through their business association ACODEM collectively negotiated licences for the use of music as ringtones. SIC considered this a price-fixing cartel, although it also confirmed that Columbian law would have allowed the publishers to act through a CMO. Yet ACODEM did not have the authorisation required by copyright law. SIC did not decide the case but closed it when the music publishers agreed to revoke ACODEM's power to negotiate royalty rates and invited the licensees to renegotiate the licences.[211] The case is instructive insofar as it highlights that the establishment of CMOs that then grant licences at uniform prices could also be regarded as price-fixing arrangement unless a justification can be found.[212]

A price cartel among architects was prosecuted by the Competition Council of Lithuania. There, the Code of Ethics of Professional Architects of the Union of Architects obliged architects to charge specific prices for their design works. After the intervention of the Competition Council, the Union of Architects repealed said provision of the Code of Ethics.[213] A very similar case on a price cartel can be reported from Belgium. There, the Flemish Association of Interior Designers was charged by the Competition Council with having set minimum prices per hour for the work of affiliated designers.[214]

In Bulgaria, the Competition Commission acted against the price scheme set by a professional association of engineers for design services in the field of urban planning in investment design.[215] The professional association was established under Bulgarian law,

[210] AGCM decision No. 5385 of 9 October 1997, Case I207, *Associazione Vendomusica/Case Discografiche Multinazionali*, Bollettino n. 41/1997, *available at:* http://www.agcm.it/concorrenza--delibere/concorrenza-provvedimenti/open/41256297003874BD/0E00320B1445EFFDC125653F002ED904.html. See also AGCM, "Condannate le major discografiche", Press Release, 22 October 1997, *available at:* http://www.agcm.it/stampa/comunicati/3459-i207-associazione-vendomusicacase-discografiche-multinazionali-federazione-industria-musicale-italiana-chiusura-istruttoria.html.

[211] SIC Resolution 70803 of 2011 – *ACODEM*. See also SIC Resolution 29829 of 2009, *available at:* http://avancejuridico.sic.gov.co/sic/docs/fr_siyc_29829_2009.htm, in which it opened proceeding against ACODEM.

[212] How jurisdictions argue the legality of establishment of CMOs in the light of the prohibition of price-fixing cartels will be explored in detail at 6.7, below.

[213] Lithuanian Competition Council, Annual Report 2000, *available at:* http://kt.gov.lt/en/index.php?show=annual_2000_en#2_12.

[214] Belgian Competition Council (Conseil de la concurrence), decision of 15 July 2008, Case no. 2008-P/K-45, *Association des architectes d'intérieur*, Annual Report 2008, p. 14.

[215] Bulgarian Commission for Protection of Competition (CPC), decision no. 651/2008, Case Summary: "Public-private restriction of competition on the market of design services in Bulgaria", *available at:* http://www.cpc.bg/Competence/ProhibitedAgreementsDecisions.aspx.

which required all engineers providing such services in Bulgaria to become members of the association. Also, Bulgarian law provided for an obligation of such engineers to abstain from charging prices below costs. In implementing this rule, the association adopted a methodology for calculating this price. The Competition Commission held that this price scheme created an indirect mechanism for fixing prices at a minimum level. Since membership in the association was mandatory for all design engineers who wanted to deliver such design services in Bulgaria, the Competition Commission concluded that the price scheme violated EU law (now Article 101 TFEU). Reliance on the legal rules in Bulgaria regulating this provision was not accepted. Rather, the Competition Commission argued that Bulgarian law was in violation of European competition law and, hence, inapplicable to the extent that it facilitated anti-competitive conduct of the association. Consequently, the professional association could not rely on those national provisions for justifying its own price methodology. The role of Bulgarian law, which had facilitated the competition law violation by the association, was only taken into account as a mitigating factor in the framework of fining the association.

Moreover, a price cartel among local radio stations was argued before the Federal Court of Australia in *Radio 2ue Sydney v Stereo FM and 2 Day-FM*.[216] In this case, two Sydney radio stations had entered into a joint venture to sell advertising time to customers and then were sued by a third radio station for price fixing. Yet the Federal Court at first instance and on appeal decided that there was no sufficient evidence of price fixing. Rather, it seemed that the two radio stations only cooperated with regard to providing more effective service for selling advertising time to customers based on phone calls, while the two stations continued to charge individual prices to advertising customers.

These examples of cases thus related to price-fixing agreements of suppliers, including right-holders, to the detriment of customers or consumers. Since copyright protection is provided for to allow authors to recoup a fair remuneration for their creative endeavours, one also has to worry about price fixing among competitors of the copyright industry to the detriment of authors and performing artists. An example of such a case is provided by practice in Turkey. There, the competition agency was informed by an anonymous complainant about an alleged agreement among five domestic soap opera producers that restricted the freedom of actors to transfer from one company to the other and that also fixed the prices paid to these actors (so-called price caps). Yet formal proceedings were not opened due to the absence of sufficient evidence of an anti-competitive agreement.[217]

At the end of this section on horizontal price fixing, a very interesting case from Spain is to be reported that does not directly deal with prices, but nevertheless relates to a horizontal

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[216] *Re Radio 2ue Sydney Pty Limited v Stereo FM Pty Limited and 2-Day Fm Limited* [1983] FCA 140; (1983) FLR 70 (12 July 1983), *available at:* http://www.austlii.edu.au/au/cases/cth/FCA/1983/140.html.

[217] Turkish Competition Authority (*Rekabet Kurumu*), decision 04-49/710-195 of 28 July 2005, Case 1270.

agreement that was designed to extract payments from undertakings in downstream markets by asserting copyright protection in the first place. Given the particular role intellectual property played in this case, the decision of 2011, in which the Spanish Competition Commission sanctioned several associations of newspaper publishers for having coordinated the conduct of their members relating to the licensing of their copyrights to providers of press reviews (so-called “press clips”), deserves particular attention in this context of this study.[218] The coordination consisted in recommendations concerning the interpretation of a copyright provision, namely, Article 32(1) Spanish Copyright Act (*ley de propriedad intelecutal*) on the protection for database works, that members of the associations were called upon to adopt vis-à-vis providers of press clips[219] and the use of clauses in the contracts with such providers. In its decision, the Competition Commission was indeed requested to express itself on the limits of competition law intervention with regard to the scope of protection of copyright law. In this regard, the Commission clearly admitted that it has no power to judge on the correctness of the interpretation of copyright law as recommended by the association. But the Commission distinguished from the question of the interpretation of copyright law the coordination of the business strategy of the publishers in exploiting their rights in contracts in relation to the providers of press clips.[220] This included three elements, namely, a joint strategy of the publishers (1) to assert original rights, (2) to seek legal protection against unauthorised clipping and (3) to force providers of press clips into licensing agreements with the clauses agreed among publishers.[221] The Commission imposed fines on the four associations, with the largest amounting to €225,000.

8.2 Bundled marketing of copyrighted works

As regards their effects, the practice of bundled marketing of copyrighted works may have effects that largely correspond to a price cartel, especially if a new entity is created that charges a uniform price for the use of the works of all right-holders. But there are also forms

[218] Spanish Competition Council (*Comisión Nacional de la Competencia*), Decision No. 2761/07 of 11 May 2011, *Asociación Editores Diarios Españoles*, *available at:* http://www.cncompetencia.es/Inicio/Expedientes/tabid/116/Default.aspx?stipobusqueda=3&PrPag=1&PagSel=1&sNumero=2761%2f07.

[219] Several questions were unclear with regard to the provision that regulates the rights in collective works such as newspapers. One of the questions was the fundamental one of whether the right belonged as an original one to the publisher or to the authors of the individual articles. The publishers’ associations recommended the first reading.

[220] *Id.*, p. 35.

[221] *Id.*, p. 36.

of coordination on an inferior level of cooperation that do not go so far as to create a uniform pricing scheme.

A very clear example is provided by the abovementioned case of centralised licensing of the images of Italian football players, which under Italian law are protected by special provisions in the Copyright Act.[222] In its decision of 1996, the AGCM considered the allocation of the centralised marketing of these images in the hands of a single firm (Panini) an illegal horizontal cartel in the sense of Article 2 of the Antitrust Law (*legge antitrust*). According to the agency, the cartel was designed to create a monopoly. In its decision, the AGCM did not consider defining Panini as a CMO. This may be explained by the fact that recognition of Panini as a CMO was excluded by Italian copyright law, which provides for a legal monopoly of the existing SIAE (Società Italiana degli Autori ed Editori).

Another Italian case with a less intensive form of centralisation of the marketing activities concerned the marketing of school books.[223] In this case, the AGCM reached a commitment decision against the Italian book publishers' association (Associazione Italiana Editori, AIE), which had coordinated the sales and distribution of school books. For the purpose of this coordination, AIE had created a database which provided information for the publishers as the supply side without also opening the database to the demand side. In its commitments, AIE agreed to open the database to schools and teachers.

As precedents for bundled distribution of copyrighted works, enforcers also need to take into account the considerable case-law provided by many jurisdictions on centralised licensing of television rights for football matches. Although football matches as such are not copyright-protected, these cases are comparable provided that the television rights belong to the individual sports clubs and not the sports federation according to the individual jurisdiction.[224]

8.3 Horizontal market sharing

Another form of hard-core agreements among competitors that restrict competition is market-sharing agreements. The survey has produced some practice in this regard. In Argentina, in 2010, two cable TV providers – CableVisión and Multicanal – were fined for

[222] *Associazione Italiana Calciatori – Panini*, *supra* note 27.

[223] AGCM Commission decision No. 18286 of 24 April 2008, Case I692, *Mercato dell'Editoria Scolastica*, Bollettino 33/2007, *available at:* http://www.agcm.it/concorrenza/concorrenza-delibere/open/41256297003874BD/ECD8DDF9A474C352C12573A60058E3C4.html.

[224] See, in more detail, at 2.4, above.

having restricted the freedom of consumers in the city of Santa Fe to choose freely between the services of the two providers pursuant to Article 20 of the Argentinian Competition Act No. 22.262.[225] This case has to be seen in the context of failed attempts of CableVisión to acquire Multicanal, which have gone on ever since 2006.[226]

Another example can be reported from Italy, where the public TV company (RAI) and the largest private TV company (Mediaset) agreed to share the market for the television rights in football matches.[227] Although football matches are not protected by copyright, the case nevertheless highlights the fact that the copyright industry also engages in market sharing regarding supply to the detriment of content providers. What is also interesting about the case is that the Italian competition agency AGCM was informed about the agreement through the broadcasting regulation authority AGCOM.

The most important IP-related case that can so far be reported from Estonia relates to a market-sharing agreement between the largest distributor of film videos (V&K Holding) in Estonia and a Lithuanian competitor. In this agreement each company promised not to enter the other country's market. The case was tried as a criminal case before the first instance Tallinn City Court.[228] The case started as one on refusal to deal when the operator of a video rental shop (Videoclub) complained to the Estonian competition agency that V&K Holding was refusing to sell to Videoclub unless the latter would increase its prices to the level V&K was charging in its own chain of video rental shops. Since Videoclub failed to get supplies from the Lithuanian distributor (Garsu Pasaulis), which relied on its own discretion in refusing to deliver the videos, the competition agency suspected that there was an agreement between V&K and Garsu Pasaulis on dividing the two national markets. Finally, V&K was convicted by the Tallinn City Court for having entered into the market-sharing agreement and had to pay a criminal fine of EEK 150,000 (approx. €9,600). The fine seems relatively small, but this was probably justified by the fact that V&K cooperated intensively with the competition agency. Also, the competition agency held V&K liable for a violation of abuse of dominance, which, however, was only considered a misdemeanour.

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[225] Resolution No. 219/10 of the Economics Ministry (Secretario de Comercio Interior). See Secretaria de Comunicación Pública, Presidencia de la Nación, Press Release of 21 July 2010, 'Aplican la Ley de Defensa de la Competencia : Multan a Cablevisión y Multicanal por concentrar el mercado de Santa Fé', *available at:* http://www.prensa.argentina.ar/2010/07/21/10084-multan-a-cablevision-y-multicanal-por-concentrar-el-mercado-en-santa-fe.php.

[226] On the merger see at 10.1, below.

[227] AGCM decision No. 6662 of 10 December 1998, Case I283, *RAI-Mediaset-RTI-Mediatrade*, Bolletino n. 27/1997, *available at:* http://www.agcm.it/concorrenza--delibere/concorrenza-provvedimenti/open/41256297003874BD/921DDF5B6B0F62EAC12566E4003B6C1F.html.

[228] Tallinn City Court, 7 October 2004, Case no. 1-393/04, *AS V&K Holding*. See the report in Frank L Fine, *European Competition Laws: A Guide to the EC and its Member States*, 2007, § 4A.04[4][a].

In Romania, in 2006, the Competition Council acted against a market-sharing agreement of two cable retransmission service providers in the city of Timişoara.[229] However, the decision was later annulled by the Court of Appeal since the right of the agency to impose sanctions had already expired. This decision was confirmed by the High Court of Cassation and Justice.

In *Rural Press v ACCC*, the High Court of Australia was requested to decide on a market-sharing agreement among regional newspapers affecting both the advertising market and the readers market.[230]

In 2010, the Czech Office for the Protection of Competition (OPC) imposed a fine on two media agencies that had entered into an agreement on dividing customers in the market.[231]

8.4 Horizontal agreements with market-foreclosure effects on outsiders

Among the most interesting cases of horizontal agreements that the survey produced are agreements that are concluded among competitors with the objective of foreclosing market access to additional competitors. Such agreements seem to be of particular concern in the film industry, where economically successful distribution of films depends on access to the cinemas. This becomes apparent in particular in a series of most recent, economically and legally highly important decisions in which the Competition Commission of India had to assess the anti-competitive character of the conduct of regional film industries in the country that was designed to block or limit access of Bollywood movies to the local market.

The Indian film market is characterized by a large variety of regional film industries which use their regional languages. These regional film industries coexist with Bollywood, where films are produced mostly in Hindi. Bollywood movies are however popular in the whole of India. The regional film industries, including the film producers, distributors and cinema operators, are organised in regional chambers of commerce. Each of the regional chambers controls the market of one of the 12 circuits in which the Indian territory is subdivided for this purpose.

The most important case on which the CCI has acted so far is the *Reliance* case, decided in February 2012, which was initiated upon the complaint of Bollywood film producers against

229 Competition Council, Decision no. 237/2006, *UPC*, reported in: Competition Council, Annual Report 2011, pp. 31 et seq. Also UPC was sanctioned for having engaged in excessive pricing (see at 9.2, below). See also Ioannis Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, paras 24-041 to 24-043.

230 *Rural Press Ltd v ACCC* [2003] HCA 75; 216 CLR 53; 203 ALR 217; 78 ALJR 274 (11 December 2003), *available at:* http://www.austlii.edu.au/au/cases/cth/HCA/2003/75.html.

231 Czech Office for the Protection of Competition, *OMD Czech and Médea*, Annual Report 2010, p. 8.

several regional chambers of the Indian film industry.[232] Later decisions dealing with similar problems make reference to, and build on the holdings in, this case. The objective of the regional film industries was to protect local production against the entry of often more popular Bollywood films by imposing discriminatory terms of access to the local film distribution market on films from outside. For that purpose the regional chambers required all film producers to become members of these chambers if they wanted their movies to be performed in the local cinemas and to register their films with the local chamber. The producers thereby had to accept restrictive and discriminatory conditions of access to the local market, such as limitations on the number of cinema screens on which the movies are shown as well as holdback periods regarding the release of the film in cinemas and the start of the sale of videos or DVDs in the local market. Simultaneously, the chambers threatened the local cinema operators with the suspension of their memberships if they screened unregistered films. The cinema operators, therefore, generally refrained from showing unregistered films. This all happened despite the fact that the power to authorise the distribution of films was exclusively allocated to the state authorities and after a decision of the Supreme Court of India that struck down discriminatory taxes imposed by some Indian states on films in Hindi.

In its order, the Commission confirmed that the regional chambers of commerce cannot be considered enterprises in the sense of the Competition Act. Therefore, the Commission denied a case of abuse of market dominance in the sense of Section 4, but applied the prohibition of restrictive agreements in Section 3 to the chambers as "associations of enterprises". According to the Commission, the chambers made anti-competitive decisions on behalf of their members as enterprises.[233] As to the act of violation, the Commission distinguished between different aspects. The obligation imposed on members not to deal with non-members was not considered a vertically agreed refusal to deal in the sense of Section 3(4)(d), but a horizontal agreement that had the effect of limiting supply in the sense of Section 3(3)(b) read with Section 3(1) of the Competition Act.[234] The same provision was applied with regard to the imposition of the compulsory registration system,[235] the limitation of the number of cinema screens[236] and the imposition of unfair holdback periods for subsequent exploitation through satellite, video, DTH technology and the like.[237] As to the requirement of anti-competitive effect, the Commission relied on the market-

[232] *Reliance Big Entertainment Ltd et al. v. Karnataka Film Chamber of Commerce et al.*, Cases No. 25, 41, 45, 47, 48, 50, 58 and 69 of 2010 – CCI decision of 16 February 2012, *available at:* http://www.cci.gov.in/May2011/OrderOfCommission/25-2010%20%28Majority%20Order%29%20feb%202012.pdf

[233] *Id.*, para. 6.16.

[234] *Id.*, paras 6.25-6.32.

[235] *Id.*, para. 6.41.

[236] *Id.*, para. 6.54.

[237] *Id.*, para. 6.65.

foreclosure effect of the behaviour.[238] A last very interesting question was whether the Commission would accept the argument of the regional chambers according to which the restrictions were required by the need to protect regional cultures and languages. The Commission considered this question in the framework of a pro-competitive justification, which, however, requires an improvement in production or supply.[239] The Commission rejected the justification with the argument that the restrictions imposed by the regional chambers deprived consumers of the possibility to watch the films of their choice.[240] As a remedy the Commission imposed relatively high fines on the Chambers (10% of the average income of the previous three years) and issued a cease-and-desist order. It is interesting to see that the Commission only acted against the regional chambers and not the individual members who were the beneficiaries of the restraint. Acting through the chambers may well have saved the local companies from the imposition of considerable fines.

On the same day, the CCI also issued an order in the *Eros* case.[241] The facts of the case are basically the same as in the *Reliance* case. But the underlying complaints were partially directed against other regional chambers of commerce. Accordingly this case was fully decided along the line of arguments in the *Reliance* case. Also, the penalty imposed on the chambers of commerce was calculated the same way. Regarding the gravity of the infringement, the Commission found very clear words to stress that the anti-competitive conduct "needs to be condemned heavily in order to ensure effective functioning of the market".[242]

In May 2012, the CCI had to decide on the *UTV Software*[243] case. In this case the informant, again a film production company, was confronted with requirements by a regional film association in Delhi, Uttar Pradesh and Uttarakhand that restricted the exploitation of the informant's films. In particular the informant criticised the unreasonable holdback period of 5 years for the exploitation of the films through media exhibition (broadcasting) and CDs. Here as well, the rules of the association had imposed a duty on the cinema operators to refrain from dealing with producers who refuse to become members. The informant struck out the restrictive terms and consequently had to face threats that its membership would be terminated and that its films would not be shown in the region. In this case also, by relying on the earlier cases, the Commission identified a horizontal agreement in violation of Section

238 *Id*., para. 6.96.

239 *Id*., para. 6.96.

240 *Id*., para. 6.97.

241 *Eros Int'l Media Ltd et v. Central Circuit Cine et al*., Cases No. 52 und 56 of 2010 – CCI Order of 16 February 2012, *available at:* http://www.cci.gov.in/May2011/OrderOfCommission/CaseNo52and56of2010MainOrder.pdf.

242 *Id*., para. 7.1.

243 *UTV Software Communications Ltd v. Motion Pictures Association*, Case No. 09 of 2011 – CCI Order of 8 May 2012, *available at:* http://www.cci.gov.in/May2011/OrderOfCommission/092011Main.pdf.

3(3)(b) read with Section 3(3)(1). Yet the Commission refrained from imposing fines since the respondent had already been fined as one of the respondents in the earlier *Reliance* case. Furthermore, two other very similar cases where decided by the Commission in early 2013.[244]

This, however, does not conclude the report on the most recent Indian practice on market foreclosure initiated by regional film associations. Two other cases are interesting because they partially differ from the abovementioned ones with regard to the facts and also with regard to the legal assessment.

In the *Heart Video* case, which was decided in August 2012, hence after the first round of film-industry orders, the Commission responded to the concerns of an informant who acted as a distributor for TV serials.[245] The informant had acquired the rights for the very popular "Mahabharata"[246] serial for the Bengali language. The informant dubbed the series and provided it to two TV stations in the state of West Bengal. The regional film association, the Eastern India Motion Picture Association (EIMPA), however, sent warning letters to the informant and the TV stations telling them to refrain from the broadcast "in the interest of healthy growth of television industry in West Bengal". In addition, the film association initiated pressure from the local union of artists and technicians working in the West Bengali film and television industry, which had an interest that not too many productions from outside the region should be broadcast by regional TV stations and, consequently, even organised a strike against the TV stations. The complaint was directed against the film industry association, the trade union and even the two TV stations as respondents. Here again the Commission held that the first two respondents, as associations of enterprises, had violated Section 3(3) on horizontal agreements.[247] It may seem surprising that the CCI also acted against the union of artists and technicians, since most jurisdictions would not apply competition law to trade unions.[248] Yet the Commission clearly pointed out that trade unions are not exempted from the application of the Competition Act.[249] What the Commission did not consider, however, is that the artists and technicians organised in the union have to be

244 *Cinergy Independent Film Services v. Telangana Telugu Film Distributors Association*, Case No. 56 of 2011 – CCI Order of 10 January 2013, *available at:* http://www.cci.gov.in/May2011/OrderOfCommission/562011.pdf; *Shri Ashtavinayak Cine Vision Ltd v. PVR Picture Ltd et al.*, Case No. 71 of 2011 – CCI Order of 10 January 2013, *available at:* http://www.cci.gov.in/May2011/OrderOfCommission/712011.pdf.

245 *Heart Video v. Eastern India Motion Picture Association*, Case No. 16 of 2011 – CCI Order of 9 August 2012, *available at:* http://www.cci.gov.in/May2011/OrderOfCommission/162011.pdf.

246 Mahabharata is one of India's two ancient Sanskrit epics.

247 *Heart Video*, *supra* note 245, para. 7.2.5.

248 For instance, such an exemption is explicitly provided by Section 55 of the Pakistani Competition Act. The Pakistani agency made reference to this provision on the question whether CMOs are exempted from the application of the Act, without arguing that CMOs would necessarily qualify as trade unions.

249 *Id.*, para. 7.2.4.

enterprises in the sense of the Act if it is to be applied to the union as an association of enterprises.[250] It may well be that the respondent trade union brought together artists and technicians who either work as employees or as self-employed people. Only with regard to the latter is the reasoning of the CCI without doubt. More importantly, the Commission confirms the market-foreclosing effect of the practices and describes them as the "anti-thesis of the principles of free markets".[251] Only as regards the TV stations, which had stopped the broadcast for some time under the pressure of the other two respondents, did the Commission hold that there was no violation, since the TV channels had not colluded with the two other respondents, but only acted under the economic pressure of the latter.[252] In sum, also in this case, the CCI relied on the reasoning in the *Reliance* case.

The only case relating to access to the local film distribution market so far in which the CCI has not confirmed a violation of competition law is *Manoranjan Films*.[253] This case also related to the requirements of the Eastern India Motion Picture Association (EIMPA) for the registration of films. The informant was a film distributor and member of EIMPA who had signed an agreement with a producer of a film that was produced in the Bengali language. The informant was given the rights for the exploitation through videos, satellite and cable and for dubbing the film in any of India's regional languages. Yet EIMPA refused to register the film, arguing that the informant had provided false information on the status of the producer. Accordingly, the informant claimed that he was denied market access to West Bengal. Although the Director General granted interim relief, the CCI denied a violation. The Commission noted that the informant had tried to register the film although he was not required to do so under the rules of EIMPA. Hence, the refusal of the registration did not work as a market entry barrier in this case.

A case on exclusionary horizontal agreements concerning access to cinemas can also be reported from the practice of the Egypt Competition Agency (ECA).[254] In 2010, the ECA received a complaint of the chairperson of the Egyptian Company for Media Investment against restrictions on the distribution of Egyptian films in cinemas. A technical team investigated the cinema distribution market, analysing the behaviour of seven Egyptian film production and distribution firms. The Egyptian film industry is characterised by the existence of two kinds of cinemas: the so-called "movie theatres", which are owned by film producers and distributors, and independent cinemas. The film producers and distributors

[250] Cf. *Heart Video*, supra note 245, para. 7.2.7 (only arguing that the union works on behalf of the collective will of its members).

[251] *Id*., para. 7.2.9.

[252] *Id*., para. 7.2.13.

[253] *Manoranjan Films v. Eastern India Motion Picture Association and The Censor Board of Film Certification*, Case No. 17 of 2011 – CCI Order of 24 April 2012, *available at:* http://www.cci.gov.in/May2011/OrderOfCommission/172011.pdf.

[254] See http://www.eca.org.eg/ECA/Resolution/LIst.aspx?categoryID=1.

prefer to show their films in their own cinemas. In addition, it was discovered that film distributors only allocate a certain percentage of their films to independent cinemas under the condition that these cinemas will not show films of other distributors. As a consequence, many independent cinemas became unable to operate all their screens. This very distribution policy was fixed by an agreement among producers and distributors that had been concluded at a meeting of the Chamber of Cinema Industry and that the agency discovered in the framework of its investigation. The ECA concluded that the agreement violated the prohibition of horizontal agreements contained in Article 6(d) of the Competition Act. The ECA referred a report to the Minister of Trade and Industry and requested the filing of a criminal lawsuit against the members of the cartel in accordance with Article 21 of the Competition Act. Also, the ECA set a 30-day deadline for the companies to eliminate the violation. The conduct of the film producers and distributors in this case, indeed, seems to have an exclusionary effect in several regards. First, the agreement has the potential of excluding the operators of independent cinemas, who may have to leave the market, and this makes it less profitable to invest in new independent cinemas. Secondly, the agreement also forecloses the market for films that are not produced and distributed by those firms that own "movie theatres". In sum, the agreement reduces access of consumers to films by limiting the number of screens on which films are displayed and may prevent Egyptian viewers from seeing the movies they prefer.

Similar cases of exclusionary horizontal agreements can also be found in sectors other than the film industry. In 2007, the Italian AGCM acted against ADS, an association of newspaper publishers that was created for collecting data on the distribution of individual newspapers in the whole of Italy.[255] Based on its rules, which were designed to monitor the sale of newspapers, ADS refused to certify Metro, a free-of-charge newspaper, with the result of restricting Metro's ability to attract revenue from advertising. The AGCM held that the refusal to certify Metro constituted a restrictive decision of an association of undertakings in the sense of ex-Article 81(1) EC Treaty (now Article 101(1) TFEU).

Metro faced practically the identical problem in Ireland. There, Metro was confronted with a refusal by the Joint National Readership Survey (JNRS) to admit it to its readership survey. This survey is used in Ireland by publishers to sell advertising space. Practically all other newspapers were included, and Metro claimed that the refusal would make it impossible to compete effectively in Ireland. These arguments were supported by the Irish Competition Authority and accordingly the agency formulated its preliminary view that there was a violation of Section 4 on restrictive agreements and Section 5 Competition Act (2002) on

[255] AGCM Decision of 17 May 2007, Case I651, *A.D.S. Accertamenti Diffusione Stampa – Audipress*, Bollettino n. 19/2007, *available at:* http://www.agcm.it/concorrenza/concorrenza-delibere/open/41256297003874BD/36A24EA9D922FEEFC12572EA003683E1.html.

abuse of dominance. JNRS consequently changed its admission policy and accepted free-of-charge newspapers such as Metro. The file was closed in January 2008.[256]

In an interesting decision of 2012, the Swiss Competition Commission fined IFPI Switzerland, the umbrella organisation of the Swiss phonogram industry, for having restricted parallel imports of phonograms from abroad.[257] The Commission confirmed that members of IFPI had agreed to abstain from importing phonograms of other IFPI members from abroad. As of 1999, new members even had to sign a declaration that they would not import such phonograms. The decision also addressed Phononet AG, a firm established by the Swiss music industry that provides an electronic data interface that standardises and facilitates the transfer of data between producers and dealers, as well as a portal for the marketing of new releases. Phononet had also included a clause in its agreements with the labels that prohibited the latter from importing phonograms of other producers. The Commission held that the Phononet agreement strengthened the agreement between IFPI members.[258] The Commission considered the latter a horizontal agreement that excluded supplies from sources from abroad in form of a territorial segmentation agreement,[259] which is categorised as a hard-core restraint under the Swiss Competition Act (Article 5(3)(c)) for which the law provides for a presumption of anti-competitive effect.[260] This decision has to be read in context with Article 3(2) of the Competition Act, which explicitly states that restrictions of parallel trade in IP-protected goods are not exempted from the prohibitions of the Act (see also at 6.1.3, above). Though confirming that dealers could easily import phonograms from other sources than the phonogram producers themselves, the Commission held that the anti-competitive effect was still sufficiently substantial to meet the requirements of the prohibition; it also took into account the qualitative gravity of the infringement.[261] In the framework of a possible justification, the Commission rejected the argument of IFPI that the agreement was designed to fight piracy. In this regard, the Commission held that the agreement would not have been proportionate even if one accepted the piracy argument as a potential justification. IFPI members could directly rely on their intellectual property rights in order to control imports of infringing phonograms.[262] More importantly, it is to be pointed out that the piracy argument was a very weak one since Switzerland follows the principle of

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256 Irish Competition Authority, Refusal of JNRS to admit Metro and other free newspapers to its readership survey', Press Release.

257 Competition Commission (Wettbewerbskommission), Decision of 12 July 2012, (2012) 4 *Recht und Politik des Wettbewerbs* (*RPW*) 820.

258 *Id.*, para. 78.

259 *Id.*, paras 71 and 79 *et seq.*

260 *Id.*, para. 76.

261 *Id.*, paras 98-108.

262 *Id.*, paras 110-129.

international exhaustion in copyright law.[263] Hence, the decision of the Swiss Competition Commission highlights the role of competition law to guarantee that right-holders do not extend the exclusivity of the copyright beyond its scope of exclusivity. Such a role of competition law can also be observed in the practice of the competition law in Australia, where copyright law also follows the principle of international exhaustion.[264]

In the Netherlands, the Arnhem courts had to deal with a private action of NVM, the Dutch association of estate agents, against ZAH, the operator of a search engine that browses through the Internet to collect information on real estate offers and combines them by setting deep links. NVM operates its own website (funda.nl) for such offers and it claimed that ZAH was infringing its database right and copyright by including data from funda.nl in ZAH's search results. In its decision of 2006, the Arnhem Provisional District Court found that there was neither an infringement of database rights nor of copyrights.[265] Quite on the contrary, the Court followed ZAH's argument according to which estate agents had colluded within NVM to act against ZAH to prevent it from using their information of real estate offers by relying on IP protection for such information. Accordingly, the Court held that NVM estate agents had violated Section 6(1) of the Competition Act by entering into a collusive agreement that sought to monopolise the market for internet information on the housing market, making funda.nl the only website providing such information. The appeal by NVM and two individual estate agents was ultimately dismissed by the Arnhem District Court. The Court fully confirmed the first decision with regard to the assessment under both copyright law and competition law.[266]

8.5 Bid rigging and other agreements distorting public tender proceedings

Another form of horizontal hard-core cartels is presented by bid-rigging agreements among competitors who take part in public tenders. At first glance, one would think that such cartels should not be much of a concern in copyright-related markets. Yet practice from

[263] This was confirmed by the Swiss Federal Court (Bundesgericht), Decision of 20 July 1998, *Nintendo*, 124 III BGE 321.

[264] Compare the discussion of the Australian *Universal Music* case at 9.10, below.

[265] Arnhem Provisional District Court, 16 March 2006, Case 136002/KG ZA 06-25, LJN AV5236, NVM estate agents v. ZAH, English summary *available at:* http://ec.europa.eu/competition/elojade/antitrust/nationalcourts/Overview+of+the+application+of+the+E+competition+rules.pdf.

[266] Arnhem Court of Appeal, 4 July 2006, Case 06/416, *NVM v. Zoekallehuizen.nl*, English summary *available at:* http://ec.europa.eu/competition/elojade/antitrust/nationalcourts/Overview+of+the+application+of+the+EC+competition+rules.pdf.

Chile provides a bid-rigging case relating to the assignment of frequencies for radio broadcasting.[267]

A very unusual case relating to public tenders can be reported from Brazil.[268] There, Microsoft was prosecuted by CADE, the national competition agency, for having chosen a single reseller of Microsoft products to the government, which led to the decision of government authorities to not apply the usual tender procedures. While CADE justified its decision against Microsoft mostly by an abuse of market dominance, it also applied the provision of the competition law that prohibits agreements that are designed to draw undue advantages from public tender procedures.[269] This case shows that public tender proceedings cannot only be distorted by collusion among competitors with anti-competitive effects on inter-brand competition but also by vertical exclusivity agreements imposed by dominant firms that restrict intra-brand competition.

Most recently, CADE started investigations on a cartel affecting public tenders among seven undertakings in the information technology service market in the Federal District. From the press release of CADE it is not clear whether Microsoft is involved in this case.[270]

8.6 Resale-price maintenance

Resale-price maintenance plays a major role in the book and newspaper (publishing) industry. As already explained (at 6.1.5, above), some countries have exempted contractual resale-price maintenance for this sector or have introduced statutory resale-price maintenance systems. Yet, in other jurisdictions competition agencies have clarified that resale-price maintenance is prohibited by competition law even in the book market. Two such jurisdictions are Sweden and Italy.

In Sweden, the Market Court held that even recommended prices printed on the paperback editions of books violate competition law, since the recommendations were largely

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[267] Competition Tribunal (*Tribunal de la Defensa de la Libre Competencia*), judgment 112/2011 of 22 June 2011, Case C 194-09, *FNE v. Radio Valparaíso Ltd. and others*, http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=2789&GUID.

[268] CADE decision of 25 August 2004, Case 08012.008024/1998-49, *Microsoft/TBA*. The decision is described in more detail in OECD, "Competition Law and Policy in Brazil – A Peer Review", 2005, pp. 23 et seq., *available at:* http://www.cade.gov.br/internacional/Peer-Review-Report-English.pdf. See also at 6.5.6, below.

[269] Article 21(VIII) of the former Competition Law No. 8.884 (1995). This provision has a very open-ended wording, prohibiting not only agreements among competitors but all agreements that lead to unjustified anti-competitive advantages in tender proceedings.

[270] CADE, "CADE begins investigation about alleged cartel in public tenders of information technology services", Press Release of 14 February 2013, *available at:* http://www.cade.gov.br/Default.aspx?92a574859c72868d99a6b68ea2a8.

followed.[271] Similarly, AGCM, the Italian competition agency, considered the prohibition of discounts imposed on book retailers combined with the threat of stopping supplies in case of a violation of this obligation an infringement of competition law.[272] Since in both cases the systems of resale-price maintenance were implemented in the framework of an agreement among book publishers, both cases also had a horizontal dimension. In Switzerland, where the population has only very recently rejected a statutory system of resale-price maintenance for books, the Competition agency is currently investigating resale-price maintenance in the market for books in French. This case may also have a horizontal dimension.[273] Finally, the Latvian Competition Council also reported two cases in which it had acted against retail-price maintenance of book publishers.[274]

Yet the book market is not the only copyright-related market that is affected by resale-price maintenance. In Japan, the JFTC acted against a resale-price maintenance system implemented by Sony for its PlayStation game software.[275] This system included three elements requiring wholesalers not to: (1) sell the software below a certain price, (2) resell to other wholesalers or (3) trade used software. The JFTC considered the first and the third element a violation of competition law. Sony immediately stopped its practice when it was requested by the JFTC to do so.

In Austria, the Supreme Court had to decide on whether the system of resale-price maintenance for press products violated competition law.[276] The Court was seised by the Austrian Federal Competition Authority, which mostly disliked the fact that the same press products (newspapers and magazines) were much more expensive in Austria than in Germany. The central legal question of the case was whether the dealers could be considered sales agents that are fully integrated in the distribution system of the publishers

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[271] *Svenska Bokhandlareföreningen v Månadens Bok et al.*, *supra* n. 153, p. 14 et seq. See, also, Ioannis Kokkoris (ed.), *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, para. 28-020.

[272] *Associazione Librai Italiani/Editori*, *supra* n 110. Note, however, that Italy has introduced a statutory system of resale-price maintenance of books as of 1 September 2011 (*legge Levi*). See also at 6.1.5 (at the end), above.

[273] Information by the Swiss Competition Commission. See, also, “WEKO sorgt rasch für freien Buchmarkt auch in der Romandie“, economieswiss.ch (28 March 2012), *available at:* http://www.economiesuisse.ch/de/themen/wb/kartellrecht/seiten/_detail.aspx?artID=WEKO-sorgt-rasch-fuer-freien-Buchmarkt-auch-in-der-Romandie.

[274] Competition Council, 9 January 2008, *Zvaigzne ABC*; Competition Council, 28 May 2008, *Lielvards*; both reported by the Competition Council.

[275] JFTC decision of 20 July 2001, *Sony Computer Entertainment*. See, also, “Japan Fair Trade Commission Smacks Sony”, ign.com (2 August 2001), *available at:* http://www.ign.com/articles/2001/08/02/japan-fair-trade-commission-smacks-sony.

[276] Austrian Supreme Court (*Oberster Gerichtshof*), 15 July 2009, Case 16 Ok 6/09, *Pressegrosso*, *available at:* http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20090715_OGH0002_0160OK00006_0900000_000.

and wholesalers and, consequently, the retailers cannot be considered independent undertakings. In line with the principles of the application of EU competition law, the Austrian court asked whether the dealers had to carry any economic risk. Despite the fact that dealers did not have to pay for press products that they were not able to sell, the Court confirmed that the dealers had to carry considerable economic risk since they had to pay for all the costs of providing the sales service.[277] The Court consequently confirmed the decision of the first instance court according to which there was a violation of the EU prohibition of restrictive agreements according to Article 101 TFEU.

Resale-price maintenance practiced by newspaper publishers was also an issue in Ireland. There, in 2003, the Competition Authority acted against Independent Newspapers (Ireland) after the agency had begun to investigate the newspaper business on its own initiative. The publisher concerned had already notified a resale-price maintenance agreement in 1992, which the Competition Authority subsequently refused to exempt from the prohibition of restrictive agreements. In 2003, still about 22% of the contracts of Independent Newspapers included resale-price-maintenance clauses. The publisher finally agreed to change its pricing policy and began to indicate the price printed on the newspapers as a "recommended price". In the light of these commitments the Competition Authority decided to close the case.[278] The same investigation also led to a similar decision against the publisher of the Irish Times.[279]

In Lithuania, the Competition Council acted against resale-price maintenance for films sold as DVDs and videos.[280]

An example of resale-price maintenance concerning ticket prices in cinemas is provided by a decision of AGCM, the Italian competition agency, regarding an agreement between the Association of cinema operators and the two associations of film distributors.[281]

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277 *Id.*, at part 5.

278 Irish Competition Authority, Decision No. E/03/003 of 10 November 2003, Case COM/132/02B, *Independent Newspaper (Ireland) Ltd.*, *available at:* http://www.tca.ie/EN/Enforcing-Competition-Law/Decisions-and-Notices/Enforcement-Decisions/Decisions/E03003.aspx?page=1&year=0.

279 Irish Competition Authority, Decision No. E/03/004 of 3 July 2003, Case COM/132/02A, *Irish Times Ltd*, *available at:* http://www.tca.ie/EN/Enforcing-Competition-Law/Decisions-and-Notices/Enforcement-Decisions/Decisions/E03004.aspx?page=2&year=0.

280 See Lithuanian Competition Council, decision of 28 January 2010, Case no. 2S-2, *UAB Forum Cinemas Home Entertainment et. al.*, Annual Report 2010, pp. 14 et seq. This decision was later confirmed by the Supreme Administrative Court, 23 June 2011. See Lithuanian Competition Council, Press Release, *available at:* http://kt.gov.lt/en/index.php?show=news_view&pr_id=885.

281 AGCM decision 9793 of 27 July 2001, Case I363, *Accordo Distributori ed Esercenti Cinema*, Bollettino n. 30/2001, para. 98, *available at:* http://www.agcm.it/concorrenza/concorrenza-delibere/open/41256297003874BD/66858F1E2177016DC1256AA30058C66A.html.

8.7 Exclusive (vertical) distribution agreements

There is also practice on distribution agreements concerning copyrighted works. An interesting case in this regard can be reported from Peru. In *Tele Cable*,[282] a domestic cable TV provider (Tele Cable S.A.), filed a complaint with INDECOPI against two TV channels (Fox Latin American Channel Inc. and Turner Broadcasting System Latin America Inc.). The two channels had terminated the supply of Tele Cable with their programmes since Tele Cable was continuously late in paying the royalty rates. In contrast, Tele Cable argued that the two channels abused their dominant position by refusing to license their programmes, but also by entering into exclusivity agreements with other cable operators. INDECOPI rejected the refusal-to-license claim since it did not consider the two channels dominant in the market for TV channels and found the refusal justified by Tele Cable's failure to pay on time. But INDECOPI also looked at the exclusivity agreement as a potentially anti-competitive vertical agreement. For this assessment, it applied a rule-of-reason test and found that the efficiencies outweighed the anti-competitive effects. In particular, the promotional campaigns for the two channels were considered to have positive effects on consumers.[283] In addition, INDECOPI found that the implementation of the exclusivity agreements in other geographical markets did not lead to any decline for other cable companies. Hence, it did not seem that the agreements had any exclusionary effect on other cable providers.

This Peruvian decision demonstrates that vertical exclusivity agreements will often have to be considered pro-competitive, especially if none of the parties holds market dominance. Yet the Italian AGCM confirmed the anti-competitive character of an agreement between a film distributor and the two major cinema operators in the city of Salerno that provided for territorial exclusivity of the cinemas.[284] Under this exclusivity agreement, which was requested by the two Salerno cinema operators, cinemas in the neighbouring city of Cava dei Terrini were only able to show the films with a considerable delay.[285] The problem of the case clearly was whether the decision of the distributors to agree on such terms was justified by objective criteria, namely, the higher quality of the cinema theatres in Salerno.[286] While the AGCM held that the exclusivity agreements limited access to the market and, therefore, affirmed a violation of Article 2(2)(b) of the Italian Antitrust Law (*legge antitrust*),[287] the

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[282] INDECOPI Resolution of 14 May 2003, Case 005-2003-INDECOPI/CLC, *Tele Cable S.A. v. Fox Latin American Channel Inc.*, *available at:* http://aplicaciones.indecopi.gob.pe/ArchivosPortal/publicaciones/5/2003/1-99/7/9/Resol005-2003.pdf.

[283] *Id.*, para. 46.

[284] *Accordo Distributori ed Esercenti Cinema*, supra n. 281, para. 98.

[285] *Id.*, para. 99.

[286] *Id.*, paras 104 et

[287] *Id.*, para. 217.

Regional Administrative Court TAR annulled this decision and held that the selection of the cinemas was based on objective criteria.[288]

In the Norwegian *Viasat* case, involving an exclusivity arrangement between a TV channel and a satellite TV network operator, the EFTA Surveillance Authority held that there was no violation of competition law.[289] In 1998, TV2, a Norwegian public-service broadcaster financed by advertising money sold its analogue satellite distribution business to Canal Digital. Thereby, Canal Digital was given the exclusive right to distribute the programmes of TV2. The Norwegian merger decision did not cover the exclusivity arrangement, which consequently became the subject-matter of the complaint to the EFTA Surveillance Authority. TV2, with a 30% share in total viewing time, was the second most popular TV channel in Norway after the state-owned public TV channel of NRK1. The complainant Viasat was the second satellite TV network operator next to Canal Digital in Scandinavia. Due to the exclusivity agreement, Viasat was only able to broadcast the programmes of the NRK1 but not of TV2, while its competitor Canal Digital could offer both. Only Viasat's TV3, with a viewer share of 6%, was not available on Canal Digital. In its complaint, Viasat argued that TV2 was a "must have" channel and that therefore the exclusivity agreement restricted competition. Responding to the concerns of the EFTA Surveillance Authority, the two parties finally terminated the exclusivity agreement in 2003, but then entered into a new exclusivity agreement for two years. In 2005, TV2 invited both satellite TV providers to make a bid. Since Viasat only made a bid for a non-exclusive agreement, TV2 decided to enter into another exclusive agreement with Canal Digital for two additional years, for which the latter paid a high price. In its assessment the Authority found that despite the exclusivity agreement, Viasat was still able to increase its numbers of subscribers thanks to the growth of the market while its market share went down. Also, a large part of Viasat subscribers were able receive TV2 free on air. Hence, the Surveillance Authority concluded that the arrangement had no significant impact on Viasat's ability to compete. In addition, Viasat had the opportunity and the financial resources to compete with Canal Digital for an exclusivity agreement as a form of competition "for the market". Finally, in 2007, the EFTA Surveillance Authority closed the case since there was no sufficient evidence of anti-competitive conduct.

The Commission of the West African Economic and Monetary Union (WAEMU) received a complaint by the Association of Private TV Operators in Africa (Association des Opérateurs Privés de Télévision en Afrique; OPTA) against AB SAT on the distribution of satellite TV in the region.[290] OPTA acted on behalf of one of its members, Deltanet TV from Senegal, whose distribution agreement with AB SAT had not been renewed. OPTA argued that the refusal of

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288 Tribunale Amministrativo Regionale (TAR) n. 7444 of 27 August 2002, *Accordo Distributori ed Esercenti Cinema.*

289 EFTA Surveillance Authority, Case 13114, *Viasat v TV2 and Canal Digital*, as reported by Ioannis Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, paras 2-025 to 2-029 (with critical remarks).

290 Information available at: Comité Consultatif de l'UEMOA, Rapport 2012.

AB SAT to continue the deal with Deltanet TV was due to an exclusivity agreement with Excaf Telecom, a competitor of Deltanet TV in the market of Senegal. OPTA argued both a restrictive agreement and an abuse of market dominance. After a preliminary assessment of the case, the Competition Committee of WAEMU decided that the case should be further investigated by the Commission.

Australia provides an interesting case at the interface of exclusive dealing and refusal to deal. In *Melway v Hicks*,[291] the High Court of Australia had to assess the conduct of Melway, a dominant publisher of a street directory for Melbourne that controlled 80 to 90% of the market for such directories and refused to enter into a distribution agreement with Hicks, a wholesaler of motor vehicle parts and accessories. Indeed, the wholesaler had been an accepted wholesaler of Melway directories in the past. But the publisher terminated the contract after the two partners of the wholesaler broke up and one of the partners left the firm and started its own business. The publisher preferred to continue its distribution arrangement with the latter person, in whom it put more trust. By terminating the distribution agreement with the previous firm, the publisher tried to exclude competition between the wholesalers, which only enjoyed a very small profit margin. When Hicks later requested the delivery of a large number of directories to be sold in its shops on the retail level, the publisher also refused this delivery. Hicks won its private action brought to the Federal Courts before the first instance and on first appeal based on the unilateral conduct rules of the former Trade Practices Act (1974) by successfully arguing a case of an illegal "taking advantage of market power deterring or preventing a person from engaging in competitive conduct in that or any other market" in the sense of Section 46(1)(i) of this Act in the form of a refusal to license. Yet the High Court of Australia was of a different opinion and categorised the conduct as one of a vertical distribution agreement based on exclusive dealing. This Court considered the other courts' categorisation of the conduct as a refusal to license an "over-simplification".[292] Rather, it highlighted that the effect of terminating the distribution agreement only had an effect on intra-brand competition for Melway directories.[293] According to the Court, the refusal to license did not result in a reduction of the sale of competing directories of other publishers but, at best, in a reduction of the sale of Melway's own directories.[294] Hence, the Court was unable to find any harm to inter-brand competition. Therefore, the Court held that the publisher Melway had not taken advantage of its market power.[295] The decision demonstrates a strong focus on economic analysis, the freedom of the dominant publisher to design its distribution system and on competition in

[291] *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13; 205 CLR 1; 178 ALR 253; 75 ALJR 600 (15 March 2001) (Kerby J. dissenting).

[292] *Id.*, para. 17.

[293] *Id.*, para. 20. Thereby, the Court relied upon the ground-breaking US Supreme Court decision in *Continental TV Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

[294] *Id.*, para. 57.

[295] *Id.*, para. 68.

the upstream market for street directories. The decision is not without doubt, as it fails to give sufficient consideration to the fact that competition also needs to be protected on the wholesale and retail level, where many different products are sold, and that especially retailers who had no access to Melway's distribution system were dependent on the supply of such directories, which were very much preferred and requested by consumers, and, thereby, were put at a competitive disadvantage with other retailers.[296]

The competition agency of Macedonia reported two most recent decisions on identical facts in which it applied the country's prohibition on restrictive agreements to agreements between foreign TV channels and two Macedonian operators of public communication networks for distribution of audiovisual content to end users.[297] The programmes contained subtitles in Macedonian for which the foreign programme provider held the copyrights. The agreements with the domestic network operators prevented the foreign content provider from delivering the same programmes with subtitles to other network operators. Hence, even cable operators only had access to the programmes without the subtitles. The agency took into account that the seller held copyrights in the subtitles, but finally held that the copyrights cannot be used in a way to restrict competition. It therefore concluded that the agreements were illegal.

In Cyprus, the Competition Commission also decided a case at the interface of exclusivity agreements and refusal to deal. The Competition Commission decided that the exclusivity agreement between the operator of a platform for pay-TV with a single pay-TV service provider violated EU competition law.[298] The Competition Commission found that the platform operator was dominant in the market of digital interactive platforms and that the exclusivity agreement distorted competition in the market for pay-TV services by excluding other pay-TV operators from access to the platform. Thereby, the Competition Commission considered the platform an essential facility and confirmed a duty to deal with all pay-TV operators based on objective and non-discriminatory criteria.

8.8 Other vertical agreements

Vertical distribution agreements can include most diverse clauses. Most of them will not raise any competition concerns. Yet sometimes competition agencies may be requested to clarify this. An interesting case was dealt with by the Italian AGCM in 2004. AGCM held that

[296] In this regard, the Court only pointed out that the Act does not pursue the protection of individual persons or corporations. *Id*., para. 17. This argument overlooks that competition should also to be protected on the wholesale and retail level.

[297] These decisions are not publically available.

[298] Commission for the Protection of Competition of Cyprus, decision 11/17/12/2008, *ATHK/LTV*, reported by Ioannis Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, paras 6-010 to 6-012.

an agreement between the newspaper publishers and the newspaper distributors on a system for the collection and provision of sales data did not violate competition law since this agreement promoted broader geographical distribution and guaranteed distribution where previously such distribution would not have been economically efficient.[299]

In the *Albatros* case, the Czech Office for the Protection of Competition fined the Czech publisher (Albatros) of the Harry Potter books for having restricted the resale of those books.[300] The purpose of this agreement was to exclude the resale to hypermarkets, which often charged lower prices than other retailers. In the Czech Republic, publishers may only recommend retail prices, which are usually respected by the regular book retailers. This case demonstrates that, even in the field of fiction, inter-brand competition will not always provide sufficient competitive pressure to keep prices low if certain titles enjoy high popularity. Hence, competition law plays a particular role in guaranteeing intra-brand price competition in such cases.

8.9 Conclusion

In the field of restrictive agreements, the survey produces some interesting and even surprising results. While in the technology-oriented field the focus of the practice and the legal debate is very much on licensing of rights, the case-law on copyright-related markets can hardly be fully captured by the category of licensing agreements. From a policy perspective, it seems more important to note that protecting such markets against restrictive agreements has the potential of promoting access to works for consumers by keeping prices low and guaranteeing open markets.

This particular effect of competition policy can be demonstrated in regard to maybe the two major sets of cases that were identified, namely, horizontal price cartels and horizontal market-foreclosure agreements. As concerns price cartels, the survey highlights that copyright-related markets are far from being immune to this clearest case of competition law violation. Price cartels can affect different categories of works. In addition, they can be initiated by the right-holders themselves or members of the copyright industry. With regard to the latter, one has to distinguish agreements among competitors as suppliers of content and those among competitors as customers, such as among film producers that fix the prices paid to performing artists. All of these price agreements have the effect of limiting output and thereby access of works, or performances, to the market. The imposition of minimum

299 AGCM decision 13113 of 22 April 2004, Case I531, *Federazione Italiana Editori Giornali-Associazione Nazionale Distributori Stampa*, Bollettino n. 5/2004, *available at:* http://www.agcm.it/concorrenza/concorrenza-delibere/open/41256297003874BD/0A5682BF05B20815C1256E3C003D7BA1.html.

300 Czech Office for the Protection of Competition (OPC), Annual Report 2008, p. 10.

sales prices in particular has the potential of raising prices for consumers at the end of the distribution chain.

The most interesting cases are certainly those involving market-foreclosure agreements among firms of the copyright industry that exclude competitors from the market. Especially the Indian film cases show what competition law enforcement can contribute to copyright policies. If Bollywood movies are excluded from the local market by collusive conduct of the local film industries in India, this not only prevents consumers from watching the films they want to watch in the cinemas. Such restraints also nourish copyright piracy since consumers know about the release in other parts of the country, but the only way of having access to these films will be through the consumption of illegal copies. Of course, the same argument can be made on price cartels in the copyright industry. If prices for legal consumption go up, consumers will be more likely to purchase illegal copies. These insights coincide with the results of a recent empirical study conducted at the Max Planck Institute for Intellectual Property and Competition Law, which explored the attitudes among Indian students toward copyright piracy in the film sector.[301] This study shows that young Indians do not necessarily respect copyright less than their peers in developed countries. But the study provides evidence that compliance of consumers by preferring legal copies to illegal ones could be enhanced if the consumers had easier and cheaper access to works. In sum, the copyright industry itself aggravates the problem of copyright piracy by engaging in anti-competitive behaviour. Accordingly, competition law enforcement should be recognised as one important element of more differentiated and better-informed anti-piracy policies.

On vertical agreements, jurisdictions certainly differ most in respect of resale-price maintenance for books and newspapers. Without entering into the cultural economics of the debate, the study at least determines that no clear recommendation can be made on whether countries should keep or introduce an exemption. Rather, from the experience of countries that apply competition law, and even more so from the experience of countries that have abolished such systems, there is quite some evidence that these systems do not produce the expected cultural benefits.

9 Unilateral Conduct (Abuse of Market Dominance)

In the following chapter, the analysis will turn to unilateral conduct. For addressing such conduct, jurisdictions have developed different legal approaches. While US antitrust law applies the concept of monopolization (Section 2 of the Sherman Act), other jurisdictions ban abuse of market dominance. The latter approach has its origins in EU law (Article 102 TFEU) and has also been adopted by the majority of other competition law jurisdictions around the world. This is why in the following the term "abuse of market dominance" is to

301 Scaria, *supra* n. 41.

be understood to also comprise the US approach on monopolization. Although the two concepts may differ to a certain degree, the competition law issues to be solved with regard to unilateral conduct are the same.

9.1 Market dominance

Rules on abuse of market dominance, first of all, require that the alleged infringer hold a market-dominant position. Also, under the US-American monopolization concept, substantial market power is required - what is usually described as "monopoly" power.[302] Market dominance and monopoly power, by definition, require competition law enforcers to define the relevant market according to the principles explained above (at 7) and, then, to assess the market power of the firm in this relevant market.

Although US courts require monopoly power for anti-competitive conduct, the "monopolization" approach to unilateral conduct is more flexible than the abuse-of-dominance approach in that it does not explicitly require a specific level of market power and also because it covers acquisition of monopoly power. This especially enables jurisdictions following the monopolization approach to also apply their unilateral conduct rules to non-dominant firms. Such cases will be discussed below (at 9.8).

Many of the following cases deal with market dominance as one element of the analysis. However, the structure of the Report will distinguish between different kinds of abuse and what kinds of undertaking – a right-holder or any other undertaking active in the distribution change – have acted. One atypical case from Luxembourg should nevertheless be mentioned here.[303] In this case the Competition Council (*Conseil de la concurrence*) ultimately found no anti-competitive conduct, neither a restrictive agreement nor an abuse. Yet the case is interesting with regard to market definition and the concept of dominance, including collective dominance. In the *Edita* case, several newspaper publishers of Luxembourg lodged a complaint against another domestic publisher (Editpress) for having launched a free-of-charge newspaper. The allegation was based on both restrictive agreements and abuse of dominance. Editpress had indeed entered into an agreement with a Swiss publisher (Tamedia) that led to the establishment of a joint venture company, Edita, the publisher of the new free-of-charge newspaper "L'Essentiel". "L'Essentiel" was distributed in open boxes in busy places in Luxembourg. The complainants argued that Editpress was only able to

[302] See *United States v. Grinnell Corp*., 384 U.S. 563, 570 et seq.: "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

[303] Competition Council (*Conseil de la concurrence*) of Luxembourg, Decision no. 2009-FO-01 of 2 July 2009, *M. Jean Nicolas et al. v. S.A. Edita et al. and S.A. Saint-Paul Luxembourg*. See the English case report by Ioannis Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, paras 19-017 to 19-021.

publish such a newspaper because of the cooperation with the Swiss partner and the press subsidies paid to it by the state of Luxembourg. It was argued that the distribution of the new newspaper considerably limited the business opportunities of the complainants. The Competition Inspection (*Inspection de la concurrence*), which opened the case, extended the investigation to a second publisher (Saint-Paul de Luxembourg) that also distributed a free-of-charge newspaper. In its closing decision, the Competition Council held that the establishment of Edita and launching of a new product did not raise any competitive concerns and that Editpress was not market-dominant in the market. In defining the relevant market, the Council distinguished between daily newspapers and papers that are published less frequently, on the one hand, as well as between paid newspapers and free-of-charge newspapers. In contrast to Editpress, Saint-Paul was held dominant in the market for paid daily newspapers. Finally, the Competition Council also explained that the two Luxembourg publishers were not collectively dominant either. In this regard, the Competition Council applied the requirements established by the former European Court of First Instance in the *Airtours* case: (1) transparency of the market; (2) retaliation by the other firms whenever one of the firms departs from the common policy; (3) lack of ability of third undertakings to destabilise the common policy.[304]

9.2 Exploitative abuse; excessive pricing in particular

Abuse-of-dominance provisions do not prohibit dominance as such. They only prohibit specific conduct described as “abuse”. While the US concept is silent on the forms of “monopolization”, other laws provide such categories or at least contain a – usually non-exhaustive - list of abuses.

In general, two major groups can be distinguished: exclusionary and exploitative abuses. The distinction matters in particular from a comparative perspective, since US law only addresses exclusionary conduct, not exploitative conduct. Exploitative conduct includes excessive pricing, which is often listed as the first example of abusive behaviour.[305] US Courts refuse to recognise excessive pricing as a case of monopolization.[306] For them, high prices are deemed to attract new competitors rather than to restrict competition.[307]

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[304] *Id*., para. 28. See Case T-342/99 *Airtours* [2002] ECR II-2585.

[305] See, for instance, Article 102(2)(a) TFEU.

[306] See, in particular, *Verizon Communications Inc. v Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004): “The mere possession of monopoly power, and the concomitant charging of monopoly power, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices – at least for a short period – is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth.”

[307] See *Rambus Inc. v. FTC* (D.C. Cir. April 22, 2008), p. 18, *available at:* http://www.ftc.gov./os/caselist/0110017/080422appealscourtopinion.pdf: “Indeed, had JEDEC limited Rambus to reasonable royalties and required it to provide licenses on a non-discriminatory basis, we would expect *less*

Hence, there exists a fundamental rift between the "European" approach, followed by numerous other jurisdictions around the world, and the US approach on exploitative abuse. Since, as explained earlier (at 7.1, above), individual copyrighted works only rather rarely result in a dominant position, excessive pricing does not seem to be a major concern. Yet excessive pricing constitutes a major issue in the practice of competition law enforcers regarding CMOs. Since CMOs usually occupy a monopoly position based on their repertoire, the question arises whether the tariffs fixed by CMOs for their blanket licences can be controlled by competition law. This issue will arise, in particular, if a given copyright jurisdiction does not dispose of specific copyright regulation and procedures for the control of the tariffs. A jurisdiction, such as the US-American one, that provides neither for such specific regulation and procedures nor for a doctrine of excessive pricing as anti-competitive unilateral conduct may well fail to solve a problem that is in need of control. With regard to the control of the royalty rates, the interface of specific CMO regulation and competition law will be discussed in more detail below (at 11). In this context, it will be seen that even US practice has found ways to use antitrust law for controlling the royalty rates of CMOs.

Yet excessive pricing may also become an issue in cases of individual right-holders that have a dominant position. Application of excessive-pricing rules to such cases is however problematic from a more fundamental and theoretical point of view. Intellectual property rights, in line with the theory of complementarity (see at 5.1, above), are recognised to promote dynamic competition by excluding imitation. Hence, in a situation where IP protection leads to market dominance simply because consumers prefer the subject-matter of protection to any other competing subject-matter, the freedom of the right-holder to charge whatever price the market allows for seems to be perfectly in line with the logic of dynamic competition. Control of the prices imposed by the dominant right-holder may well reduce incentives for innovation, and dynamic competition, in this field.[308] This, however, does not mean that competition agencies should never control excessive pricing of dominant right-holders. Rather, what is required is a pro-competitive justification for intervention. For instance, when it comes to controlling the royalty rates and tariffs fixed by CMOs, the argument would be that the individual right-holder would not be able to impose a monopoly price for the individual license. Bundled licensing by CMOs, therefore, should not be dealt with as a regular case of excessive pricing by an individual right-holder, but as an agreement that is allowed because of its transaction-cost-saving effects. In order to balance the pro and anti-competitive effects of collective rights management, it seems mandatory to allow centralised licensing on the condition that the royalty rates imposed by CMOs are either

competition from alternative technologies, not more; high prices and constrained output tend to attract competitors, not to repel them."

[308] This argument can be best explained by pharmaceutical patents. If a pharmaceutical company makes a major invention that provides patients with a drug that cures a certain disease much more effectively than any other pre-existing drug, this company will hold a dominant position. Competition law should not intervene by controlling the price since the supra-competitive price imposed by this company will create incentives for further investment of competing pharmaceutical companies in developing even better drugs.

controlled by specific regulation or at least as a matter of excessive pricing rules of competition law.

These very few ideas explain why competition law enforcers hardly ever intervene in the pricing of copyrighted works of individual right-holders. Things may, and should, be different where the right-holder has acquired the rights from original right-holders and gains market dominance by compiling several works to a distinct product. There may be basically two examples of this: (1) the case of large music publishers who begin to license their repertoires themselves without relying on collective rights management anymore. In this case, the effect on the market of centralised licensing through such a right-holder is not different from centralised licensing through a CMO.[309] The second set of cases relates to "must-have" scientific journals for which the publishers can impose monopoly prices on their customers (mostly research institutes and libraries). Especially in the latter set of cases, the publisher may also dispose of a dominant position vis-à-vis the original right-holder (author), namely, if the journal is the only one in the specific, often very narrow, scientific field where the author can, and has to, publish his or her article to gain scientific recognition (see also at 7.1, above). In such a situation, the scientific or academic publisher is able to engage in abusive conduct in two markets.[310] This includes exploitative conduct and excessive pricing in particular. A scientific publisher of a must-have journal is not only able to impose a monopoly price for subscriptions on research institutes and libraries, but also a monopoly price on authors to have their articles published.

Practice on excessive pricing beyond collective rights management, however, has remained very limited. Yet a most interesting case can be reported from China. There, Microsoft is currently facing allegations of excessive pricing for its computer programs.[311] This case proves a general feature of the development of Chinese competition law already during its first stage of application, namely, that private parties try to rely on the new law with a view to protecting their economic interests. The case started as a copyright infringement case. In March 2012, Microsoft sued Ghuangzhou Kam Hing Textile Dying before the Nansha District People's Court for copyright infringement regarding its software products. The Hong Kong parent company of the defendant had bought original Microsoft software but failed to negotiate additional licences for its subsidiaries in neighbouring mainland China. Against the infringement claim, the defendant brought a counterclaim based on competition law. The

309 This group of cases also include the one in which music publishers cooperate with CMOs in licensing rights. The major examples are the newly established systems of centralised licensing of online rights for the use of works of music in Europe, such as CELAS (see at 7.2, above), which only cover the Anglo-American repertoire of individual publishing companies.

310 Indeed, scientific and academic publishers as intermediaries are active in a two-sided market.

311 On this case see Jessica Hua Su, "Microsoft is Facing Excessive Pricing Accusations in China", *Kluwer Competition Law Blog* (17 December) 2012, *available at:* http://kluwercompetitionlawblog.com/2012/12/17/microsoft-is-facing-excessive-pricing-accusations-in-china/ (with a critical view on whether competition law can be a useful tool for price control).

latter was rejected by the District Court for lack of jurisdiction.[312] Consequently, Ghuangzhou Kam Hing brought an independent competition law claim to the Ghuangzhou Court alleging excessive pricing on the part of Microsoft based on the argument that the royalty rates charged in the Guangzhou province were 50% higher than in Hong Kong. The Court accepted the complaint. This case must be seen as one of many in which multinational companies are currently accused of charging higher prices for branded goods in China than in other parts of the world. This has also led to decisions of the NDRC, the Chinese competition agency competent for price-related restraints, in which fines were also imposed on such firms such as Nike for excessive pricing of basketball shoes.[313]

A software-related case can also be reported from Jamaica. There, in the *Blue Cross* case, the Staff of the Competition Commission in 2002 issued a recommendation to the Commission to enter into a consent agreement with Blue Cross Jamaica (BCJ).[314] BCJ is a provider of a variety of health insurance plans to companies in Jamaica. In the framework of processing claims to the health care providers, it also offers an electronic claims-processing system, the so-called Provider Access System (PAS), which replaced a former manual system. BCJ faced allegations according to which it violated competition law by imposing excessive prices on health care providers for the use of PAS. Indeed, after the introduction of PAS, BCJ required all health care providers to give up the old manual system and to use PAS only, at a royalty rate of 1.75% of each claim. Health care providers who refused to enter into these agreements had to face the termination of business with BCJ. The staff identified several competition concerns, namely, an exploitative effect on health care providers, a reduction of innovation in the market for data processing and competitive disadvantages for health care providers who would not accept the use of PAS. BCJ finally agreed to make commitments, such as the provision of an alternative system free of charge, the grant of a transition period, the allowance to customers with difficulties in accessing telecommunication systems and fewer than 40 claims a month to use the manual system and to make available the software specifications to any party that wishes to develop an alternative system. The recommendation does not make clear on which provision the competition law violations were based. In particular, the recommendation contains nothing that would explain a dominant position of BCJ.

312 One wonders why the Court did not accept the counterclaim as a possible defence against the infringement claim. One reason might be that the defendant did not argue a case of refusal to license but of discriminatory and excessive pricing. Even if the counterclaim was justified, this would not necessarily save the defendant from being convicted for copyright violation.

313 On this latter case see *China Competition Bulletin*, Edn 15, May 2011; Edn 20, May 2012 and Edn. 23, September/October 2012.

314 Jamaican Competition Commission, Staff Recommendation of 8 August 2002, Case 4257, *Blue Cross of Jamaica*, *available at:* ##.

Excessive prices may become more of a problem when rights are held by undertakings of the copyright industry that impose high prices on their downstream customers for the use of these rights or supply of copyrighted works.

Such an example is presented by an action taken by the Finnish Competition Authority in 2000. The underlying case related to the dominant provider of news pictures. In this regard, the case was not very different to the application of excessive pricing rules to dominant CMOs. The Authority was critical on the prices charged due to the fact that the dominant firm failed to provide any transparent pricing scheme or to demonstrate any objective reason why prices differed considerably for different customers. Since the undertaking accepted this critique, the Authority finally concluded that there was no longer any abuse of market dominance and that there was no need to impose fines for past conduct.[315]

A case of excessive pricing was also argued in a complaint of the Association of Francophone Book Retailers of Belgium (*Syndicat des Librairies Francophones de Belgique*) against Dilibel, a Belgian subsidiary of the French Hachette editorial group and exclusive distributor of Hachette books in Belgium, before the Belgian Competition Council.[316] The book retailers argued that Dilibel, as the dominant importer of books from France, engaged in excessive pricing by imposing a uniform additional "mark-up" price on the price fixed for books in France according to the French *Loi Lang* on resale-price maintenance for books. However, the Competition Council only assessed a market share of 30% for Hachette. Hence, it held that Dilibel was not dominant in the market and rejected the complaint. Two days later, the Competition Council rejected the identical complaint against Interforum, the subsidiary of the French Editis editorial group.[317] In both cases, the Competition Council also rejected allegations according to which Dilibel and Interforum had entered into a restrictive agreement under which they would both set "mark-up" prices. Since the mark-ups differed significantly, the Competition Council could not confirm any proof of such an agreement. The book retailers' association appealed for a second decision of the Competition Council in both cases. But these appeals were likewise rejected.[318]

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[315] Finnish Competition Authority, decision of 10 January 2000, Case 10/61/97, *Lehtikuva*, *available at:* http://www.kilpailuvirasto.fi/cgi-bin/suomi.cgi?luku=ratkaisut/muut-ratkaisut&sivu=ratk/r-1997-61-0010 (original Finnish version); see also Finnish Competition Authority, Yearbook 2001, p. 22.

[316] Belgian Competition Council (*Conseil de la concurrence*), decision no. 2009-P/K-24-AUD of 20 October 2009, Case CONC-P/K-06/0008, *Syndicat des Librairies Francophones de Belgique contre Dilibel*, *available at:* http://economie.fgov.be/nl/binaries/24_2009PK24AUD_Syndicat_des_libraires_Dilibel_tcm325-80094.pdf.

[317] Belgian Competition Council (*Conseil de la concurrence*), decision no. 2009-P/K-25-AUD of 22 October 2009, Case CONC-P/K-06/0009, *Syndicat des Librairies Francophones de Belgique contre Interforum*, *available at:* http://economie.fgov.be/nl/binaries/37_2010PK37_Interforum_Pub_tcm325-110296.pdf.

[318] Belgian Competition Council (*Conseil de la concurrence*), decision no. 2010-P/K-36 of 22 September 2010, Case CONC-P/K-06/0008, *Syndicat des Librairies Francophones de Belgique contre Dilibel*, *available at:* http://economie.fgov.be/nl/binaries/Beslissing_nr_2010-P_K-36_Dilibel_pub_tcm325-110273.pdf; Belgian Competition Council (*Conseil de la concurrence*), decision no. 2010-P/K-37 of 22 September 2010, Case CONC-

Excessive pricing allegations made in a complaint by newspaper retailers against Kronos, the sole distributor of Greek newspapers in Cyprus, were rejected by the country's Competition Commission.[319] In the light of the fixed commission rates granted by the two Greek suppliers to Kronos and the costs of Kronos, the Commission did not find any evidence that could support a case of excessive pricing. It nevertheless made clear that excessive-pricing cases have to be assessed in each and every individual case, which may be taken as an indication that the Commission is in principle willing to apply the prohibition on excessive pricing.

In Hungary, the Competition Council confirmed a case of excessive pricing of the dominant provider of cable TV to consumers in the region of Lake Balaton.[320] The cable provider offered several programme packages. Since the same programmes could otherwise only be received by combinations of antenna and satellite dishes at much higher costs, the Competition Council defined the relevant market as that for cable TV. Based on a price increase well above the inflation rate and a profit rate of 34%, the Competition Council concluded that the cable TV provider had engaged in excessive pricing. In contrast, the Competition Council held that the reorganisation of the programme packages could not be regarded as an abuse of dominance.

In Luxembourg, the Competition Council (*Conseil de la concurrence*) issued a cease-and-desist order against a dominant cable TV operator (Coditel) that had sent out unjustified bills for service that was not delivered.[321]

In Romania, the Competition Authority acted against a dominant provider of cable TV services in Bucharest on charges of excessive pricing.[322] Excessive prices were ascertained by the Authority in a cost-price comparison. However, the Court of Appeal annulled the decision, holding that the market definition was incorrect and that the arguments of the

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P/K-06/0009, *Syndicat des Librairies Francophones de Belgique contre Interforum*, *available at:* http://economie.fgov.be/nl/binaries/37_2010PK37_Interforum_Pub_tcm325-110296.pdf.

319 Commission for the Protection of Competition of Cyprus, decisions 53 to 54/2010 of 8 September 2010, *Christos Kagelis et al. v. Kronos*, Annual Report 2010, p. 30.

320 Hungarian Competition Council, Case Vj-93/2003, *Balantonfüred Kabelszat Kft*; upheld by the Municipal Review Court, decision of 9 November 2005, Case 2.Kf 27, as reported by Ioannis Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, paras 14-046 to 14-048.

321 Competition Council (*Conseil de la concurrence*) of Luxembourg, Decision no. 2010-FO-02 of 10 December 2010, *Coditel*, *available at:* http://www.concurrence.public.lu/fr/decisions/abus-de-position-dominante/2010/decision-2010-fo-02/Decision-N_2010-FO-02-du-10-decembre-2010.pdf. See also the French summary of the decision, *available at:* http://www.concurrence.public.lu/actualites/articles_communications/2010/12/decision_cablodistribution/index.html. In this decision, the Competition Council also had to decide on the lawfulness of tying the sale of a decoder to the provision of cable TV services (see at 9.11, below).

322 Competition Council, Decision No. 237/2006, *UPC*, reported in: Competition Council, Annual Report 2011, pp. 31 et seq. Also, UPC was sanctioned for having entered into a market-sharing agreement with a competitor (see at 8.3, below). See also Ioannis Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, paras 24-044.

Authority on excessive pricing were not sufficient. Yet the High Court of Cassation and Justice restored the Authority's decision.

In 2010, the Competition Authority of Vietnam opened investigations against Megastar, a film distributor, on allegations of abuse of dominance relating to the distribution of imported films.[323] The case was initiated upon the complaint of several cinema operators, in which several violations of competition law were argued, including the charging of unreasonable sales prices. No information is available as to how the investigation developed.

In a complaint before the Competition Commission of India, NH Media, an operator of a radio station, argues that the leading T-Series music label, which holds almost a monopoly over Bollywood music, imposes unreasonable royalty rates and conditions on radio stations. At the time of the writing of this Report, the case was still at a preliminary stage.[324]

Also, it is interesting to see whether individual jurisdictions apply their excessive-pricing rules under competition law to other IPRs. This could be taken as an indication that such jurisdictions would also be prepared to apply such rules in copyright-related markets.

Such a case can be reported from Taiwan, where the FTC has recently ordered a dominant patent pool, namely, for rewritable compact disc (CD-R) technology, to lower its royalty rates in response to fundamental changes in the market for CD-Rs. The cease-and-desist order issued by the FTC is currently under review before the IP Court of Taiwan.[325]

In South Africa, in particular, practice seems to be very open to applying the excessive-pricing rule provided for by Section 8(a) of the Competition Act to dominant right-holders.[326] However, the case-law has so far only dealt with patent-related cases and conflicts concerning pharmaceutical patents in particular. In the *Hazel Tau* case,[327] which was initiated by complaints of several HIV-infected individuals, the Competition Commission expanded the investigation so as to include a refusal to license based on an essential facility. It concluded that two pharmaceutical companies, GlaxoSmithKline and Boehringer Ingelheim, had violated the Competition Act by (1) charging excessive prices, (2) refusing to grant competitors access to an essential facility and (3) engaging in exclusionary conduct by

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323 *Megastar Media Company*, information *available at:* Vietnam Competition Authority, Annual Report 2011, p. 13.

324 See Poonam Ahuja, "Competition Commission meets HT Media in T-Series royalty case", radioandmusic.com (11 May 2012), *available at:* http://www.radioandmusic.com/content/editorial/news/competition-commission-meets-ht-media-t-series-royalty-case.

325 Case reported by the Taiwan FTC.

326 This was stated by the representative of the Competition Commission in the response to the Questionnaire.

327 *Hazel Tau and others v. GlaxoSmithKline South Africa and Boehringer Ingelheim*. See Competition Commission, "Competition Commission finds pharmaceutical firms in contravention of the Competition Act", Media Release of 16 October 2003, *available at:* http://www.cptech.org/ip/health/sa/cc10162003.html.

refusing to grant licences for the importation of generics. The case was settled before the Competition Tribunal was able to hand down its decision; the two pharmaceutical companies agreed to grant licences to generic manufacturers and to allow licensees to export to sub-Saharan countries and to charge royalties that do not exceed 5%. As a consequence of the Commission's endeavours, prices for patented anti-retroviral drugs went down considerably by 2006. The decision was obviously very much inspired by the Commission's willingness to help ordinary people, but the Competition Commission maintains that the action was based on sound competition policy.[328]

9.3 Refusal to license

Refusal-to-license cases are at the centre of the application of competition law to copyright. In these cases, the very nature of the copyright as an exclusive right conflicts with a duty to license as a competition-law remedy to a refusal to license. This is why the European Court of Justice already in the early *Volvo* case, which had to do with design protection for spare parts, indicated that competition law could only be applied in exceptional cases. The Court stated as follows:

> It must also be emphasized that the right of the proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without its consent, products incorporating the design *constitutes the very subject-matter of his exclusive right*. It follows that an obligation imposed on the proprietor of a protected design to grant to third parties, even in return for a reasonable royalty, a licence for the supply of products incorporating the design would lead to the proprietor thereof being *deprived of the substance of the exclusive right*, and that a refusal to grant such a license cannot *in itself* constitute an abuse of a dominant position.[329]

While the Court called for self-restraint on the part of competition law enforcers in applying the abuse-of-dominance provision to a refusal to license, in its last sentence of the passage quoted, the Court also indicated that application would not be generally excluded. By pointing out that the refusal to license cannot "in itself" constitute an abuse of dominance, the Court seemed to require certain "plus factors" to argue a duty to license.[330] It was in the copyright-related case of *Magill* that the Court pointed out more clearly that a refusal to license can only be regarded an abuse of dominance in "exceptional circumstances":

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[328] See Competition Commission, "GSK and BI issue anti-retroviral licences", Competition News, Ed. 15 (March 2004), p. 1-2, *available at:* http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/March-04-Newsletter.pdf.

[329] *Volvo*, *supra* n. 3, para. 8. (Emphasis added)

[330] Indeed, the Court also listed a number of hypothetical cases in which it would justify a duty to license. These cases include the arbitrary refusal to supply spare parts, the charging of unfair prices for spare parts and the decision of the right-holder no longer to produce spare parts. See *Volvo*, *supra* n. 3, para. 9.

> However, it is also clear from [the judgment in *Volvo*] that the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct.[331]

Henceforward, case-law in Europe mostly dealt with developing a standard for the application of Article 102 TFEU to refusal-to-license cases. Internationally as well, refusal-to-license cases are generally conceived as a sub-category of a refusal to deal. Accordingly, cases of refusal to license are usually analysed against the background of both an essential facility and leveraging theory. In this context, the question that is asked is whether the intellectual property right, or more precisely the subject-matter of protection, constitutes an essential input to which the petitioner of the license needs access to enter a downstream market. Thereby, harm to competition is identified as the extension of market dominance from the IP-licensing market in which the right-holder is dominant to a downstream product market. This implies the distinction of two separate markets and requires that the right-holder be dominant in both markets.

Yet this approach is insufficient to capture all refusal-to-license cases and may provide false guidance to capture, and respond to, more appropriate theories of harm. First, as can also be learned from the international case-law, refusals to license are not only a problem of vertically integrated firms. In some instances, even right-holders who are not active in the product market may be tempted to refuse a licence. Secondly, the essential facilities and leveraging approach pushes practice to accept a distinct licensing market where, in reality, no such market exists. Similarly, in such instances, a leveraging theory does not necessarily describe the most appropriate theory of harm. In practice, there is a clear risk of legal formalism according to which competition law enforcers automatically apply the once developed test for refusal-to-license cases, which only fits an essential facilities and leveraging case, whenever they identify a refusal to license.

Keeping this in mind, in the following, the analysis will first explain the EU standard on refusal-to-license cases in contrast to the US standard. Indeed, as on excessive pricing, these two jurisdictions apply very distinct principles to refusal-to-license cases. From there, the analysis will shed light on the practice of other jurisdictions. Also, the analysis cannot be limited to copyright cases. In general, competition law enforcers would not apply different standards to different IPRs.

9.3.1 The EU standard on refusal to license

In EU practice, there have been three major cases that have framed the test for the application of Article 102 TFEU to refusal-to-license cases: *Magill* (1995),[332] *IMS Health* (2004)[333] and *Microsoft* (2007).[334] The first two judgements were handed down by the Court

[331] *Magill*, *supra* n. 2, para. 50.

[332] *Supra* n. 2.

[333] *Supra* n. 2.

of Justice, while *Microsoft* was decided only by the Court of First Instance (CFI, now General Court) and was not appealed to the Court of Justice. This makes *IMS Health* the most important decision.[335] Yet *Microsoft* re-interpreted *IMS Health* in important regards and may therefore also considerably influence the future development. This is why, in the following, the analysis builds on the *Microsoft* decision and will thereby explain how the *Microsoft* standard differs from the *IMS Health* standard.

The *Microsoft* case is characterised by a number of specificities which need to be explained beforehand. The case was not on copyright. Indeed, both the Commission[336] and the CFI left open the question of whether Microsoft could rely on intellectual property protection in the first place, but nevertheless applied the EU standard on refusal to license. In this case, the CFI had to decide whether the Commission had correctly ordered Microsoft continuously to disclose the interoperability information contained in its Windows operating systems program to the producers of work group server operating system programs. Microsoft tried to rely on both patent and copyright protection against the backdrop of the *IMS Health* decision of the Court of Justice, which increased hopes of Microsoft to win the case if it were presented as a refusal-to-license case and not just as a regular refusal-to-deal case. While the assertion of patent and copyright protection was very doubtful, it was at least clear that regarding the interoperability information Microsoft could invoke trade secrecy protection.[337] Since the Commission had already applied ex-Article 82 EC (now Art. 102 TFEU) as if the interoperability information were protected by IPRs, the CFI was not required to clarify what kind of IPR, or only trade secrecy laws, would protect the interoperability information. Both the Commission and the CFI saw the need to apply the European standard on refusal to license as developed in *Magill* and then in *IMS Health*.[338] Indeed, it was possible to conceive the *Microsoft* case as a leveraging case since Microsoft was active both in the market for operating systems, where it was dominant with the Windows program, and in the market for work group server operating systems. Yet the two markets have to be conceived as adjacent or related markets rather than upstream and downstream markets, since Windows is not an input for the production of work group server operating systems in the production or distribution chain. More importantly, the Commission and the CFI came up

334 *Supra* n. 31..

335 It is to be noted, however, that the ECJ has now received a referral from a German court asking the question of whether the holder of a standard-essential patent violates EU competition law by suing for an injunction despite a previous commitment to grant licences at FRAND (fair, reasonable and non-discriminatory) terms. See Case C-170/13 *Huawei Technologies*.

336 Commission Decision of 24 March 2004, Case COMP/C-3/37.792 – Microsoft, [2007] OJ No. L 32, 23 (summary decision); unabbreviated prohibition decision *available at:* http://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_4177_1.pdf.

337 Whether the EU standard on refusal to license should also apply to a case of refusal to disclose trade secrets is discussed in more detail by Surblytė, *supra* n. 31.

338 Note that the Commission could not take into account the IMS Health decision, which was handed down by the ECJ on 29 April 2004, hence, one month after the Commission Decision.

with a more refined theory of harm. They did not only consider the case one on exclusionary conduct based on the strategy of Microsoft to extend dominance to the related market. They conceived the case as one on limitation of follow-on innovation. The Commission and the CFI thereby introduced a new test in the framework of the IMS Health test on refusal to license which is known as the "incentives balance test". Accordingly, the CFI phrased a four-factor test on refusal to license as follows:

> (332) It follows from that case-law that the following circumstances, in particular, must be considered as exceptional:
>
> - in the first place, the refusal relates to a product or service *indispensable* to the exercise of a particular activity on a neighbouring market;
> - in the second place, the refusal is of such a kind as to *exclude any effective competition* on that neighbouring market;
> - in the third place, the refusal *prevents the appearance of a new product* for which there is potential consumer demand.
>
> (333) Once it is established that such circumstances are present, the refusal by the holder of a dominant position to grant a licence may infringe Article 82 EC [now Article 102 TFEU] *unless the refusal is objectively justified*.[339]

The four factors – (1) indispensability, (2) exclusion of competition, (3) prevention of the emergence of a new product, (4) absence of objective justification – were initially developed by the Court of Justice in *Magill*[340] and further developed in *IMS Health*.[341] In both decisions the ECJ formulated a "three-factor test", in which, however, the indispensability requirement contained in an introductory sentence was not counted. Under this test, the indispensability requirement mostly coincides with the reasons why the right-holder is market dominant in the primary market in the first place. Yet the requirement necessitates an analysis of the role of access to the IPR for access in the secondary market. Because of this requirement, the *Magill* judgment is often viewed as a major decision of the European Court of Justice on the establishment of a European essential-facilities doctrine.[342] The second requirement – on exclusion of competition in the secondary market – identifies the test as one that is based on a leveraging theory. The third requirement – the so-called new-product rule – was viewed by the CFI in *Microsoft* as a requirement that only applies in cases concerning the refusal to license an intellectual property right.[343] The last requirement, of

339 *Microsoft*, *supra* n. 31, paras 332 et seq. (emphasis added).

340 *Magill*, supra n. 2, para. 53.

341 *IMS Health*, *supra* n. 2, para. 38.

342 Note, however, that the European courts have never used the term "essential facilities".

343 *Microsoft*, *supra* n. 31, para. 334. Indeed, the ECJ had left open the question of whether the new-product rule is to be applied to regular refusal-to-deal cases in Case C-17/05 *Bronner* [1998] ECR 7791. Indeed, the ECJ was able to reject a duty to deal in *Bronner* since it was held that access to the dominant firm's

absence of objective justification, was probably the most important one in the *Microsoft* case, while it had not played any significant role in the previous cases before the Court of Justice, since it was in the framework of this requirement that the incentives-balance test was applied. In this context the CFI asked the question of whether a duty to license imposed on Microsoft in view of promoting follow-on innovation by Microsoft's competitors in the market for work group server operating systems would seriously restrict Microsoft's own incentives to invest in better work group operating systems. Mostly because this question was answered in the negative, Microsoft lost the case and the duty to disclose interoperability information to the competitors as imposed by the Commission was affirmed by the Court.

As mentioned above, the CFI modified the *IMS Health* test in several regards. First, the CFI does not seem to accept the ECJ's so-called cumulative theory according to which all three requirements of exclusion of competition, prevention of a new product and absence of objective justification need to be fulfilled for a duty to license where access to the subject-matter of protection is indispensable. Whether these requirements have to be understood in a cumulative sense was unclear after *Magill*, but then clarified in the affirmative in *IMS Health*. The CFI's departure from the cumulative theory is yet made possible by some ambiguous wording in the *IMS Health* decision, where the ECJ stated that for showing that a refusal to license is abusive "*it is sufficient* that three cumulative conditions be satisfied".[344] Following this wording, the *Magill* test and, in particular, the requirement of the prevention of a new product only have to be understood as one example of "exceptional circumstances" in which EU competition law enforcers can argue a duty to license.

Secondly, the CFI softens the requirement of the "exclusion of competition" to "exclusion of effective competition" in the secondary market. In the *Microsoft* case, this requirement created problems since Microsoft was able to argue that its competitors were still active in the market for work group operating systems; the company criticised the Commission's decision for having relied on the mere risk of elimination of competition.[345] The CFI held that it is not necessary that the conduct be likely to eliminate "all" competition in the market, but that it suffices that the conduct is likely to eliminate "effective" competition. According to the Court, the presence of competitors in certain niches would not suffice to justify the existence of effective competition.[346]

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newspaper distribution system was not indispensable. The holding of the CFI in *Microsoft* on this point, however, only indicates that the new-product rule may possibly not be applicable in other than IP cases by simply referring to the case-law of the ECJ. Hence, it is still for the ECJ to confirm this point. In its Priority Guidance (*supra* n. 16), para. 81, the Commission requires likely consumer harm also for general cases of a refusal to supply.

[344] *IMS Health*, *supra* n. 2, para. 38. (Emphasis added)

[345] *Microsoft*, *supra* n. 31, para. 439.

[346] *Microsoft*, supra n. 31, para. 563.

Third, the CFI also opened the so-called new-product rule. Microsoft indeed argued that its refusal to disclose the interoperability information did not lead to the prevention of the emergence of a new product since Microsoft offered viable work group server operating systems to customers. In this regard, the *Microsoft* case substantially differed from *Magill*, where the prevention of the emergence of a comprehensive TV guide, which the dominant TV stations did not offer, was easy to demonstrate. In this regard, the CFI returned to the reasoning of the *Magill* case, where the Court of Justice had explicitly relied upon the wording of Article 102(2)(b) TFEU for defining its new product rule. There, the Treaty refers not only to a limitation of production but also to the limitation of "technical development" as a case of abusive conduct. By doing this, the ECJ established the distortion of innovation with the result of preventing "better" products from entering the market as a subcategory of the prevention of a "new" product. Indeed, Article 102(2)(b) TFEU sheds additional doubts on the cumulative approach advocated by the ECJ in *IMS Health*. Article 102(2) TFEU only contains a non-exhaustive list of examples of possible abuses. It does not exclude the possibility of recognising abuses not mentioned in Article 102(2) TFEU.[347] In particular, one may wonder whether discriminatory licensing practices in which a right-holder only refuses to license to some but not all petitioners for the licence could not as well be regarded an abuse of market dominance under Article 102(2)(d) TFEU.

Fourth, while the ECJ in *Magill* and *IMS Health* put the absence of objective justification on the same level with the other requirements, the ECJ distinguished between the first three as the basis for a showing of abusive conduct and recognised the objective justification only as a defence available to the dominant firm. Thereby the Court put the burden on the dominant firm to argue the objective justification. In doing this, the CFI could rely on previous cases of the Court of Justice where this Court had effectively transferred the structure of Article 101(3) TFEU for the purpose of applying Article 102 TFEU.[348]

Taken together, all four "modifications" to the *IMS Health* standard help competition law enforcers to argue an abuse of market dominance in cases of refusal to license. Accordingly, the CFI judgment in *Microsoft* can also be read as a critique by this court of the stringent requirements defined by the Court of Justice in *IMS Health*.

Indeed, *IMS Health* also appears as a problematic decision in other regards. In particular, the case seems to be substantially different from the *Magill* case.[349] In *Magill*, the essential facilities and leveraging test worked nicely, since the program information controlled by the copyright could indeed be viewed as an essential input for independent publishers who wanted to enter the downstream product market. In contrast, in *IMS Health*, market

[347] See Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331, paras 57-59 (holding that competition law enforcers are not prevented from recognising abusive conduct relating to rebates beyond the requirements of Article 102(2)(b) TFEU).

[348] *Id.*, paras 69 (arguing that is for the dominant firm to argue the economic justification) and 84-91.

[349] As to the facts of these cases see at 5.2.1, above.

dominance did not arise from the copyright protection of the protected brick structure as such, but from the use of this brick structure in the service market for the provision of data on the marketing of pharmaceuticals in Germany through which the brick structure emerged as a de facto industry standard. In this regard, the recognition of an upstream licensing market seemed rather formalistic and the application of a leveraging theory extremely misguided.

In sum, the analysis of the EU case-law on refusals to license still seems rather unsettled. Not all decisions are fully convincing. And in particular the *Microsoft* "modifications" to the *IMS Health* test are still in need of confirmation by the Court of Justice. Also, the "Priority Guidance" issued by the Commission in 2009 on the application of ex-Article 82 EC (now Article 102 TFEU) does not provide any further help, as it does not specifically address refusal to license in the framework of the general chapter on refusal to supply.[350]

What can be retained from the analysis is that, ever since the *Magill* decision, it is clear that EU competition law can be relied upon to argue that a refusal to license a copyright can be regarded as abusive conduct in the sense of Article 102 TFEU under certain conditions.

9.3.2 The US standard on refusal to license

US law deals very differently and much more cautiously with the issue of refusal to license. There are no decisions of the US Supreme Court on cases involving a refusal to license. Yet it is possible to draw important conclusions from the general case-law on refusals to deal for how the Court would deal with refusal-to-license cases.

For almost 20 years, the decision in *Aspen Skiing* established, and for 20 years remained, the basis for the law of the US on refusals to deal.[351] In 2004, the Supreme Court had the chance to decide again on a refusal to deal in the *Trinko* case.[352] This case contains wording which provides substantial guidance for refusals to license as well.

In *Trinko*, the Supreme Court described *Aspen* as being "at or near the outer boundary of § 2 liability" on monopolization.[353] *Aspen* was a "termination" case in which a firm with monopoly power had dealt with competitors in the past, but then suddenly decided to change its business strategy and terminated the arrangement with the competitor. Termination cases are clearer cases of anti-competitive behaviour than are initial refusal-to-deal cases, in which the firm with monopoly power has always refrained from dealing with the competitor. In termination cases, there is at least the assumption that cooperation was efficient for some time. Since, in *Trinko*, the defendant had never voluntarily dealt with the

[350] Priority Guidance, *supra* n. 16, para. 78.

[351] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

[352] *Trinko*, *supra* n. 306.

[353] *Trinko*, *supra* n. 306, p. 409.

competitor,[354] the Supreme Court was unable to draw any conclusion from the previous conduct on whether the refusal to deal was anti-competitive.[355] The Court explicitly left open whether US law should recognise an essential-facilities doctrine.[356] Rather, the Court warned against extending the scope of intervention under Section 2 too much, given the risk of making false decisions and deterring powerful firms from efficient conduct, and considering the need of constant supervision of such firms, which can hardly be exercised by courts in the framework of private law suits.[357]

It is to be expected that in a case of a refusal to license courts will be even more cautious in applying Section 2 than in a general case of refusal to deal. This is supported by the Supreme Court's clear statement in *Trinko* that the prospect of being able to charge monopoly prices "induces risk taking that produces innovation and economic growth." In this regard, *Trinko* even seems to be reasoned in view of the trans-Atlantic debate on the competition law requirements for a duty to license.[358] At best, plaintiffs could now try to argue a duty to license before US courts in termination cases. This is most important to note, since the EU *Magill* judgment clearly established that prior licensing is not a requirement for applying Article 102 TFEU to a refusal to license.

For the future development in the US, a lot may depend on the attitude of the competition agencies. In September 2008, *i.e.* at the end of the Bush administration, the Department of Justice published a report on the application of Section 2 that in essence recommended that Section 2 should practically never be applied to intellectual property, stating simply: "antitrust liability for unilateral, unconditional refusals to deal with rivals should not play a meaningful part in Section 2 enforcement."[359] Once the Obama administration came into office, this report was quickly withdrawn.[360] This unprecedented move, however, was not complemented by any proactive policy to address IP-related cases under Section 2 of the Sherman Act.[361] In contrast, the other US antitrust agency, the Federal Trade Commission,

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[354] In *Trinko*, the defendant telephone company was only under a legal obligation to grant access to its telephone network as a matter of the regulatory rules of the US Telecommunications Act. The plaintiff argued that the defendant had violated Section 2 of the Sherman Act by not providing appropriate service to the customers of its competitors.

[355] *Trinko*, *supra* n. 306, p. 409.

[356] *Id*., p. 411.

[357] *Id*., p. 414 et seq.

[358] *Id*., p. 407.

[359] Department of Justice, "Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act", 2008, p. 129 (no longer available on the Internet). See also Richard Duncan, Craig Coleman, Horst Daniel & Philip Haleen, "Litigating Single-Firm Conduct under the Sherman Act and the EU Treaty: divergence without end, or change we can believe in?, (2009) *Global Comp. Litig. Rev.* 148, 157.

[360] Department of Justice, "Justice Department Withdraws Report on Antitrust Monopoly Report", Press Release (11 May 2009), *available at:* http://www.justice.gov/atr/public/press_releases/2009/245710.htm.

seems to be more dedicated to developing a tougher stance on intellectual property when applying competition law. However, in this regard, the focus is very much on the competition-patent interface and not on copyright.[362]

In sum, one has to conclude that US antitrust law does not provide strong remedies in cases of refusal to licence. However, it is also important to note that under US intellectual property law there are other remedies available that have similar effects to a duty to license under Section 2 of the Sherman Act. Application of Section 2 would work as a compulsory licensing system and, thereby, deprive the right-holder of the ability to exclude a third party from using the right. The same effect is produced under the so-called *eBay* rule recognised by the US Supreme Court.[363] According to the Supreme Court in the *eBay* decision, in the case of an infringement of a patent, injunctive relief will not be automatic but, as a form of equitable relief, will depend on a four-factor test.[364] Although the *eBay* rule is of general application and does not require a competition-law-oriented analysis, its application may well limit the exclusivity of rights in scenarios where other jurisdictions would apply their competition laws with a view to justifying a compulsory licence. There is no doubt that the *eBay* rule also applies to copyright cases. Indeed, in *eBay*, the Supreme Court even referred to its practice in copyright cases, where it highlighted the principle of equity and finally concluded that an injunction will not be automatic in copyright infringement cases.[365] In more recent case-law, US courts have applied the eBay rule in copyright-related cases as well.[366]

9.3.3 Refusal to license in EU Member States

The principles on refusal to license under EU competition law as presented above (at (i)) only partially describe the situation in the EU. Under the so-called Implementation Regulation 1/2003,[367] national competition authorities and courts have the power, and are under a

361 While during the 8 years of the Bush administration, the DoJ initiated not a single case on Section 2, the Obama administration during at least initiated at least one case. See *United States and State of Texas v. United Regional Health Care System*, Complaint filed at the US District Court for the Northern District of Texas, 25 February 2011, *available at:* http://www.justice.gov/atr/cases/f267600/267651.pdf.

362 See the most recent policy document: Federal Trade Commission, "The Evolving IP Marketplace – Aligning Patent Notice and Remedies with Competition", March 2011, available at: http://www.ftc.gov/os/2011/03/110307patentreport.pdf.

363 See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

364 According to this test the plaintiff has to show (1) that he or she has suffered an irreparable injury, (2) that remedies at law would only inadequately compensate for that injury, (3) in light of the balance of hardships between the parties, equitable relief is warranted and (4) that the public interest would not be disserved by a permanent injunction.

365 See *New York Times Co. v. Tasini*, 533 U.S. 483 (2001).

366 *Salinger v. Colting*, 607 F.3d 68 (2nd Cir. 2010); *Perfect 10, Inc. v. Google, Inc*. (9th Cir. 2011), *available at:* http://cdn.ca9.uscourts.gov/datastore/opinions/2011/08/03/10-56316.pdf.

367 *Supra* n. 9.

duty, to apply Article 102 TFEU.[368] But, in contrast to Article 101 TFEU, the provision on restrictive agreements, Member States are authorised to prohibit unilateral conduct within the scope of application of Article 102 TFEU as a matter of national law although such conduct would be legal under Article 102 TFEU. This means that Member States, under their unilateral conduct rules, are allowed to be more interventionist than the case-law of the European courts would permit.

For clarification it also needs to be pointed out that, in the case of a refusal to license an intellectual property right, Article 102 TFEU will typically apply. To be applicable, Article 102 TFEU requires that the right-holder hold a dominant position “in the internal market or a substantial part of it” and that the abuse “may affect trade between the Member States”. In this regard, the European Courts have always recognised that it suffices for the dominant position to exist within a single Member State.[369] Hence, national monopolies in particular fall within the scope of application of Article 102 TFEU.[370] Domestic intellectual property rights that give rise to market dominance have the same geographical outreach. Application of Article 102 TFEU in such cases is justified by the fact that the exclusivity of the right would prevent competitors from other Member States from entering the country of protection without a licence. The refusal to license thereby affects trade between the Member States.

In cases in which Article 102 TFEU applies, Member States are allowed to choose between two approaches regarding parallel applicability of national competition law. According to Article 3(1), 2nd sentence, of Regulation 1/2003, Member States are authorised to apply domestic competition law in parallel to Article 102 TFEU, but they are not obliged to do so. In this regard, Member States have opted differently. For instance, Italian law follows the principle of exclusivity. To the extent that Articles 101 and 102 TFEU apply, the Italian Antitrust Law (*legge antitrust*) is not applicable.[371] This means that, in Italy, refusal to license is only governed by European law even if the national agency or the courts deal with such cases. In contrast, Germany has opted for parallel application.[372] In Germany, therefore, the question arises whether the national competition law provides for stricter rules on refusal to license.[373]

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368 As to the national competition agencies, this arises from Article 3(1), 2nd sentence, and Article 4 of Regulation 1/2003. As to the courts of the Member States, the power to apply Article 102 TFEU is explicitly stipulated in Article 5 of the Regulation. The duty of the courts to apply Article 102 TFEU follows from the direct effect of this provision, which is confirmed by Article 1(3) Regulation 1/2003.

369 See the precedent in Case 322/81 *Michelin* [1983] ECR 3461, para. 28.

370 See, for instance, Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, para. 28 (on the former monopoly of the German Federal Office for Employment which prevented private businesses from providing recruitment consultancy even for business executives).

371 Article 1(1) of Law No. 287 of 10 October 1990.

372 Section 22(3) of the Act against Restraints of Competition.

373 Section 22(3), 3rd sentence, of the Act against Restraints of Competition explicitly provides: “The application of stricter rules of this Act shall remain unaffected.”

Indeed, German case-law has produced quite some practice with regard to refusal-to-license cases due to the leading role this jurisdiction plays in patent infringement litigation within the EU. In infringement litigation procedures, especially where standard-essential patents are involved, the defendant may try to rely on a duty to license as a matter of competition law as a defence against the infringement claim. The leading case is *Standard-Spundfass*, decided by the Federal Supreme Court (*Bundesgerichtshof*)[374] shortly after the ECJ delivered its decision in *IMS Health*[375] and the entry into force of Regulation 1/2003. This case is interesting in several regards: first, the Court only applied German competition law although Article 102 TFEU (ex-Article 82 EC) was clearly applicable – the defendant was an Italian firm that was sued for infringement of a standard-essential patent by selling drums for chemical liquids in Germany – and the German Court may already have been under a duty to apply Article 102 TFEU. The Court was probably able to do so by arguing a duty to license under German law alone, which would therefore mean there was no need to assess the case also under EU law.[376] Second, the Court did not apply the general provision on abuse of dominance in Section 19, but former Section 20(1) of the German Act against Restraints of Competition,[377] the general discrimination prohibition of German law, since the patent holder had agreed to license to German producers that had participated in the standard-setting process while refusing to license to the Italian defendant. According to this provision, a dominant undertaking may not directly or indirectly treat other undertakings differently from similar undertakings without any objective justification. According to this rule, the Court therefore had to answer the question of whether the exclusivity of the patent provided an objective justification. Third, the Court answered this question in the negative. In doing so, the Court did not rely on the refusal-to-license test as developed by the ECJ, or in particular the new-product rule.[378] Rather, the court relied upon the fact that the patent was standard-essential, from which the court concluded that the patent holder was under a duty to grant access to the protected technology. In this context, the Court argued that such duty to license was justified since the patent holder did not hold a market-dominant position due to the technological superiority of its technology but only due to the decision made by the chemical industry in the process of standardisation. From the facts, the case can hardly be said to have fulfilled the *IMS Health* test. The Court did not even ask whether the drums of the Italian manufacturer were "new" products or, at least, technologically superior to all other drums sold in the market. Hence, it can be concluded that, in the light of *Standard-*

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374 *Supra* n. 129.

375 *Supra* n. 2.

376 Note that no statement can be found in the judgment in this regard. The Court kept completely silent on the applicability of European law.

377 Now Section 19(2) No. 1 Act against Restraints of Competition (version of 26 June 2013).

378 Indeed, the Federal Supreme Court cited *IMS Health* only once, namely in the context of distinguishing between the upstream licensing market and the downstream product market.

Spundfass, it is easier to argue a duty to license as a matter of German competition law than under EU law.

However, the question is whether the *Standard-Spundfass* holding can also be transferred to copyright cases. While discrimination cases can also occur in copyright-related cases, it is to be pointed out that the decision does not rely so much on discrimination as on the fact that the patent holder benefited from a standardisation decision made by the firms of the given industry. Had the patent holder generally refused to grant licences, the Court would probably have decided similarly on the basis of the general rule on abuse of market dominance as stipulated by Section 19 of the German Act. Therefore, *Standard-Spundfass* could be relied upon as a precedent in Germany in which copyright controls access to a standard which was fixed by the industry.[379]

German courts so far have not produced much practice on refusals to license a copyright. However, a case is currently pending before German courts that greatly resembles the European *Magill* case.[380] In *Elektronischer Programmführer*, the Federal Supreme Court (*Bundesgerichtshof*) in 2012 held that the discrimination prohibition of former Section 20(1) of the Act against Restraints of Competition can also be applied as a defence against a claim based on copyright infringement.[381] In Germany, TV stations provide programme information, which as such is not protected by copyright. In addition, TV stations also offer copyright-protected promotional images and texts to the publishers of TV guides. In *Elektronischer Programmführer*, the defendant was the operator of a free-of-charge electronic programme guide (EPG) on the Internet. The defendant had used promotional content made available on the websites of the TV stations without authorisation and was then sued for copyright infringement by the German CMO (VG Media) that manages the related rights of broadcasters. What distinguishes this case from *Magill* in particular is that the TV stations did not refuse to license to the defendant as such. Rather, they provide promotional content for free to the publishers of printed TV guides and aim to charge the operators of electronic programme guides for the use of the same content. The case also differs from *Standard-Spundfass*, which presents both a discrimination and clear refusal-to-license case. In *Standard-Spundfass*, the patent owner granted licences for free to some manufacturers, charged others for the use of the patent and refused to license to the defendant in the infringement case. In contrast, the case in *Elektronischer Programmführer*

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379 Note in this context that also *IMS Health* was both a German case and a case where the copyright precluded the use of a standard by third parties. Yet, in *IMS Health*, the standard was a *de facto* standard for which German courts would still have to clarify whether the *Standard-Spundfass* rule applies.

380 *Supra* note 2. See also at (i), above.

381 Federal Supreme Court (*Bundesgerichtshof*), decision of 27 March 2012, Case KZR 108/10 – *Elektronischer Programmführer*, (2012) *Gewerblicher Rechtsschutz und Urheberrecht* 1062, also *available at:* http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=bad08a945e67dd8409f4dca7c709ac9e&nr=61327&pos=0&anz=1.

could be categorised as a pure discrimination case. Yet the plaintiff was seeking an injunction and thereby relied upon the exclusivity of the copyright.

In contrast to the Dresden Court of Appeals,[382] the Federal Supreme Court considered a violation of the discrimination provision of Section 20(1) of the Act against Restraints of Competition. Thereby the Court defined a proper market for the promotional material of the individual TV stations, which were considered to be dominant in this regard.[383] The Court also identified discriminatory conduct, since the TV stations allowed use of this material free-of-charge to printed TV guides but not to the operators of electronic programme guides.[384] Of course, the important question was whether the CMO, acting on behalf of the TV stations, could rely on an objective justification. In contrast to *Standard-Spundfass*, the Court did not consider at all that the material was copyright-protected and whether the application of competition law should be limited, as held by the ECJ in *Magill*, to exceptional circumstances. The Court only discussed whether there were reasons for discriminating between printed TV guides and electronic programme guides. In particular, the Court raised the question whether the fact that the TV stations had their own websites for providing programme information could justify such discrimination. Yet the Federal Supreme Court left this question open[385] and remanded the case back to the Dresden Court of Appeals (*Oberlandesgericht*) for further consideration of whether an objective justification was available or not.[386]

By not even citing the European case-law on refusal to license, the Court sends another clear message that the European requirements are not considered as any limitation to German competition law, at least as a defence against a claim for injunctive relief of IP right-holders. Whether this can be explained by the nature of *Elektronische Programmführer* as a discrimination case is not that clear from the reasoning of the Court. Rather, it seems that in this decision the Court only relied upon the wording of former Section 20(1) of the German Act without giving any consideration to the fact that a copyright was involved. What is clear, however, is that the European requirements of a refusal to license would not allow for affirming abusive conduct. Also, the Federal Supreme Court’s own standards set out in *Standard-Spundfass* would not be met. In *Standard-Spundfass*, the licence was a condition for the petitioner to enter the market; this was not the case for the operator of the online programme guide. This operator was perfectly able to enter the market and to stay in the market by providing information on the TV programmes without having to rely on the use of the promotional material. Also, operators of electronic programme guides are perfectly able

382 Dresden Court of Appeals (*Oberlandesgericht*), decision of 22 May 2005, Case 14 U 818/09, (2010) *Zeitschrift für Urheber- und Medienrecht* (*ZUM*) 362, also *available at:* http://openjur.de/u/32285.html.

383 *Id.*, para. 32.

384 *Id.*, para. 33-34.

385 Id., para. 35.

386 *Id.*, para. 36.

to compete without the licence. With respect to the printed TV guides, for which the consumer has to pay, the two kinds of guides should probably not be attributed to the same relevant market. And with respect to the TV stations' own promotional activities, the independent online TV guides are better off, since they compile the information of the different TV stations. In sum, the licence neither seemed "indispensable" for entering the market, nor did the refusal to license exclude effective competition in the market for electronic TV guides.

Despite the fact that case-law is still lacking, it is to be pointed out that the essential-facilities provisions contained in the Slovak Competition Act (2001) and the Czech Competition Act (2001) (see at 6.2.1, above) also provide for a duty to license in cases in which the EU standard for a duty to license would not necessarily be fulfilled. In the definition of the essential facility, Article 8(3) of the Slovak Competition Act only requires that the petitioner be unable to duplicate the facility – including a right – and that the refusal to deal restrict competition in the relevant market. This definition, and especially the first requirement, cannot be equated with the indispensability requirement of the EU case-law. The mere fact that it is impossible to duplicate a facility does not mean that another undertaking is in need of access to this facility in order to enter the market. A good example of this is the decision of the German Federal Supreme Court in *Elektronischer Programmführer*, which has just been discussed. There, the copyright-protected promotional material of the TV station cannot be duplicated. Yet the operators of online TV guides do not need to use this material to run their business. Also, it still need to be clarified whether the requirement of a "restriction of competition" meets the European standard of an "exclusion of effective competition". In particular, the other requirements stipulated in Article 8(5) of the Slovak Competition Act do not provide for a new-product rule as an additional requirement for cases of a refusal to license. While the Czech Competition Act explicitly applies within the scope of application of Articles 101 and 102 TFEU,[387] the Slovak Competition Act does not contain any rules on its scope of application with regard to EU law. Still, it has to be concluded that that the Slovak essential-facilities rule also applies within the scope of application of EU law.[388]

Case-law from other EU Member States on refusal to license is extremely limited. In some Member States, at least, there have been cases on refusal to license a patent that may provide some insights for future cases on refusals to license a copyright.

[387] Article 1(4) of the Czech Competition Act.

[388] This is confirmed by Article 6(4) of the Slovak Competition Act which provides that the Slovak ban on restrictive agreements does not apply to agreements that are exempted under European competition law. A similar provision on abuse of dominance does not exist.

In the Netherlands, in 2002, the Competition Authority NMa had to decide a case which, much like the earlier EU case in *Magill*, related to the licensing of TV programmes.[389] As will be seen, both NMa and Dutch courts tried to apply the European standard to refusal to license while this standard was still evolving. In *De Telegraaf v NOS and HMG*, NMa had to decide on the complaint of the largest Dutch newspaper, De Telegraaf, against broadcasting corporations that had refused to supply programme information. De Telegraaf wanted to add a weekly TV guide as a supplement to its weekend edition and, due to the refusal, found itself in a similar situation as the independent Irish publisher in the *Magill* case. Under Dutch copyright law, likewise, the programme listings were considered copyright-protected. Yet the situation in the Netherlands differed from that in Ireland in that the broadcasters were granting each other cross-licences that enabled consumers to buy comprehensive TV guides. Nevertheless, NMa ordered the broadcasters to grant licences to De Telegraaf. In their appeal, the broadcasting corporations argued in favour of applying the European new-product rule according to which a refusal to license can only be considered an abuse if the subject-matter of protection is an essential input for a new product. Since comprehensive TV guides were already available to consumers, De Telegraaf's supplement should not be considered a new product. However, the District Court of Rotterdam was of a different opinion. The District Court argued that the two EU decisions in *Magill* and *Bronner* did not necessarily require a new product and that it would be sufficient for the input to be essential for producing the product. The Court thereby tried to prevent the broadcasters from reserving the TV Guide market for themselves.[390] Yet, on further appeal, the Court of Appeal for Trade and Industry annulled the District Court's decision.[391] This was due to the fact that, meanwhile, the ECJ had decided its IMS Health case, in which it clarified that the prevention of a new product has to be treated as a necessary ("cumulative") requirement of the refusal-to-license test. Substantial demand for the product does not make the product a new one.

In France, the competition agency and the courts treated a refusal to deal in IP-related cases in two earlier instances, namely, the *NMPP* and the *Apple iPod* case.

The *NMPP* case goes back to a complaint submitted to the former Competition Council (*Conseil de la concurrence*) in 2003 against NMPP, which later became Presstalis. For a long time, there were only two press distribution services ("*messageries de presse*") in France, NMPP and SAEM-TP, created by the major newspaper publishers in France. SAEM-TP,

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389 Dutch Competition Authority (NMa), Decision of 3 October 2001, Case 1, *Telegraaf v. NOS/HMG*, reported by Ioannis Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, paras 21-037.

390 District Court of Rotterdam, Decision of 11 December 2002, Case MEDED 01/2430-RIP and MEDED 01/2474-RIP, NOS and HMG v. NMA, reported by Ioannis Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, paras 21-038.

391 Court of Appeal for Trade and Industry, Decision of 15 July 2004, Case AWB 03/132, NOS and HMG v. NMa, reported by Ioannis Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, paras 21-038.

however, did not hold any logistics centres. Therefore, SAEM-TP subcontracted NMPP to organise the distribution of its newspapers. This made NMPP the only provider of press distribution services that delivered newspapers to wholesalers. For their own distribution and the communication with the press distribution service providers the wholesalers used the "Presse 2000" software, which was designed by NMPP. At one point, MLP, a press distribution service provider which had so far only been active in the markets for monthly newspapers and less frequent publications, wanted to extend its operation to the market of distribution of daily newspapers, in which NMPP was dominant. For its business organisation it tried to use its own TID computer system but discovered that, without a digital interface between Presse 2000 and TID, wholesalers would have to type in the information in this system. However, NMPP refused to grant access to its Presse 2000 software. Consequently, MLP brought a complaint against NMPP before the Competition Council alleging an abuse of dominance on the part of NMPP. In addition, MLP complained about the rebate system that NMPP had implemented with the effect of preventing customers from dealing with MLP (see at 9.13, below). Based on the reluctance of the wholesalers to work with two computer systems, the Competition Council considered the Presse 2000 software an essential facility and in December 2003 imposed interim measures and ordered NMPP to allow MLP access to the core elements of Presse 2000 to enable automatic transfer of files between the Presse 2000 system and MLP computers, on the one hand, and to refrain from applying its rebate system, on the other hand.[392] The Court of Appeal of Paris later confirmed the Council's preliminary decision, holding that Presse 2000 was an essential facility.[393]

The Court of Appeal handed down its decision in February 2004, just a few weeks before the European Court of Justice decided in *IMS Health* (see at 9.3.1, above). This may be one reason why the Court of Appeal did not apply the European new-product rule. Also, the Court, unlike the European Court of First Instance in *Microsoft*, did not even address the issue of whether the case was one on refusal to license an intellectual property right. In substance, the Court held that access to the interoperability information ("*tronc commun*") contained in Presse 2000 was "indispensable" for MLP to connect its own software with Presse 2000 and to compete on equal footing with the two other press distributors. The Court further held that it was not possible for MLP to enter the market with its own software, since the wholesalers had repeatedly confirmed that they would refuse to work with two systems. Indeed, this shows that Presse 2000 had become an industry standard. Yet in 2005 this decision, upon further appeal by NMPP, was annulled by the Court of

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392 French Competition Council (*Conseil de la concurrence*), decision 03-MC-04 of 22 December 2003, *MLP v. NMPP and SAEM-TP*, *available at:* http://www.autoritedelaconcurrence.fr/user/avisdec.php?numero=03-MC-04. See also Conseil de la Concurrence, "The Conseil de la concurrence announces interim measures concerning NMPP", Press Release of 23 December 2003, *available at:* http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=127&id_article=249.

393 Paris Court of Appeal (*Cour d'appel de Paris*), Decision of 12 February 2004, Case 2004/00827, SAEM-TP and NMPP v. MLP, *available at:* http://www.lexinter.net/JPTXT4/JP2005/arret_saem_nmpp.htm.

Cassation (*Cour de cassation*).[394] This latter Court indeed found that the essential-facilities doctrine would not justify a duty to deal in this case. The reason was that MLP had confirmed that it would be perfectly able to develop a program that would be technically as efficient as Presse 2000. The fact that such a program would not have constituted a reasonable alternative for wholesalers from an economic perspective was not considered sufficient by the Court. The Paris Court of Appeal followed the assessment of the Court of Cassation, held that MLP could not claim access to Presse 2000 and annulled the 2003 decision of the Competition Council.[395] Despite these appeal decisions, the Competition Council was still concerned about the discriminatory effect of the refusal on the possibilities of MLP to enter the market, which finally convinced NMPP to allow the entry of data on the sale of MLP newspapers in the Presse 2000 system. The Competition Council finally accepted these commitments since they were likely to remove the distortions of competition that affected MLP.[396]

In the *Apple iPod* case, the French Competition Council had a complaint to decide on by VirginMedia, a subsidiary of the Lagardère media group, which offered a music download service on the Internet in competition with Apple iTunes.[397] VirginMedia complained that its customers were not able to play music from its platform on the Apple iPod due to the DRM system, the FairPlay software used by Apple, that was incompatible with the Microsoft DRM system used by VirginMedia. VirginMedia therefore claimed a licence for FairPlay to make its downloads compatible with the iPod, which was rejected by Apple. VirginMedia considered FairPlay as an essential resource and argued that the refusal to license by Apple as a dominant undertaking in the adjacent market for digital devices for playing downloads constituted an abuse of market dominance. However, the Competition Council did not consider FairPlay essential for doing business in the market for online music downloads. The Council gave three reasons: First, music is not only downloaded for the purpose of being played on digital walkmen such as the iPod. Most people only download to their computers and play music from their computers. Second, music can also be burned on digital CDs. This allows one to work around Apple's DRM. Third, more and more competing devices have recently appeared on the market that allow VirginMedia music to be played. In general, the Competition Council ascertained a dynamic development of download services in the French market, which makes it unlikely that Apple's refusal to license could leverage market power from the device market to the music download market and exclude competitors in the latter

394 French Court of Cassation (*Cour de cassation*), Decision no. 1159/05 of 12 July 2005, *NMPP v. MPL*, *available at:* http://www.courdecassation.fr/jurisprudence_2/financi_re_574/arr_ts_575/arr_ecirc_851.htm.

395 Paris Court of Appeal (*Cour d'appel de Paris*), Decision of 31 January 2006, Case No. 05/14782, *NMPP v. MLP*.

396 French Competition Council (*Conseil de la concurrence*), Decision no. 08-D-04 of 25 February 2008, *MLP v. NMPP*, *available at:* http://www.autoritedelaconcurrence.fr/pdf/avis/05d16.pdf.

397 French Competition Council (*Conseil de la concurrence*), Decision no. 04-D-54 of 28 June 2004, *VirginMedia v. Apple*, *available at:* http://www.autoritedelaconcurrence.fr/pdf/avis/05d16.pdf.

market. Hence, the Competition Council held that there was no evidence for a causal link between the refusal to license and any harm to competition. Accordingly, the Competition Council rejected the complaint.

At the end of the proceedings, in both French cases claims for a duty to license, or at least to grant access to a computer program, were rejected based on the indispensability requirement. Only in their initial decisions in the *NMPP* case, which predated the ECJ judgment in *IMS Health*, did both the Competition Council and the Paris Court of Appeal seem to apply a more interventionist version of the essential-facilities doctrine that did not include the new-product rule. Whether this would be accepted by the Court of Cassation is still an unanswered question, since that Court did not have to address this issue in *NMPP*, as it had already held that access to Presse 2000 was not indispensable.

In Italy, the AGCM had two earlier cases to decide on refusal to license pharmaceutical patents, in 2006.[398] Those cases presented quite peculiar facts linked to the grant of complementary protection certificates. Italy had introduced such protection based on an autonomous decision before the European SPC Regulation[399] made such systems mandatory in the whole of the EU. This led to complaints by Italian generics producers against holders of SPCs in Italy, namely, Glaxo and Merck, that refused to license the production of generics for export to countries where such protection did not exist. Consequently, the AGCM granted compulsory licences based on ex-Article 82 EC (now Art. 102 TFEU) for the production of generics in Italy for sale to other countries, including EU Member States, where patent protection had already expired. Thus, the compulsory licences had the objective of enabling Italian firms to compete in the markets of other EU Member States. These peculiarities of the case may also explain why the AGCM did not rely on the *IMS Health* test for arguing abuse. These two Italian decisions are important in that they are the first ones in which competition law enforcers applied the EU prohibition of abuse of market dominance to a refusal to license a patent. Yet these two cases do not provide much insight for copyright cases, except insofar as they may indicate that the AGCM is willing to apply Article 102 TFEU

398 AGCM decision 15175 of 8 February 2006, Case A363, *Glaxo-Principi Attivi*, Bollettino n. 6/2006, *available at:* http://www.agcm.it/concorrenza/concorrenza-delibere/open/41256297003874BD/F6DE3DE75F12767CC12571220055E7E1.html; AGCM decision 16130 of 15 November 2006, Case A364, Merck-Principi Attivi, available at: http://www.agcm.it/concorrenza/concorrenza-delibere/open/41256297003874BD/7BB10C4039418D79C1257241003C6AF7.html.

399 Regulation (EC) No. 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products, [2009] OJ No. L 152, p. 1. The original Regulation No. 1768/92 obliged to grant SPCs for patented medicine for which the first market authorization in the EU was obtained after 1 January 1985. For Denmark and Germany the relevant date was 1 January 1988 and for Belgium and Italy 1 January 1982. This created a period of three, respectively 5 years, during which SPC protection existed in Italy while patent protection had already expired in other Member States.

to refusals to license IPRs in general. This was confirmed in a very recent case that, again, related to a refusal to license a pharmaceutical patent.[400]

A more interesting case was decided by the AGCM in 2011.[401] In this case, based on Article 102 TFEU, the AGCM imposed on Bayer Cropscience a duty to provide access to two studies on the effects of fosetyl-aluminum on human beings and animals to competing manufacturers of fungicides based on fosetyl-aluminum used in agriculture. The competitors had to rely on these studies to maintain their marketing authorisations for Italy. The AGCM considered Bayer Cropscience as dominant in the Italian market for such products.[402] With regard to abusive conduct, the AGCM explicitly referred to the concept of an "essential facility" by also citing the requirements established by European case-law, including the new-product rule.[403] In order to avoid a duty to supply, Bayer argued that it had intellectual property rights in the studies without, however, specifying the kind of these rights.[404] The AGCM affirmed all these requirements. In particular, the AGCM did not accept Bayer's reliance on the existence of IPRs as a basis for an objective justification, instead pointing out that all the requirements established by the European courts are meant to justify a duty to license on the basis of Article 102 TFEU and that, therefore, the mere existence of an IPR cannot provide an objective justification.[405] Yet the AGCM decision was annulled by the Regional Administrative Court.[406] The Court did not support the AGCM's finding that there was no other way to get access to the studies than by imposing a duty on Bayer to grant access. The Court had found out that other competitors succeeded in getting access through

[400] This most important case before the AGCM dealing with pharmaceutical patens in which the AGCM has applied Article 102 TFEU so far relates to the practices of Pfizer to delay the market entry of generic pharmaceuticals by acts of so-called life-cycle management, such as the application of divisional patents. See AGCM decision 23194 of 11 January 2012, Case A431, *Ratiopharm-Pfizer*, Bollettino n. 2/2012, *available at:* http://www.agcm.it/concorrenza/concorrenza-delibere/open/41256297003874BD/9AEB2CC6CAB65EA2C1257996003333CD.html.

[401] AGCM decision 22558 of 28 June 2011, Case A415, *Sapec/Bayer-Helm*, Bollettino n. 26/2011, *available at:* http://www.agcm.it/concorrenza/concorrenza-delibere/open/41256297003874BD/610146405B4DA2D4C12578D20044F26A.html.

[402] *Id*., para. 231.

[403] *Id*., para. 266. More concretely, the AGCM formulated five requirements: (1) lack of duplication; (2) lack of alternative in the market; (3) prevention of a new product; (4) lack of objective justification; and (5) elimination of competition to the detriment of consumers. Hereby, the AGCM cited the decision of the ECJ in *IMS Health*, although it is quite doubtful that this decision has established the requirement of the prevention of a new product generally for all refusal-to-deal cases. In this regard, see also *supra* n. 343.

[404] *Id*., paras 153 and 158 et seq. Indeed, Bayer might have had a copyright in the studies. Yet, for a refusal to license a copyright, one would also have to require that the competitors intended to use the copyright, i.e. original elements of the study in form of a reproduction, in the framework of getting their market authorization maintained.

[405] *Id*., paras 292 et seq.

[406] Tribunale Amministrativo Regionale (TAR) of Lazio, decision no. 4403 of 16 May 2012, *available at:* http://www.dimt.it/interna.php?id_sezione=36&id_articolo=572&noNav=1#.US4TT1eRdtk.

regular administrative court proceedings provided for by the regulatory rules applicable to the sector.

9.3.4 Refusal to license in other jurisdictions

A case that very much resembles the EU *Microsoft* case[407] can be reported from Switzerland. In the *SIX* case,[408] the respondent (Six Group) was considered dominant as a provider of software systems for the operation of payment terminals for credit cards and pay cards. At the same time, SIX produced electronic payment terminals used in shops. The case before the Swiss Competition Commission was initiated by a competing terminal provider, which complained that its terminals were not compatible with the so-called DCC (digital currency conversion) function which is part of the software payment system of SIX. The complainant argued that SIX, by refusing to supply interoperability information, forced dealers to also buy the physical terminals from SIX. The Swiss Competition Commission held that the refusal to disclose the interoperability information indeed constituted an abuse of market dominance. The case was still pending on appeal at the time of the writing of this report. Before the Commission, SIX asserted copyright protection for the interoperability information. In contrast to the European Commission and the European Court of First Instance in the *Microsoft* case, which had left the issue open,[409] the Swiss Competition Commission held that neither the interfaces nor the interoperability information are protected by copyright.[410] After affirming market dominance of SIX in the market for software payment systems, the Commission considered whether SIX had abused its market dominance in the sense of Article 7 of the Competition Act, whereby the Commission assessed the case for the different sub-categories of abuse listed in this provision.[411] With regard to the provision on refusal to deal in Article 7(2)(a), the Commission explicitly stated that this provision also captured cases of refusal to license intellectual property.[412] It is in particular with regard to refusals to license that the Commission confirmed a violation.[413] For an abusive refusal to deal, the Commission formulated four requirements, for which it found inspiration in the EU Priority Guidance: (1) there is a refusal to deal; (2) the refusal refers to an input which is objectively required to compete in a downstream or related market; (3) the refusal causes anti-competitive effects; (4) the refusal cannot be justified by legitimate business reasons.[414]

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407 *Supra* (i).

408 *SIX/Terminals mit Dynamic Currency Conversion (DCC)*, *supra* n. 70.

409 *Supra* (i).

410 *SIX/Terminals mit Dynamic Currency Conversion (DCC)*, *supra* n. 70, paras 114-126.

411 *Id.*, para. 304.

412 *Id.*, para. 307.

413 *Id.*, para. 483. Yet the Commission also affirmed abusive conduct in form of a discrimination (para. 499) and a case of limitation of technological development (para. 504), which basically coincides with the refusal-to-deal abuse, and, finally, a tying (para. 526).

414 *Id.*, para. 308.

It is in respect of the latter requirement that the Commission, again in line with the EU *Microsoft* case, looked at the incentives of the parties to invest in innovation. In this context also, the Swiss Competition Commission pointed out that the mere existence of intellectual property protection does not suffice for a justification.[415] Rather, the Swiss Competition Commission relied upon the "incentives-balance test", which had been developed by the European Commission in the *Microsoft* decision.[416] Beyond this, the Commission explained in a detailed analysis why the non-disclosure of the interoperability information in the case would reduce follow-on innovation in the market for the terminals rather than reduce incentives for innovation within the dominant firm.[417] Concerning the standard of abuse in the form of a refusal to deal, despite obvious allegiance to the European approach, the Commission did not take up the *Magill* and *IMS Health* requirement of the prevention of a new product. Whether this is to be explained by the fact that the Commission was very sceptical on the existence of IP protection can hardly be said. Rather, what can be seen is that the Swiss Competition Commission was aware of the fact that the case at least involved the protection of trade secrets. In sum, what seems more important is that the decision is very much in line with how the European *Microsoft* case was decided. This Swiss case thus confirms that the new-product rule does not fit all cases, and that for cases on software interoperability in particular, application of the incentives-balance approach provides much better guidance than the formalistic new-product rule.

In jurisdictions of emerging and developing economies the practice dealing with the question of whether competition law can impose a duty to license is very much driven by the debate on access to essential medicine. Case-law relating to this issue is also relevant for copyright, since cases in which competition law enforcers apply unilateral conduct rules to a refusal to license a patent establish standards that can later also be used for a refusal to license a copyright.

One of the most active jurisdictions in this regard is South Africa. A duty to license was first argued in the *Hazel Tau* case, which started as a complaint on excessive pricing and in which the Competition Commission also recognised a case of anti-competitive refusal to license patents.[418] Thereby, the Commission applied Section 8(b) Competition Act, according to which a refusal to grant a competitor access to an essential facility is prohibited as an act of abuse of market dominance. Most importantly, in this context, the Commission gave the term "essential facility" as defined in Section 1(1)(viii) of the Act as "an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide *goods or services* to their customers" a broad reading so as to include essential patents. Especially in this regard, the *Hazel Tau* decision is also relevant for

415 *Id.*, para. 452.

416 *Id.*, para. 453. See also *supra* (i).

417 *Id.*, paras 454-470.

418 *Hazel Tau*, *supra* n. 327.

copyright-related cases. The *Hazel Tau* case was followed by other similar cases. In 2007, the Competition Commission received a complaint against the pharmaceutical company Merck for having refused to license HIV patents for importing and manufacturing generics.[419] This complaint caused Merck to settle the case with several generics producers before the Commission could even complete its investigations.

The only copyright case from South Africa that has so far been dealt with under the essential-facilities rule of Section 8(b) of the Competition Act is *DW Integrators v SAS*, which was decided by the Competition Tribunal.[420] The claimant seeking interim relief was a service provider to licensees of the respondent's software and it argued that the software constituted an essential facility and, therefore, the respondent was also under a duty to license to the claimant. The Competition Tribunal did not consider whether the software indeed constituted an essential facility since the claimant had already failed to define the relevant market convincingly.[421] In particular, the Tribunal did not follow the claimant's view that the respondent's information delivery software constituted a proper market and that the respondent tried to leverage market dominance to the service market by refusing to license the software.[422] Rather, the Court hinted at the fact that there were alternative suppliers of delivery software.[423] Also, the Court rejected a narrow market definition based on the fact that the claimant had established itself as a specialist for respondent's software, since this would leave it to the claimant to create a situation in which the respondent would be considered market-dominant. The case, indeed, calls to mind the US Supreme Court's decision in *Eastman Kodak*, where the Court applied Section 2 of the Sherman Act to Eastman Kodak's tying of services to the sale of its copying machines and where the court accepted a proper relevant market for such Kodak machines due to the switching costs of customers.[424] The Competition Tribunal, however, refrained from adopting this approach to market definition since the claimant had not produced sufficient factual and conceptual basis for identifying dominance in this way. Although the issue of abuse was not addressed, the Competition Tribunal expressed caution regarding the grant of preliminary relief in an IP-related case by citing yet another US decision[425] and, in even more general terms, stated

419 *Treatment Action Compaign v. MSD (Pty) Ltd and Merck & Co., Inc*. Legal submissions of the complainant *available at:* http://section27.org.za.dedi47.cpt1.host-h.net/wp-content/uploads/2010/10/TACvMSDlegalsubmissions.pdf.

420 *DW Integrators CC v SAS Institute (Pty) Ltd*, Case No. 14/IR/NOV99, [1999-2000] CPLR 191 (CT), also *available at:* http://www.saflii.org/za/cases/ZACT/2000/16.pdf.

421 *Id*., paras 23 and 31.

422 *Id*., para. 24.

423 Id., para. 25.

424 *Eastman Kodak Co. v. Image Technical Services, Inc*. 504 U.S. 451, 467-79 (1992).

425 *Atari Games Corp. v. Nintendo of America, Inc*., 897 F.2d 1572, 1577(Fed. Cir. 1990), which warns that "the danger of disturbing the complementary balance struck by Congress is great when a court is asked to

that "caution is particularly well-advised when dealing with the interface between anti-trust and intellectual property".[426] In sum, despite some practice, the standard on refusal to license an IPR is still very unsettled in South Africa, with a very proactive Competition Commission, especially in cases relating to pharmaceutical patents and, it would seem, a much more hesitant Competition Tribunal.

In the already mentioned *Tele Cable* case from Peru,[427] INDECOPI also had the task of deciding whether the two TV channels, Fox Latin American Channel Inc. and Turner Broadcasting System Latin America Inc. had abused their dominant position by not licensing TV rights to Tele Cable, a cable TV company. INDECOPI decided against an abuse of market dominance since it was not possible to consider the two channels dominant in the relevant TV channel market.

A case of dominant TV channels is also presented by the *Globosat* case from Brazil.[428] In this case, an undertaking that is active on the level of licensing and selling programmes to pay-TV operators had failed to convince Globosat, an undertaking belonging to the Globo TV conglomerate, to license the sports channel "Sportv", for which it held the exclusive rights for the broadcasting of many sports events. In the complaint it was argued that Globosat tried to monopolise the downstream pay-TV market by its refusals to license. The Brazilian CADE finally reached a settlement with Globosat in 2006 in which the Globosat committed to licensing its channels on non-discriminatory terms. Yet no obligations were imposed on Globosat for the time after the expiry of a six-year period, since CADE considered the market development to be too dynamic to allow any predictions on the market conditions in the more distant future.

In China, competition law was relied upon to counter allegations of copyright infringement in a case before the Shanghai Higher People's Court.[429] Although the plaintiff did not exactly argue a duty to license, the case falls within the category of refusal to license in a broader sense. The case is also known as China's first competition law case based on a private law suit. Both the plaintiff and the defendant operate eBook Internet platforms (www.du8.com and www.qidian.com). The work "Star Change", written by an author under the pseudonym "I eat tomatoes", became very popular on the Qidian website. Consequently, the plaintiff ordered another author to write a work entitled "Star Change Sequel" under the pseudonym

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preliminarily enjoin conduct affecting patent and antitrust rights. A preliminary injunction entered into without a sufficient factual basis and findings, though intended to maintain the status quo, can offend the public policies embodied in both the patent and the anti-trust laws."

[426] *DW Integrators*, *supra* n. 420, para. 18.

[427] *Tele Cable*, *supra* n. 45.

[428] CADE, Case 0812.003048/2001-31, *614 TVC S/A and others, Associação Neo TV, Globo Comunicações e Participações S/A, Globosat Programadora Ltda.*

[429] See You Minjian, 'To Understand Abuse of Market Dominance in Anti-Monopoly Law', China Intellectual Property, 5 July 2010, *available at:* http://www.chinaipmagazine.com/en/journal-show.asp?id=593.

"I eat no tomatoes" and published it on its du8 website. This latter work adopted the character, plot and environment of the pre-existing work. The plaintiff alleged that, following a request by the defendant, the author of the second work had stopped writing for the plaintiff and had apologised to the author of the pre-existing work on the defendant's website. The plaintiff sued the defendant for abuse of market dominance. While the No. 1 Intermediate People's Court held the defendant's conduct legitimate and rejected the claim, the High People's Court disagreed partially, but in the end rejected the plaintiff's appeal. In this case, the courts dealt with both market dominance and abuse. On dominance, the High Court held that the plaintiff failed to present sufficient measurable evidence that there was dominance of the defendant in any of three possible markets for China's Internet literature, domestic original literature and network original literature. The Court required third-party surveys and detailed data. On abuse, the High Court did not find any evidence of coercion. Yet the Court argued that even in the case of coercion this would not make the conduct an abuse. Abuse can be justified by legitimate reasons. Since the plaintiff tried to free-ride on the pre-existing work, the defendant's request was considered reasonable and legitimate by the court. It is interesting to see that the court did not delve into the question of whether the conduct of the plaintiff in putting the derivative work on the Internet amounted to an infringement of copyright. If this is so, the decision can also be read in the sense that, under Chinese competition law, the claiming of copyright protection by dominant right-holders against infringing competitors cannot by itself be considered an abuse of market dominance. In this regard, this case closely resembles the early *Volvo* case[430] of the European Court of Justice on refusal to license.

In Canada, the legislative situation is already quite peculiar due to the fact that Section 75 Competition Act (1985) contains a specific provision for refusal to license. Yet refusal to license does not seem to have become a major issue in copyright-related cases so far. In the *Warner Music Canada* case, the Competition Tribunal developed the general rule according to which the mere refusal to license a copyright cannot be considered a violation of competition law.[431] In this case, BMG had sought a licence to make sound recordings of Warner music. In *Sono Pro v Sonotechnique*, the Competition Tribunal had to deal with a refusal-to-deal scenario in which the defendant had refused to supply Dolby audio products to the plaintiff.[432] The defendant in the case was the exclusive dealer of Dolby products in Canada and had developed a policy to sell directly to consumers and not to deliver to other retailers. Under Section 103.1(7) Competition Act, which requires that the applicant be directly or substantially affected in its business by a refusal to deal in the sense of Section 75, the Competition Tribunal rejected the plaintiff's claim since the plaintiff had only vaguely described the importance of Dolby products for its business.

430 *Volvo*, *supra* n. 3. See also at 9.3.1, above.

431 *Director of Investigation and Research (DIR) v. Warner Music Canada Ltd.*, Case CT-97/3, 18 December 1997, 78 C.P.R. (3d) 321. See also Competition Bureau, IP Enforcement Guidelines, 2000, at 4.2.1.

432 *Sono Pro, Inc. v. Sonotechnique, Inc.*, 2007 Comp. Trib. 18.

Some other jurisdictions do not yet have practice on refusal to license but their competition agencies have adopted guidelines on how to apply their competition law to a refusal to license. One of these countries is Singapore. Its IPR Guidelines,[433] which also cover copyright, point out that, in line with what has been explained above (at 7.1), an intellectual property right does not necessarily create a market-dominant position.[434] As to abusive conduct, following a leveraging theory, the Guidelines identify the extension of dominance as a reason for concern.[435] Yet they also make clear that a refusal as such will not be considered an abuse. Only in "limited circumstances" where the right constitutes an essential facility might this be different.[436] Also, the Guidelines stipulate that in individual cases due consideration should be given to the impact on technology and innovation.[437] Although Singapore has not yet produced any practice with regard to refusal to license, the Guidelines tend in the direction of an application that will be in line with the practice under EU law.

In China, the fifth Draft IP Guidelines bring somewhat more precision to the criteria under which SAIC would deem a refusal to license an abuse of market dominance.[438] In line with international standards, the Draft first states that, generally, an unconditional and non-discriminatory refusal to license will not constitute a violation of competition law. Yet it is also stated that a refusal can be considered abusive if the IPR is essential for the licensee in the sense that the refusal would preclude the licensee from competing effectively in the market. On this point the Draft Guidelines do not require that this market be a secondary market; thus they abstain from explicitly mandating the application of a leveraging theory. As to the additional requirements for a duty to license, it is to be highlighted that the Draft IP Guidelines refrain from following the EU approach to require exceptional circumstances or, in particular, the prevention of the emergence of a new product. In sum, the Draft Guidelines would seem to provide more flexibility and eventually lead to the recognition of a duty to license even in a situation in which the petitioner of the patent only intends to duplicate the products of the right-holder offered in a downstream or related market.[439]

It is to be noted that competition-oriented compulsory licence systems are sometimes also integrated in the intellectual property legislation. However, such rules are usually found in patent legislation and not copyright legislation. One example of such a jurisdiction is Chile.

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433 CCS Guidelines on the Treatment of Intellectual Property Rights, *supra* n. 30.

434 *Id*., para. 4.2.

435 *Id*., para. 4.4.

436 *Id*., para. 4.6.

437 *Id*., para. 4.8.

438 SAIC's 5th Draft on AML Enforcement in the Field of IPRs, *available at:* http://chinaipr2.files.wordpress.com/2012/10/aba-china-aml-ip-guidelines-comments_finalpackage.pdf (in Chinese and English version).

439 In this sense see Wang & Bird, *supra* n. 65, p. 45 (criticising the departure from the EU standard in the light of the goal of promoting innovation).

There, Article 51, No. 1, of the Industrial Property Law provides the Competition Tribunal (*Tribunal de la Defensa de la Libre Competencia*) with the power to grant compulsory licences.[440] In China, the State Intellectual Property Office (SIPO) has issued Guidelines on compulsory patent licences granted on the basis of Article 49 of the Chinese Patent Act.[441] These Guidelines state that the grounds for the grant of such licences based on patent law includes the elimination of adverse effects on competition by anti-competitive conduct.

9.3.5 Duty to license as a defence against infringement claims

In jurisdictions that recognise a refusal to license as a possible form of abuse, difficult questions will arise regarding the conditions under which an alleged infringer can rely on a competition law obligation to license as a defence in infringement proceedings. These conditions influence the effectiveness of competition law, as can be illustrated in the light of extreme solutions. On the one extreme, jurisdictions could deny the defence as a matter of principle. This would mean that, as long as the right-holder is not ordered by competition agencies or courts to grant the licence, the petitioner of the licence would not be entitled to use the right. On the other extreme, jurisdictions could give broadest scope to the competition law defence by automatically dismissing the infringement claim for injunctive relief if the right-holder is under a duty to license as a matter of competition law. In the latter case, unilateral conduct rules would work just like a statutory licence that does not require a previous decision by any agency or court allowing the use.

Of course, these issues will only arise if the IP infringement court also has power to apply competition law. In a national system that concentrates enforcement in the hands of separate agencies or courts, the IP infringement court can at best stay proceedings and wait for a decision to be issued by the agency or courts that are competent to apply competition law.[442] Once such a decision is available, however, the IP infringement court that has stayed proceedings will have to decide on the conditions under which a decision that confirms a case of abusive refusal to license can be held against the infringement claim.

The *Global Yellow Pages v Promedia* case from Singapore demonstrates that such cases can easily arise in any jurisdiction. [443] In this case, the defendant tried to rely on competition law as a defence against an infringement claim. The High Court of Singapore did not grant the

[440] It is to be noted that the Competition Tribunal has so far not yet used this provision.

[441] SIPO, “Measures for Compulsory Licensing of Patent Implementation“, 1 May 2012. See also “Newly revised Measures for Compulsory Licensing of Patent Implementation to come into force”, IPR in China (21 March 2012), *available at:* http://www.chinaipr.gov.cn/newsarticle/news/government/201203/1285090_1.html.

[442] This was confirmed, for instance, by the Tunisian competition agency. In Tunisia, the Competition Council has exclusive competence to apply the Competition Act and to adjudicate competition cases.

[443] *Global Yellow Pages Ltd. v Promedia Directories Pte Ltd* [2010] SGHC 97. The case was on the unauthorised reproduction of the plaintiffs directories. The plaintiff sought an injunction based on copyright violation.

defence given the exclusive jurisdiction of the Competition Commission to decide on competition law violations.

In China, courts still have to confirm that defendants could rely on a competition law defence. Yet the power of Chinese courts to adjudicate issues of both IP and competition law may favour the recognition of such a defence. In *Founder v Procter & Gamble (P&G)*,[444] the defendant relied upon the prohibition of abuse of market dominance in the Anti-Monopoly Law against a copyright infringement claim. Yet the courts only applied copyright law to decide the case. In this case, Beijing Founder Electronics had filed a suit before the Beijing Haidian District People's Court accusing P&G of an infringement of Founder's copyright in the Qian-style of Chinese characters used for Founder's "Rejoice" product label and the packaging for Founder products. P&G used the same Qian-style characters for its own products. The defendant advanced two arguments against the claim: First, it argued against copyright protection of the Qian style, since this would allow the centuries-old art of calligraphy to fall into the public domain. Second, even if the style was copyrightable, Founder's refusal to license the copyright would amount to an abuse of market dominance. In December 2010, the District People's Court held for the defendant by recognising copyright protection of Founder only for the Qian font as a whole but not for individual characters. Therefore, the defendant was free to use these characters. On appeal, in July 2011, the Bejing Intermediate People's Court relied on an implied licence granted by Founder as a basis for confirming the dismissal of the law suit. Hence, by relying on copyright alone, neither of the courts had to address the competition law defence.

Under EU law, this question has not yet been dealt with. On the one hand, this is rather surprising since Article 102 TFEU is directly applicable in the Member States and has to be applied pursuant to Article 5 of Implementation Regulation 1/2003.[445] On the other hand, refusal-to-license cases have only reached the European Courts after decisions of the European Commission as a competition agency or on referral by the courts of the Member States. The latter could indeed refer questions on the conditions for bringing a so-called "Euro-defence" based on Article 102 TFEU in national IP infringement proceedings to the European Court of Justice. It was only most recently, at the beginning of 2013, that in the *Huawei* case, the Dusseldorf District Court (*Landgericht Düsseldorf*) of Germany[446] referred this issue to the ECJ.[447]

[444] See "Second instance trial opened for Founder v. P&G", ip.people.com.cn, 11 April 2011, *available at:* http://ip.people.com.cn/GB/152255/14399850.html.

[445] In this regard see also at (iii), above.

[446] Dusseldorf District Court (*Landgericht Düsseldorf*) of 21 March 2013, Case 4b O 104/12, (2013) *Gewerblicher Rechtsschutz und Urheberrecht* 614, also *available at:* http://openjur.de/u/617729.html. At the ECJ the

[447] Case C-170/13 *Huawei Technologies.*

Indeed, the conditions under which a competition law defence can be brought have so far been most intensively discussed in Germany. There, in the *Standard-Spundfass* case, the Federal Supreme Court still left this question explicitly unanswered since it was not relevant for deciding the case.[448] In the more recent *Orange Book Standard* case, however, the Federal Supreme Court found the opportunity to decide upon this most disputed question.[449] In this case, the defendant distributed rewritable compact discs (CD-Rs) in Europe and then was sued for infringement of the plaintiff's German part of a European patent that is essential for the technological standard used for CD-Rs (so-called Orange Book Standard). Against the plaintiff's claim for an injunction, the defendant tried to rely upon former Section 20(1) of the German Act against Restraints of Competition by arguing that the defendant was trying to impose discriminatory royalty rates on licensees. The Court left the question of whether the royalties were discriminatory open and rejected the defendant's reliance on Section 20(1) by stating that the defendant had in any case not fulfilled the procedural requirements for bringing such a defence. Thereby, the Court did not reject the availability of the competition law defence as such.[450] According to the Court, both the defendant who uses an intellectual property right without authorisation and the right-holder who rejects the offer to conclude a license agreement in contravention of Section 20(1) violate the law. This is why the Court followed the opinion also expressed by some lower courts and many voices in legal writing that, according to the general German law principle of good faith, the patent holder abuses his IP right if he seeks an injunction although he is under a legal obligation to grant a licence.[451] Yet the Court also obliged the petitioner of the patent to act in good faith. Therefore, the Court imposed two obligations on the defendant in IP infringement proceedings as conditions for bringing a competition law defence: first, before using the IPR, the petitioner must submit an unconditional offer to the patent owner that the latter cannot reject without violating competition law. Secondly, after the rejection, the petitioner must act as a faithful licensee. This includes a duty to pay or deposit reasonable royalty fees.[452] Under the first requirement of an unconditional offer, the petitioner for the patent risks losing his defence in particular if he submits his offer under the condition that a court will confirm that the intended use is covered by the patent claims.[453]

448 *Standard-Spundfass*, *supra* n. 129.

449 *Orange Book Standard*, *supra* n. 18.

450 *Id.*, para. 26.

451 Under German law, this is called the *dolo facit* defence, which derives from the Roman law principle of "dolo facit qui petit quod statim redditurus est", meaning that a person acts in bad faith if he claims what he, based on a different legal ground, would immediately have to give back.

452 *Orange Book Standard*, supra n. 449, para. 29.

453 *Id.*, para. 32. Another question is, as indicated in the *Huawei* referral decision by the Dusseldorf District Court (*supra* n. 446), whether the requirement of an "unconditional offer" would also exclude the defendant's possibility to claim the invalidity of the patent.

At least initially, Dutch Courts seemed to be even less willing to consider a competition law defence. In a case also relating to the Orange Book Standard the District Court of The Hague denied reliance of the defendant on competition law as a defence against the infringement claim.[454] According to this Court, the defence would violate the fundamental principle of Dutch patent law that requires a licence or a court decision as an entitlement for using someone else's patent.[455] Hence, the defendant would be required to ask the patent-holder to grant the licence and, in case of a refusal, to sue the patent owner in court.[456] Moreover, the Dutch court explicitly rejected the adoption of the approach of the German Federal Supreme Court.[457]

In these decisions, the German and Dutch courts did not consider whether their approaches were compatible with EU competition law. Although EU law does not provide for any explicit rules in this regard, the European Court of Justice requires the Member States to respect a principle of both equivalence and effectiveness when they apply and enforce EU competition law.[458] According to the principle of equivalence, the Member States have to apply rules to the enforcement of EU competition law that are not less effective than those applicable in the case of a violation of national competition law. According to the principle of effectiveness, however, these rules must be such that they allow effective enforcement of EU law. Effectiveness of enforcement of EU law, however, is doubtful since the German and Dutch courts did not create any incentives that would prevent patent holders from refusing the licence and, thereby, violating competition law. Since national courts also have to apply Article 102 TFEU when they apply national competition law, these courts have to take the need of effective enforcement of European competition law into account.

These concerns caused the Dusseldorf Regional Court (*Landgericht Düsseldorf*) in March 2013 to refer the case to the ECJ. The German court was influenced by the recent opening of proceedings by the Commission against Samsung, in which the Commission expressed its preliminary view that an undertaking holding a standard-essential patent cannot seek an injunction without violating Article 102 TFEU after having entered into FRAND commitments[459] as long as the plaintiff is willing to negotiate a licence.[460] Already a year

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[454] The Hague District Court (*Rechtbank 's Gravenhage*) of 17 March 2010, Cases HA ZA 08-2522 and 316535/HA ZA 08-2524, *Koninklijke Philips Electronics N.V. v. SK Kassetten GmbH & Co. KG*, *available at:* http://www.eplawpatentblog.com/2010/March/Vonnis%20316533%20HA%20ZA%2008-2522%20en%20316535%20HA%20ZA%2008-2524%20%28Philips%20-%20SK%29.pdf.

[455] *Id*., para. 6.20.

[456] *Id*., para. 6.22.

[457] *Id*., para. 6.25.

[458] See, in particular, Case C-45/99 *Courage* [2002] ECR I-6297, para. 29; Joined Cases C-295/04 to C-298/08 *Manfredi* [2006] ECR I-6619, para. 62.

[459] FRAND commitments are entered into when patent owners notify standard-essential patents to a standard-setting organisation (SSO). Thereby, they commit to licensing at fair, reasonable and non-discriminatory (FRAND) terms.

earlier, in the Dutch *Samsung v Apple* case, the abovementioned District Court of The Hague went a step further by arguing that the owner of a standard-essential patent who has entered into a FRAND commitment is not allowed to claim an injunction as long as Apple, the defendant, is willing to negotiate the licence.[461] Yet this decision was not based on competition law but a contractual obligation arising from the FRAND commitment.

While the German and Dutch courts developed the abovementioned principles in patent infringement cases, it can be expected that they would equally be applied to copyright cases. In the more recent copyright case *Elektronischer Programmführer* already discussed above,[462] the German Supreme Court considered whether reliance on former Section 20(1) German Act against Restraints of Competition would be excluded in the light of the *Orange Book Standard* case. The Court answered the question in the negative. In particular, the defendant was not considered to be under a duty to deposit any royalty rates since the defendant argued a case of discrimination as compared to the treatment of the publishers of printed programme guides, who were granted licences for free.[463]

9.4 Refusal to license without vertical integration

As explained above, the doctrine according to which a refusal to licence can be considered an abuse of market dominance is regularly based on the theory of harm that the dominant right-holder tries to extend its dominance to a downstream or related market (leveraging theory). This requires that the right-holder also be active in this secondary market. However, refusals to license also occur if the right-holder is not vertically integrated (so-called non-practicing entities, NPEs). The question is whether in these cases as well a refusal to license can be considered anti-competitive.

In such cases, exclusion of the other undertaking from using the subject-matter of protection is not the ultimate objective of the right-holder. Rather, the refusal to deal and the injunction serve the purpose of extracting excessive royalty rates. The major examples from the patent field are cases where owners of standard-essential patents refuse to license at FRAND terms. In the field of copyright, refusals to license by CMOs are major examples of

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[460] See European Commission, Samsung – Enforcement of ETSI Standards Essential Patents (SEPs), Memo/12/1021, 21 December 2012, *available at:* http://europa.eu/rapid/press-release_MEMO-12-1021_en.htm.

[461] District Court of The Hague, (*Rechtbank 's Gravenhage*) of 14 March 2012, Cases 400367/HA ZA 11-2212, 400376/HA ZA 11-2213 and 400385/HA ZA 11-2215, *Samsung v Apple*, *available at:* http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBSGR:2012:BV8871.

[462] *Elektronischer Programmführer*, *supra* n. 381.

[463] *Id.*, para. 40.

this category of abuse. Therefore, some copyright laws react with a statutory duty of collecting societies to grant licences[464] and impose mechanisms of royalty control.

Cases where non-vertically integrated firms refuse to license for other reasons than for extracting excessive royalty rates are rare. An example is provided by the Russian *Microsoft* case, which has already been discussed above[465] and in which Microsoft, in 2008, had stopped selling the XP version of its Windows operating system. The Russian competition agency FAS did not consider this a violation of competition law. And indeed, Windows neither applied a strategy of extending market dominance to other markets, nor did it try to extract excessive prices. Rather, Microsoft wanted to promote newer versions of the Windows program.

A refusal-to-license case in a most classical copyright area with no vertical integration can be reported from Austria. There, in 1997, the Supreme Court had to decide a case in which the defendant film distributor with a market share in Austria of about 20% refused to license additional films in the future to the operator of a large cinema after the latter had not screened an earlier film as often as promised, which consequently caused a dispute of the two on the duty of the cinema operator to pay a contractually agreed fine.[466] The distributor declared that it would only supply additional films after the payment of this fine. This caused the cinema operator to sue the distributor for infringement of competition law. The Supreme Court (*Oberste Gerichtshof*) confirmed a duty to license on the part of the distributor. Although the distributor was not market-dominant in Austria according to general principles, the Court nevertheless confirmed market dominance based on a special rule of Austrian competition law which holds that an undertaking with superior market power in relation to its business partners has to be considered market-dominant. In particular, such superior market power is to be confirmed in a case in which the termination of existing business relations would result in major economic problems of the dependent undertaking. Indeed, the distributor held exclusive licences for certain films for the territory of Austria. Consequently, the Supreme Court even considered the distributor a “monopolist” with regard to such films. Since this statement was made without any analysis of the relevant market in the light of the criterion of substitutability, it is to be noted that the Court did not explicitly declare an individual film a relevant market, but only argued the absence of the possibility of the cinema operator to get the same films from other sources as a ground for “superior market power”. According to Austrian law, the refusal to license was therefore in need of a particular objective justification. Since the distributor had the possibility to sue the cinema operator for the contractual fine, the Court denied an objective justification.

[464] See, for instance, Section 11 of the German Law on Collective Rights Management (*Urheberrechtswahrnehmungsgesetz*).

[465] *Supra* at n. 50.

[466] Austrian Supreme Court (Oberster Gerichtshof), 9 September 1997, Case 4 Ob 214/97t, *Filmverleihgesellschaft*, (1997) *Medien und Recht* 328.

What is most interesting in this case is that the Court did not give any weight to the fact that the case was not a simple refusal-to-deal case but a case on refusal to license a copyright. No consideration was given to the standard for refusal to license a copyright under the *Magill* decision of EU law.

9.5 Discrimination by dominant right-holders

As has already become clear in the analysis above (at 6.5.3), refusal-to-license and discrimination cases are often difficult to distinguish. Especially price-discrimination can have effects on competition that are very similar to a refusal to license. Whether a right-holder refuses to license at any price or whether he is only willing to license at a price which makes it economically unreasonable for third party to take the license may not make much of a difference. This is especially so in so-called margin-squeeze cases. If a dominant right-holder grants licences to a subsidiary active in a downstream market at much lower royalty rates than to other firms in the downstream market this may have the same anti-competitive effects in the market as an outright refusal to license. Therefore, margin-squeeze cases, or a sub-category of them, are also called "constructive refusals to deal". Constructive refusal-to-deal cases may at first glance appear as pure excessive pricing cases[467] or as discrimination cases. Yet the theory of harm is best captured by understanding the pricing strategy as a substitute for a refusal to deal.

Also, discrimination cases overlap with refusals to license when the petitioner for the licence does not want to pay the discriminatory price, while the right-holder refuses to sell at lower prices. This becomes most apparent when the petitioner uses the subject-matter of protection without authorisation and then the right-holder claims an injunction. The refusal to deal is accordingly used to impose a higher and, sometimes, a discriminatory price. This is why cases such as that of the German Federal Supreme Court in *Orange Book Standard*[468] are discussed as both refusal-to-license and discrimination cases. The same can be stated about the German case in *Elektronischer Programmführer*.[469]

Discrimination cases are difficult since, on the one hand, it is to be accepted that dominant firms, like others, should not be under a general duty to deal with trading partners on identical terms. Competition laws of different jurisdictions therefore allow for an objective justification of discrimination either as a matter of statutory provisions or in their respective

[467] On this see, for instance, OECD, Competition Committee, Roundtable on Refusals to Deal, Note by the European Commission, 4 October 2007, OECD-Doc. DAF/COMP/WD(2007)100, para. 9 et seq., *available at:* http://ec.europa.eu/competition/international/multilateral/2007_oct_refusals_to_deal.pdf.

[468] *Supra* n. 18.

[469] *Supra* n. 381.

case-law. In the following, some additional discrimination cases affecting copyright-related markets will be reported.

In the Polish *Discovery* case, the TV channel operator Discovery Communications Europe, which was considered dominant by the Polish competition agency, agreed to grant special price discounts for the transmission of "Animal Planet" to cable operators that were associated with the All-Polish Association of Cable Television Operators.[470] From the very short report of the Polish competition agency it is not quite clear how the agency argued the dominant position of Discovery and what the market position of the All-Polish Association of Cable Television Operators was. The anti-competitive effect most likely existed in the exclusionary effect on the non-member cable operators. This raises the question whether the case should not be considered one on an abuse of the cable operators' association.

Microsoft won cases in which it was accused of having engaged in discriminatory pricing both in India and Russia. In the Indian case,[471] a customer of Microsoft had complained that the price of Windows operating system which it had ordered for the computers in its offices via dealers was almost twice as high as the price to be paid for the program if bought as part of a computer under an OEM licence, although the programs were identical. The customer alleged a case of discriminatory pricing by a dominant firm in violation of Section 4(2)(a)(iii) of the Competition Act. According to the informant, this pricing mechanism will force OEMs to preinstall Windows and thereby exclude competing manufacturers of operating systems. The Competition Commission, however, did not find any violation. Still by the Commission, Microsoft was considered being allowed to use its IPRs in the program as it likes in order to prevent piracy.[472] In order to distinguish between the two forms of distribution, Microsoft pointed out that it is the licence with the customer that determines the character of the product. Moreover, Microsoft argued that OEM versions are different in nature in that they provide efficiencies in the form of installation, testing, support warranty, activation, updates and stability.[473] The Commission accepted the arguments advanced by Microsoft, which applies the same pricing strategy worldwide.[474] In the Russian case, the FAS held that the charging of different prices for Microsoft's operating system run on notebooks and webbooks was economically and technically justified.[475]

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470 UOKiK, decision of 14 May 2007, Case DOK-59/2007, *Discovery Communications Europe*, Annual Report 2007, p. 17 et seq.

471 *Singhania &Partners LLP v. Microsoft Corp. and Embee Software Pvt. Ltd.*, Case No. 36 of 2010 – CCI Order of 22 June 2011, *available at:* http://www.cci.gov.in/May2011/OrderOfCommission/SinghaniaMainOrder050711.pdf.

472 *Id.*, para. 6.

473 *Id.*, para. 9.

474 *Id.*, para. 17.

475 *FAS v Microsoft*, *supra* n. 50.

9.6 Predatory pricing among right-holders

Just like other undertakings, dominant right-holders may engage in predatory pricing to exclude smaller competitors from the market. In several jurisdictions, predatory-pricing cases related to the newspaper industry.

In the Polish *Marquard* case, a dominant publisher of a sports newspaper applied a predatory pricing strategy against a smaller competitor in the region of Silesia.[476]

In the French *Amaury* case, competition enforcers have most recently dealt with predatory pricing allegations brought against a publisher of a sports newspaper.[477] For a long time, the press group Amaury has been the publisher of France's only daily sports newspaper "L'Equipe". In November 2008, another publisher launched a second nationwide sports daily newspaper under the title "Le 10 sports" and sold it at only € 0.50. Amaury finally decided to bring its own low-cost newspaper – "Aujourd'hui Sport" – to the market. This gave rise to the competition law complaint of the publisher of "Le 10 sports" by the end of 2008, in which Amaury was accused of abuse of dominance. In particular, it was argued that Amaury had offered extremely low prices to advertising customers and made offers for placing simultaneous advertisements in "L'Equipe" and "Aujourd'hui Sport". When the former Competition Council (*Conseil de la concurrence*) made dawn raids to search the offices of Amaury, Amaury seised the Court of Appeal of Paris to protect its press secrecy. The decision of the Court of Appeal in favour of Amaury, in which the Competition Council was ordered to hand back all documents it had found, was however reversed by the *Cour de cassation* in January 2012. Then, on 31 August 2012, the Court of Appeals confirmed the legality of the dawn raids. The Court ultimately held that the dawn raids were the only means to find out whether Amauray had effectively violated competition law and that the available evidence on the conduct of Amauray was sufficient to justify the dawn raids.

In Austria, Mediaprint, the major newspaper publisher, controlling more than 80% of all newspaper sales in the country, was accused of below-cost pricing strategies in the Federal State of Tirol to the disadvantage of Moser, the publisher of a local newspaper, which controlled 61.7% of the newspaper market in Tirol.[478] Indeed, the prices charged for Mediaprint newspaper subscriptions in Tirol were below 50% of the prices charged in other parts of the country. Mediaprint argued against market dominance and tried to justify low prices by the objective of building up a larger stock of subscriptions that would make

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476 UOKiK, decision of 12 June 2006, *Marquard Media (MMP)*, Annual Report 2006, p. 18.

477 See "L'enquête de l'Autorité de la concurrence sur les pratiques commerciales de l'Equipe aura bien lieu", *avosports*, 7 September 2012, *available at:* http://www.avosports.fr/index.php?option=com_content&view=article&id=346:lenquete-de-lautorite-de-la-concurrence-sur-les-pratiques-commerciales-de-lequipe-aura-bien-lieu&catid=36:actualitesjurisprudentielle&Itemid=53.

478 See the final decision of the Austrian Supreme Court (*Oberster Gerichtshof*), 5 December 2007, Case 16 Ok 5/07, *Mediaprint*, *available at:* http://www.ris.bka.gv.at.

investment in the creation of a home delivery system in Tirol economically viable. On appeal, the first-instance decision was rejected since it was not in line with the orders applied for by the plaintiff. Yet, in conformity with the first-instance decision, the appeal court nevertheless defined the relevant market as the newspaper market of Tirol and confirmed market dominance of Mediaprint, based on the presumption of market dominance of Austrian law at a market share of 30% (now Section 4(2), No. 1, Cartel Act 2005). According to the appeal court, Mediaprint had not successfully rejected the presumption. The fact that Moser held a much larger market share in the regional market of Tirol was not considered sufficient, since market dominance can also arise from superior financial resources. Also, the appeal court confirmed a prima facie case of below-cost pricing, given the fact that Mediaprint was consecutively raising prices in other parts of the country, while prices were lowered in Tirol. Yet, the case was settled and the Mediaprint agreed that it would not offer prices that would lead to a price level in Vienna that was more than 27% higher than that in Tirol. Some years later, Mediaprint filed a request to have the court settlement amended. The court settlement in fact allowed such an amendment in the case of a significant change of the market circumstances. Mediaprint argued that Moser had meanwhile started to sell a new tabloid in Tirol that directly competed with the defendant's nation-wide tabloid while charging much lower prices. Hence, Mediaprint in its turn now accused Moser of selling below costs. The first instance court rejected the request to amend the settlement, holding that the fact that Moser was now selling an additional newspaper would not justify lowering prices for the Mediaprint newspaper below the 27% threshold. Yet the Austrian Supreme Court declared the former settlement invalid due to a change of the market circumstances. First, it stated that Mediaprint still held a market-dominant position since the market shares and the financial strength of the firms had remained stable. But the Court also held that the former defendant now needed more economic freedom to respond to the market entry of the new newspaper by being able to lower the prices of its newspapers below the threshold fixed in the settlement. After this decision, Mediaprint tried to act against Moser with allegations of predatory pricing. However, the case was closed in March 2008 by the first instance Cartel Court and the Federal Competition Authority when Moser decided to withdraw its tabloid from the market.[479]

In the United Kingdom, the Office of Fair Trading (OFT) confirmed a case of predatory pricing among newspaper publishers regarding advertising space in Aberdeen under the Competition Act 1998.[480] On this case, the OFT had to decide twice. The first decision was set aside by the Competition Tribunal by a decision of 19 March 2002, in which the Tribunal criticised the market definition by the OFT. Yet, in its second decision of 16 September 2002,

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[479] Federal Competition Authority (*Bundeswettbewerbsbehörde*), 'Kampfpreisunterbietung Medien', Press Release, Case BWb/M-128.

[480] Office of Fair Trading, Decision of the Director General of Fair Trading No. CA98/14/2002 of 16 September 2002, *Predation by Aberdeen Journals Ltd*, *available at:* http://www.oft.gov.uk/shared_oft/ca98_public_register/decisions/aberdeen2.pdf.

the OFT maintained its conclusion based on the guidance provided by the Tribunal. The complainant in this case was the publisher of a free-of-charge newspaper who argued that Aberdeen Journals had charged prices significantly below market value for its own free-of-charge newspaper in order to exclude the complainant from the market. The complainant argued that Aberdeen Journals was thereby losing up to £ 1.0 million per year. The major part of the second decision is again dedicated to market definition. In the end the OFT defined the relevant market as that for "advertising space in the local newspapers concentrated on the Aberdeen market".[481] What is most important in this regard is that the OFT did not exclude paid newspapers. Both kinds of newspapers compete for the same advertising customers. Indeed, Aberdeen Journals started its free-of-charge newspaper only after the complainant's newspaper had entered the market, in which Aberdeen Journals so far had held a 100% share, as a means to defend its own advertising business. The OFT finally imposed a penalty of more than £ 1.3 million. This decision was subsequently confirmed by the Competition Appeals Court, which only lowered the penalty to £ 1.0 million.[482]

Another predatory pricing case in the newspaper industry can be reported from South Africa. In the on-going *Media 24* case,[483] the dominant publisher of two community newspapers – Vista and Gouldveld Forum – in the Goldfields area of the Free State was accused by another community newspaper publisher of having lowered the advertising rates for one of the two newspapers below average variable costs. The Commission concluded that Gouldveld Forum was used as a fighting brand to prevent competition with the larger and more lucrative Vista title. The Commission not only analysed the case as one on predatory pricing according to Section 8(d)(iv) Competition Act, but also under the broader exclusionary-conduct rule of Section 8(c) Competition Act, since the complainant had to stop publishing its community newspaper, leaving Vista and Gouldveld Forum as the only community newspapers in the region. The Commission referred the case to the Competition Appeal Tribunal in November 2011 with a request to make the dominant publisher pay a penalty of 10% of its annual turnover.

Predatory pricing allegations were rejected in a case relating to the market for the distribution of music discs, cassettes and CDs by the Competition Commission of Cyprus in 2003.[484]

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481 *Id*., para. 131.

482 Competition Appeal Tribunal, 23 June 2003, Case 1009/1/1/2, *Aberdeen Journals Ltd v OFT* [2003] CAT 11.

483 See Competition Commission, Press Release of 31 October 2011, *available at:* http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/FINAL-MEDIA-RELEASE-Media-24.pdf.

484 Commission for the Protection of Competition of Cyprus, *Michalis Neokleous v All Records Ltd*., Annual Report 2003, p. 21.

9.7 Exclusionary conduct by right-holders restricting intra-brand competition

Exclusionary conduct is typically directed against competitors of the dominant firm. Yet in a very peculiar case from Brazil, Microsoft was prosecuted for conduct that restricted intra-brand competition for Microsoft products.[485] The case also contains elements of discriminatory conduct. In Brazil, Microsoft had developed a distribution system under which "Large Account Resellers" (LARs) were identified as resellers to important corporate customers in defined geographic areas. Although Microsoft had accepted multiple resellers in some areas depending on whether the resellers met the LAR requirement, in the Federal District of Brasilia, TBA was chosen as the only reseller. After Microsoft had informed the Federal Government that TBA would be the only authorised distributor of Microsoft products, the Federal Government purchased from TBA outside the usually practised tender procedures. CADE found that Microsoft was dominant in the relevant market of sale and licensing of software and computing services to the federal government. According to CADE, the imposition of an exclusive reseller was unlawful since this excluded intra-brand competition in a market in which inter-brand competition did not sufficiently work. In the framework of assessing whether Microsoft could rely on an objective justification, CADE rejected Microsoft's argument that it had selected its resellers according to neutral qualifications. According to CADE, Microsoft had constructed these criteria in such a way as to assure that only TBA could qualify and, thereby, was seeking to evade bidding procedures. While Microsoft was accorded the freedom to establish a distribution system of its choice, CADE also made clear that this does not include "the prerogative to do it in a discriminatory manner." The case obviously raises diverse aspects of anti-competitive conduct. CADE finally held that Microsoft unlawfully restricted competition in the sense of Article 20(I), abused its market-dominant position in the sense of Article 20(IV) and entered into an agreement that was designed to secure an improper advantage in public procurement in the sense of Article 21(VIII) of the former Competition Law No. 8.884 (1994). Therefore, Microsoft was ordered to pay a fine of 10% of the turnover made with products sold to the government, and TBA a 7% fine.

9.8 Monopolization without dominance – False assertion of IPRs and sham litigation

As indicated above, the unilateral conduct rules of some jurisdictions may also be applied in cases where there is no market-dominant position. One interesting set of cases in which competition law may play a role in this regard are those of false assertion of intellectual property rights. Right-holders can distort competition by sending warning letters to competitors relating to IP infringement although they are fully aware that there is no infringement. These cases are most important in the field of patents, where unintentional infringements are frequent and the question of whether a patent is violated is often

[485] *Microsoft/TBA*, *supra* n. 268.

extremely difficult to answer. Such distortions of competition do not require that the firm actually be dominant. Therefore, some jurisdictions may apply unfair competition law, and others, such as Germany, general tort law to provide adequate protection.

Brazil provides an example of such conduct relating to copyrights.[486] In the *Box 3* case, a company active in the advertising business (Box 3) filed a script for the format of a TV show designed to promote the sale of products with the national library for copyright registration. After the copyright filing, which has no effect on the acquisition of copyright protection, the company and its managers filed nine law suits against competitors for copyright infringement. All final decisions were against the plaintiff, holding that TV formats cannot be protected by copyright law. However, some preliminary injunctions were issued and some competitors were driven out of the market. CADE held that Box 3 had violated the former Competition Act No. 8.884 (1994) that prohibited in its Articles 20 and 21(IV) and (V) the restriction of access of new firms to the market as well as the creation of impediments to the development of competitors. CADE imposed a fine of 5% of the annual turnover on the firm and ordered that a note be published in the most-sold national daily newspapers informing the public that the company and its managers had been condemned by CADE for having conducted sham litigations.

Of course, abusive use of procedures before IP offices and courts also has to be taken into account if the right-holder is dominant. In this regard, the Korean Guidelines on Abuse of Market Dominance provide that a dominant undertaking that hampers other enterprises' business by unfairly using administrative or judicial procedures such as patent infringement law suits that relate to intellectual property rights violates the abuse prohibition.[487]

9.9 Refusal to deal by dominant distributors

Refusals to license are not the only form of refusals to deal that negatively affect competition in copyright-related markets. While in refusal-to-license cases, competition law restrains the exclusivity of the IPRs, there are other refusal-to-deal cases in which competition law intervention is designed to promote access of works to the market. These are the cases in which dominant holders of facilities that are essential for the distribution of works refuse access of works to these facilities and thereby prevent these works from reaching consumers. Since there are many bottlenecks, often due to technological factors, in the distribution of copyrighted works, such cases are relatively frequent. They can affect different sectors.

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[486] CADE decision of 15 December 2010, Case 08012.004283/2000-40, *Box 3 Video e Publicidade*, *available at:* http://www.cade.gov.br/temp/t272201321041699.PDF.

[487] Korean Fair Trade Commission, Guidelines for the Review of the Abuse of Market Dominant Position, 6 October 2009, at IV.3.D.(6).

9.9.1 Centralised licensing platforms

In Japan, for instance, the JFTC acted against a group of five phonogram companies that had joined together to establish an electronic platform for the distribution of their own ring tones. At the same time they refused to admit other providers of ring tones to the platform. The JFTC identified a market share of the platform of about 50%, affirmed a violation of Article 19 of the Antimonopoly Law in the form of a joint refusal of trade and issued a cease-and-desist order.[488]

A similar case with a different outcome can be reported from Sweden. In the *Bonus* case decided by the Market Court,[489] the defendant (Bonus Presskopia) acted as an intermediary between right-holders and users concerning the reprographic reproduction of works for schools, enterprises, public authorities etc. The Court held that Bonus Presskopia did not act in an abusive way when it refused the request of two smaller companies to become members.

9.9.2 Dominant newspaper distributors

Under EU law, the major case belonging to the category of dominant distributors of copyright-protected content is *Bronner*.[490] This decision of the ECJ is usually cited as the leading case on refusal to deal that is not an IP case. Yet the case deals with a dominant distributor of copyrighted works, namely, a newspaper publisher that ran the only nation-wide doorstep newspaper distribution system in Austria. A competing newspaper publisher was seeking access to this system by relying on the European prohibition of abuse of dominance. Based on the *Magill* requirements, the European Court of Justice decided against a duty to deal since access to the distribution system was not required for selling the newspapers, nor was it impossible to duplicate the distribution system.[491]

A case with great similarity to *Bronner* was more recently decided by the South African Competition Tribunal. In *Mandla-Matla Publishing*,[492] the complainant was once the publisher of the only newspaper in IsiZulu language. This publisher entered into an agreement with Natal Newspaper, the predecessor of Independent Newspapers, the respondent company. In this agreement Natal promised to provide services (printing,

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488 JFTC decision of 26 April 2005, Case No. 3 (Kan) of 2005, *Toshiba EMI Ltd.*, summary of the case *available at:* http://www.tomeika.jur.kyushu-u.ac.jp/result.php?s=c0d7a3066c9853abfb365c4dac87d7d7&c=fd1c5bf13665ac3b4f89460d5c11c80b.

489 Market Court (*Marknadsdomstolen*), decision of 17 June 1999, Case MD 1999:13, *Bonus Presskopia*.

490 *Bronner*, *supra* n. 343.

491 See also the final decision of the Austrian Supreme Court (*Oberster Gerichtshof*), 15 May 2000, Case 16 Ok 4/00, *available at:* http://www.ris.bka.gv.at (confirming that there was no abuse since the refusal did not exclude the possibility of the competitor to sell its newspapers in the market).

492 *Mandla-Matla Publishing (Pty) Ltd v Independent Newspapers (Pty) Ltd*, Case No. 48/CR/Jun04, Decision of 6 November 2006, *available at:* http://www.comptrib.co.za/cases/complaint/retrieve_case/581.

distribution, sale of advertising, administration of an editorial department) to the complainant, which remained responsible for the editorial policy. In 2002, the complainant terminated the agreement and replaced it by a similar agreement with Natal Witness Printing and Publishing. The complainant communicated the new deal with Natal Witness to the respondent only after the conclusion of this deal in October 2001. The respondent then held back information, which it considered as proprietary, on the distribution of the newspaper, especially in the Durban area, including names and addresses of agents, and would only act if the complainant and Natal Witness agreed to enter into a distribution agreement for certain districts. After 1 April 2002, the respondent launched its own IsiZulu newspapers as a direct competitor of the complainant and informed its country distributors that they were not permitted to distribute any other IsiZulu newspaper than the respondent's one. The complainant brought two complaints regarding (1) the withholding of information (information complaint) and (2) the exclusivity agreement with distributors (exclusivity complaint). The Competition Commission decided against the complainant, who then brought the case to the Tribunal. The Tribunal stated that by 2005 the respondent's newspaper had become the one with broader circulation and more sales (66% as compared to complainant's 34%). This outcome was held to be positive, since there were now two newspapers and the complainant was compelled to build up its own distribution network in the Durban region. Therefore, the Tribunal even considered the claim to grant access to respondent's distribution system as "anti-competitive". Such claims can only be justified under an essential-facilities doctrine.[493] In the *Mandla-Matla* case, however, the refusal to grant access had even promoted competition.[494] The complainant's theory of harm was built on the extension of market dominance from the distribution market to the newspaper market.[495] In addition, the Tribunal found an implicit theory according to which the respondent had leveraged market dominance in the market for many other newspapers to convince distributors not to sell the complainant's newspaper.[496] Still, the Court was not able to identify any anti-competitive effect as required for a competition law violation since the respondent's conduct had indeed enhanced competition.[497] The failure to show any anti-competitive effect necessarily led to the dismissal of the complaint.[498]

In France, control of dominant newspaper distributors has been a major issue of competition law enforcement for quite some years. Most recently, in 2012, the Competition Authority

[493] Id., para. 53.

[494] Id., para. 54.

[495] Id., para. 56.

[496] Id., para. 63.

[497] Id., para. 99.

[498] Id., para. 100.

rendered its decision in the *Presstalis* case.[499] In France, the sale of newspapers by individual numbers is organised on three levels: On the first – upper – level, on behalf of the publishers, press distribution services (“*messageries de press*”) deliver newspapers to wholesalers (“*dépositeurs de presse*”). On the second – intermediary – level, the wholesalers deliver the newspapers to retailers (“*diffuseurs*”). And on the third – lower – level, newspapers are sold by retailers to consumers. Presstalis is a press distribution company that is also active on the second level as a newspaper wholesaler. In the complaint brought by the national press wholesalers’ association it was argued that Presstalis was dominant on the first level and that competing wholesalers would be dependent on Presstalis. In the complaint, a series of abuses was argued. The Competition Authority only confirmed a few of them, of which two shall be mentioned in the following: first, the Authority discovered clauses in the agreements with wholesalers that were designed to prevent the latter from establishing direct relationships with the publishers and, thereby, from entering into competition with Presstalis on the first level. Secondly, the Authority criticised a clause that allowed Presstalis to terminate the contract and thereby to stop supplying wholesalers without any reasons and on very short notice (48 hours). According to the Authority, this contractual right could be used by Presstalis as a threat to deter wholesalers from trying to enter into negotiations with competing press distribution services. The Authority concluded the case by a commitment decision. Thereby, Presstalis entered into a commitment not to terminate a contract with wholesalers that directly contract with publishers unless this significantly jeopardised the proper performance of the distribution service provided by Presstalis to the wholesaler. Presstalis also accepted the condition of not terminating a contract without three months’ notice, except in cases of a material breach of the wholesaler’s contractual obligations. By also addressing the issue of termination, the Competition Authority used the prohibition on abuse of dominance to control conduct in the form of a refusal to deal.

In Greece, the Competition Commission had to decide on an alleged abuse of market dominance by the only two Greek newspaper distributors.[500] In this *Argos/Europi* case, giving rise to two judgments, the complaint was brought by a small newspaper retailer on the island of Crete who was excluded by the distributors from their selective distribution system for not meeting certain minimum standards of distribution. Since there was no evidence for any collusion between the two distributors, the Commission relied on the

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[499] French Competition Authority (*Autorité de la concurrence*), decision no. 12-D-16 of 12 July 2012, *available at:* http://www.autoritedelaconcurrence.fr/user/avisdec.php?numero=12D16 (original French version). See also Autorité de la concurrence, **“**The Autorité de la concurrence has obtained commitments from Presstalis, a press distribution service, that improve the functioning of competition in various press distribution markets”, Press Release of 12 July 2012, *available at:* http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=418&id_article=1947.

[500] Hellenic Competition Commission, *Argos S.A./Europi S.A.*, Case 252/III/2003, *available at:* http://www.epant.gr/img/x2/apofaseis/apofaseis406_1_1194342855.pdf; Case 519/VI/2011, *available at:* http://www.epant.gr/img/x2/apofaseis/apofaseis670_1_1331818086.pdf.

concept of collective dominance of the two. Yet the Commission did not find any abuse, but held that the termination of the agreements with the complainant was justified by legitimate business reasons.

9.9.3 Dominant cable and other broadcasting network operators

In a highly politicised case, the Competition Commission of India acted against a group of cable TV operators in Punjab that had obstructed the transmission of the programmes of a regional TV news channel (Kansan News).[501] In its complaint, the informant Kansan News reported that the transmission was disrupted on several occasions for political reasons. On one occasion, the transmission was disturbed when Kansan reported on the Finance Minister of Punjab, who had to resign from government due to some scandals. Since December 2010, the audio has been completely muted. Also, the cable slot was altered without prior notice. When Kansan complained by sending a legal notice to the cable operators, they cancelled the retransmission contract without giving reasons. Kansan alleged that the cable operators tried to harass the informant, who repeatedly had criticised the ruling political party in Punjab. In its order, the CCI first considered cable TV service a distinct product in relation to other platforms for TV transmission.[502] It explained that the characteristic features of cable TV are different from direct-to-home (DTH) digital compression TV due to the lack of high definition quality of cable TV[503] and also with regard to the limited geographical reach of cable TV.[504] Moreover, cable TV does not allow any choice as to the channels provided, whereas DTH services offer packages of different channels.[505] Furthermore, the CCI identified Punjab and Chandigarh as the relevant geographic market[506] and found that the group of cable operators had to be considered a dominant player with a substantial market share.[507] As to the abuse, the CCI disregarded the cable operators’ argument that they were not under a regulatory duty to carry any specific channel. Rather, the CCI relied on evidence that the cancellation could not be justified by insufficient interest of the audience. Indeed, the CCI stated that the informant’s channel was “effectively wiped out from the entire relevant market”.[508] The Commission concluded that the cable TV operators had abused their market dominance by denying market access (Section 4(2)(c) Competition Act)[509] and by limiting the provision of TV services (Section

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501 *Kansan News Pvt. Ltc. v. Fast Way Transmission Pvt. Ltd. et al.*, Case No. 36/2011 – CCI Order of 2 September 2012, *available at:* http://www.cci.gov.in/May2011/OrderOfCommission/362011.pdf.

502 *Id.*, para. 6.2.2.

503 *Id.*, para. 6.2.4.

504 *Id.*, para. 6.2.5.

505 *Id.*, para. 6.2.6.

506 *Id.*, para. 6.2.10.

507 *Id.*, para. 6.3.7.

508 *Id.*, para. 6.4.11.

509 *Id.*, para. 6.4.12.

4(2)(b)(i) Competition Act).[510] In contrast, the Commission affirmed neither the allegation of excessive pricing, since there was no indication what a fair price would have been,[511] nor that of a limitation of the provision of cable services.[512] Due to the gravity of the contravention, the CCI imposed a penalty of 6% of the average annual turnover of the cable TV operators for the preceding three years.[513] This case differs from the cases discussed before by the fact that the CCI did not rely on a leveraging theory for arguing abuse. Whether the cable TV operators were vertically integrated by also running TV channels was not even considered. From a policy perspective, it is most interesting to see that the CCI intervened to provide protection against a restraint of competition that was not motivated by business considerations but political reasons.[514] The case shows that a competition agency, by protecting competition in the market, can also promote more general political values and democracy in the given country.

A case relating to cable TV can also be reported from Costa Rica. There, the competition agency confirmed an abuse of market dominance by an undertaking that had denied access of a broadcasting company specialised in satellite and Internet broadcasting to its cable network in one region of Costa Rica. The agency imposed a duty to grant access to the network at non-discriminatory conditions as well as the highest possible fine of 410 minimum wages.[515]

The State Anti-monopoly Service of Georgia (SASG) acted against the dominant TV station TVR, which held a market share of 77%, on the basis of abuse of market dominance. This decision was based on a complaint of the smaller competitor Caucasia, which held a market share of 23%. Caucasia complained that TVR had interrupted the transmission of a Davis Cup tennis match of Caucasia.[516] The telecommunication service was provided by Telecentri, which obviously acted in accordance with an agreement with TVR which, according to SASG, had a discriminatory character to the disadvantage of Caucasia.

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[510] *Id.*, para. 6.4.15.

[511] *Id.*, para. 6.4.14.

[512] *Id.*, para. 6.4.17.

[513] *Id.*, para. 7.1.

[514] Indeed, there is no bright line between economic and political motivation. In the *Kansan* case, the cable operators were obviously very close to the ruling party in Punjab. Yet the cable operators by obstructing the service of Kansan may also have tried to please the government as an attempt to maintain political support for its existing dominant position in the cable service market.

[515] Comisión para Promover la Competencia, decision 01-2011 of 25 January 2011, *Cable Visión de Costa Rica v. Empresa de Servicios Públicos de Heredia*, available at: http://www.ciberleycr.com:82/ciberinfo/Comisi%C3%B3n%20de%20Promoci%C3%B3n%20de%20la%20Competencia/JURISPRUDENCIA%20COPROCOM%202012/JURISPRUDENCIA/A%C3%91O%202011/VOTO%2001-2011%20RESOLUCI%C3%93N%20FINAL%20CABLE%20VISION-ESPH.pdf.

[516] See Ketevan Lapachi & Mamuka Tivishvili, Georgia, in: CUTS International, *Competition Regimes of the World*, 2006, p. 383, 385.

Another, rather unusual case can be reported from El Salvador.[517] This case was not on access of content providers to a cable network, but on the exclusion of competing cable TV providers by refusing access to residential homes that were controlled by a cable network operator. Salazár Romero, a construction and urbanisation company and developer of residential areas, had entered into an exclusivity agreement, according to which the residents of the future residential buildings would only have access to the cable services of Boss Visión. When the service employees of the competing cable providers Muvie Cable and Amnet tried to enter the premises, where construction was going on, to install technical equipment for interconnection needed by a total of 5,373 potential future residents, the employees of Salazár Romero refused such access. Consequently, the competing cable providers independently complained to the competition agency. The agency assessed the case as one on exclusionary abuse of dominance (Article 30(a) Competition Act). In this respect, the agency entered into a very thorough analysis of the relevant market. Thereby, it took into account the existence of different kinds of technologies and networks, such as cable and satellite.[518] However, the agency recognised that, from a perspective of demand-side substitutability, satellite distribution causes much more costs for consumers than cable and, therefore, satellite provision is only attractive in regions that have not yet been covered by cable networks. Accordingly, it excluded satellite provision from its definition of the relevant markets.[519] Also, the competition agency looked at potential competition from a perspective of demand-side substitutability. But due to high entry barriers, it finally defined the relevant product market as the one for the provision of subscription TV through cable only.[520] Furthermore, the agency pointed out that Romero Salazár and Boss Visión belonged to the same group of companies, having the same physical person as a major share-holder who exercised control over both companies, and that thereby the two companies followed a common business strategy.[521] The agency concluded that the two companies jointly held a dominant position in the relevant geographic and product markets.[522] In this regard, the agency argued that due to the combination of the property in the premises with the cable operation the group of companies was able to exclude competing companies from access to final consumers, namely, the future residents. Accordingly, the agency defined the geographic markets extremely narrowly, namely, as the markets for the premises owned by Salazár Romero, and furthermore concluded that in these markets the two companies jointly

[517] Superintendencia de Competencia, Decision of 8 November 2007, Case SC-017-D/PA/NR-2006, *Muvie Cable and Amnet v. Salazar Romero and Boss Visión*, *available at:* http://de.slideshare.net/scompetencia/sc-017-d-pa-nr-2006-081107-1030.

[518] *Id*., p. 44.

[519] *Id*., p. 45 et seq.

[520] *Id*., p. 49.

[521] *Id*., pp. 56-60.

[522] *Id*., pp. 62 et seq.

held a monopoly for the provision of subscription TV services.[523] With regard to abusive conduct, the agency concluded from available evidence that the two companies had indeed excluded competing cable providers from entering the market they controlled through their monopoly position.[524] Finally, in addition to a cease-and-desist order, the agency imposed a fine of US$29,820 on Salazár Romero and of US$4,260 on Boss Visión.

A similar case from Ireland shows that exclusive agreements between pay-TV providers and residential home developers are a widespread competition law problem. In 2009, the Irish Competition Authority held that such an agreement, which affected homes in the Dublin area, will not violate the prohibition of restrictive agreements under Section 4(1) Irish Competition Act (2002) and former Article 81 EC (now Article 101 TFEU), if it only allows for exclusive provision for a period of time no greater than two years.[525] Also, the Competition Agency was unable to identify any illegal unilateral conduct, since the pay-TV provider was not held to be dominant. Since, according to abovementioned requirements, the agreement before the agency was not considered anti-competitive, the Competition Authority closed the case. What is more important for understanding the different legal assessment is that, in contrast to the case from El Salvador, the two parties to the exclusive agreement did not belong to the same group of undertakings.

9.9.4 Dominant film distributors

An interesting refusal-to-license case concerning the distribution of films to cinemas can be reported from Austria.[526] In this case, operators of cinemas sued a film distributor in Austria that also ran a considerable number of multiplex cinemas in the country for abuse of market dominance. It had done so, they alleged, by not licensing most popular movies to its competitors, by delaying confirmation of orders, which made it more difficult for cinemas to fix their programmes, by delaying the supply of advertising material and refusing the delivery of preview versions of the films etc. In its decision, the Austrian Supreme Court confirmed the first-instance decision against the defendant distributor. A major issue in the case was market definition and the existence of market dominance, since there were quite a number of distributors active in the Austrian market. In contrast to an earlier decision of 1997, where the Supreme Court held that individual films create a monopoly of the right-holder, without entering into a detailed market analysis (see at 9.4, above), the Court here analysed the case in the light of demand-side substitutability. Based on this, the Court confirmed the view of the first instance court according to which cinemas compete with each other based on the

[523] *Id*., pp. 64 et seq.

[524] *Id*., pp. 80 et seq.

[525] Irish Competition Authority, Decision No. E/09/001 of 14 August 2009, Case COM/06/06, *Alleged anticompetitive practices in the provision of pay-TV infrastructure and services to apartment developments*, *available at:* http://www.tca.ie/images/uploaded/documents/e_09_001_pay-tv_exclusivity_decision_note.pdf.

[526] Austrian Supreme Court (*Oberster Gerichtshof*), 4 April 2005, Case 16 Ok 20/04, *available at:* http://www.ris.bka.gov.at.

attractiveness of the programme. Therefore, the plaintiffs that all operated cinemas of a larger size depended on supply by the defendant distributor.[527] As to the question of abuse, it is to be pointed out that the first instance court refused to give special weight to the fact that the refusal to supply related to copyrighted material. According to this Court, intellectual property rights do not deserve more protection than physical property and, therefore, no higher threshold for competition law intervention was required.[528] The Supreme Court did not question this standard. Rather, it confirmed that the first instance court correctly found that there was no objective justification for the refusal to supply and discriminatory behaviour.

This case was followed by some other cases with similar facts. In a decision of 2008, the Austrian Supreme Court (*Oberster Gerichtshof*) had to deal with the question of whether a film distributor was under a duty to agree to the supply of a film that to be released with a total of at least 50 copies in Austria to a cinema operator on an order that was submitted to the distributor four weeks before the official start of the film.[529] The plaintiff ran a cinema with only two screens, where it showed blockbuster movies. The defendant distributor was by far not the most important one in the Austrian market; it only held a share of 9.5% of all movies performed in Austrian cinemas in 2007. The defendant was also operating several cinemas; one of them was situated 22 km away from the plaintiff's cinema. The conflict between the two arose when the defendant released the movie "Asterix bei den Olympischen Spielen". The defendant refused to deliver a copy of this movie, referring to the limited number of copies (71) and the low ranking of the plaintiff in the list of profitability of Austrian cinemas. Yet, according to the facts before the court, the plaintiff could expect enough viewers to cover the costs of the production of an additional copy. The first instance court held that the defendant was both dominant for the blockbuster movie and that, given the profitability of performing the movie in the plaintiff's cinema, there was no objective justification for the refusal. As in the earlier decision, the Supreme Court defined a blockbuster movie as a proper relevant market by using the concept of demand-side substitution. Hence, it was held that the defendant had a market share of 100%.[530] Hereby, the Court rejected the opposite view, according to which the relevant market has to be defined as the market of all movies of a particular genre. The Court argued that substitutability cannot be assessed in general terms, but has to relate to the concrete circumstances of the case in which a cinema operator may well have to rely on access to certain blockbuster movies to do business.[531] As regards the objective justification for the

[527] *Id.*, p. 13.

[528] *Id.*, p. 9.

[529] Austrian Supreme Court (*Oberster Gerichtshof*), 16 July 2006, *Asterix bei den Olympischen Spielen*, Case 16 Ok 6/08, *available at:* http://www.ris.bka.gv.at.

[530] *Id.*, at part 6.2.

[531] *Id.*, at part 6.4.

refusal, the Court in principle accepted that argument that delivery to an additional cinema may only redirect viewers from one cinema to another cinema without increasing the total number of viewers. Yet, in the light of past conduct of the defendant, the Court did not consider this argument as sufficiently substantiated by the defendant.[532] In yet another and more recent case the first instance Cartel Court (*Kartellgericht*) seemed to have made an even further step in controlling refusal to license by film distributors to cinemas. In a decision of 2011, this Court accepted commitments by Constantin Film, one of Austria's largest film distributors, according to which Constantin Film will be under a duty to deliver its films to all cinema operators.[533]

A film distribution case was also reported by the Latvian Competition Council.[534] There, the Competition Council acted against Forum Cinemas, a market-dominant film distributor that also operates cinemas. The Competition Council identified a number of unfair terms in the agreements with independent cinema operators, such as unfair remuneration systems, restrictions on advertising and requests to provide sales data that could be used by Forum Cinemas to its own advantage in competition with other cinemas. Although the Competition Council did not report any case of refusal to license, the case provides an example of exclusionary conduct by a vertically integrated dominant film distributor.

A very similar case was also dealt with by the Lithuanian Competition Council in 2010.[535] The alleged forms of abuse of market dominance of the vertically integrated dominant film distributor and cinema operator also included refusals to license. The Competition Council concluded the case in the form of a commitment decision.

Allegations of illegal refusal to license by dominant film distributors were rejected by the Croatian Competition Agency in a decision of 2011.[536] Based on its investigations, the Competition Agency found that the two distributors that allegedly had abused their market dominance applied objective economic criteria when they refused to supply individual movies to the complainant, an operator of a cinema in the city of Zadar.

More recently, in Switzerland the Competition Commission also investigated potential abuses regarding the distribution of cinematographic works in Lausanne and Geneva,

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532 *Id*, at part 7.6.

533 Cartel Court (*Kartellgericht*), 9 May 2011, Case 26 Kt 2. See also Bundeswettbewerbsbehörde (Federal Competition Authority), 'Vergabe von Filmkopien an Kinos', Press Release of 17 June 2011.

534 Latvian Competition Council, decision of 17 September 2012, Forum Cinemas, as reported by the Competition Council.

535 Lithuanian Competition Council, decision of 9 June 2010, Case no. 1S-98, *UAB Forum Cinemas*, Annual Report 2010, p. 19.

536 Croatian Competition Agency (CCA), decision UP/I 030-02/2008-01/80 of 24 February 2011, *Kino Zadar v. Blitz and Duplicato Media*, Annual Report 2011, pp. 29-31, *available at:* http://www.aztn.hr/uploads/documents/eng/documents/AR/Annual_Report_of_the_Croatian_Competition_Agency_for_2011.pdf.

without finding any violation of competition law. These investigations started after several complaints of cinema operators on the refusal of dominant distributors to license. Thereby, it was also alleged that the distributors acted under pressure from the company Pathé, the largest cinema operator in the two cities, to exclude smaller competitors from the market. Yet, according to the report of the Commission's Secretariat on its preliminary findings, there was dominance but no evidence of abusive conduct of the distributors. Since there are large, in part cultural, differences between the cinemas, the Secretariat held that the refusal to license certain films to individual cinemas was justified by legitimate business reasons.[537] With regard to Pathé, which holds a market share of 80% in the market on the Swiss side of Lake Geneva, the Secretariat identified market dominance, but did not find any evidence of abuse since the distributors did not confirm that Pathé had exercised any pressure on them.[538]

Films are also distributed in the form of videos and DVDs. A case relating to a refusal to supply video rental shops by a dominant distributor of film videos occurred in Estonia. This case is reported above (see at 8.3).

9.10 Exclusivity agreements by dominant distributors

A dominant distributor may also try to maintain its dominance by entering into exclusivity agreements with content providers and thereby exclude actual and potential competitors. An example of this is provided by the Greek *Forthnet/Multichoice* case.[539] Forthnet and Multichoice are affiliated firms that jointly operate the only satellite platform for TV transmission, called NOVA, in Greece. They obliged all free-of-charge Greek TV channels to enter into exclusivity agreements that prevented them from licensing their programmes to any other satellite platform provider. According to the Hellenic Competition Commission this practice created barriers to entry. The case was closed with a commitment decision after the two firms agreed to amend the existing agreements and to refrain from entering into new exclusivity agreements.

Downstream exclusive dealing was an issue in the decision of the Full Court of the Federal Court of Australia in *Universal Music v ACCC.*[540] This case was triggered by the reform of

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[537] Secretariat of the Competition Commission (*Secrétariat de la Commission de la concurrence*), Enquêtes préalables : Distribution cinématographique dans les villes de Lausanne et Genève, (2012) 4 *Recht und Politik des Wettbewerbs* (RPW) 744, para. 24.

[538] *Id*., para. 28.

[539] Hellenic Competition Agency, commitment decision of 26 March 2012, *Forthnet S.A. and Multichoice Hellas S.A*. See the Press Release of 26 March 2012, *available at:* http://www.epant.gr/img/x2/news/news415_1-1336988903.pdf.

[540] *Universal Music Australia Pty Ltd v ACCC*, [2003] FCAFC 193 (22 August 2003), *available at:* http://www.austlii.edu.au/au/cases/cth/FCAFC/2003/193.html.

Australian copyright law in 1998.[541] In this year, the legislature allowed Australian wholesalers and retailers to import compact discs and other sound recordings from other countries provided that those products were produced legally and with the consent of the right-holder, whereas previously the right-holders in Australia could control such imports. This led to countermeasures by two major distributors, Universal Music Australia and Warner Music Australia, that made it publicly known that they would not supply wholesalers and distributors that bought from foreign sources.[542] Both the Australian competition agency (ACCC) and the Federal Court found that the two firms infringed the prohibition of abuse of market power and exclusive dealing.[543] The full court accepted the appeal with regard to abuse of market power. According to the Court, it was not proven that either of the firms held "a substantial degree of power in the market" in the sense of Section 46 of the Trade Practices Act 1974. However, the Court confirmed a case of exclusive dealing according to Section 47 of that Act as a unilateral restraint. The purpose of the conduct was to discourage retailers from importing or acquiring titles from abroad. This case seems interesting for two reasons. First, competition agencies intervened with the objective of safeguarding the economic success of a decision of the copyright legislature to limit the rights of the right-holders. Second, the Full Court did not hesitate to use the provision on exclusive dealing as a unilateral conduct rule, although it simultaneously held that there was no evidence of significant market power. While it is true that Section 47 did not require any significant market power, the critical question may be asked of whether such conduct can result in a restraint of competition if there is no significant market power.

9.11 Tying by dominant distributors

In its young history, India's competition law has also generated an economically important and complex tying case in the TV distribution industry,[544] for which the Competition Commission of India, however, did not find any violation of competition law. In India, TV signals are distributed by four technologies: (1) free-to-air, (2) cable TV, (3) direct-to-home (DTH) satellite broadcasting (requiring a set-top box), and (4) internet protocol (IP) TV. When the CCI decided the case, it counted 130 million TV sets, 71 million of them with cable TV. 7.6% of households had DTH (expected to grow to 17% by 2017). DTH, as the better

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[541] On this change of copyright law see also the paper by the former Chairman of the ACCC Alan Fels, "Repeal of parallel importation restrictions: A step forward for copyright in Australia and New Zealand", 29 August 1998, *available at:* http://www.accc.gov.au/speech/repeal-of-parallel-importation-restrictions-a-step-forward-for-copyright-in-australia-and-new.

[542] Note that this case has some similarities with the *IFPI Switzerland* decision of the Swiss Competition Commission of 16 July 2012 discussed at 8.4, above.

[543] The ACCC also concluded that there was a restrictive agreement. However, this infringement was rejected by the Federal Court.

[544] *Consumer Online Foundation v. Tata Sky Ltd*, Case No. 02/2009 – CCI Order of 24 March 2011, available at: http://www.cci.gov.in/menu/MainOrderConsumer250411.pdf.

technology, is expected to replace cable. The case before the CCI related to the bundling strategies of the 4 DTH service providers. Each of them forced customers to also buy hardware (dish antennae and set-top boxes (STBs) from these service providers by restricting interoperability between DTH services with the hardware of independent manufacturers. This practice also restricted competition between the DTH providers since customers were not able to switch without buying new hardware. The informant alleged several restraints of competition: (1) the creation of barriers to entry for enterprises that only manufacture STBs; (2) the subscription agreements containing conditions that make migration more difficult (forfeiture of balance in case of cancellation); (3) illegal tying arrangements regarding DTH service and the purchase or rent of STBs; (4) exclusive dealing agreements between service providers and manufacturers; (5) a restriction of the market for the production of goods or provision of services by denial of market access; and (6) unilateral tying by dominant enterprises. On the first account, the CCI criticised that the DTH service providers built CAMs (conditional access modules as access cards) into the STBs instead of offering CAMs as independent products. Yet the CCI considered intervention inappropriate since the sector-specific regulator was still considering the issue in the light of existing technical constraints.[545] On the second account, the CCI did not want to intervene since there was no evidence of an agreement among DTH providers; pure parallel behaviour was not considered sufficient to justify intervention.[546] On the third account (tying arrangement), the CCI noted that the sector regulator had already ordered that consumers must have the choice to give back their hardware if they want to migrate to another service provider, that is, if the consumer opts for rent instead of purchase. This requires that the sector regulator ensures sufficient consumer information on different options.[547] The issue of tying can also be sufficiently addressed by the sector regulator since tying is a "necessary fall out of the lack of technical compatibility or interoperability".[548] The sector regulator TRAI had accepted built-in CAM cards since a CAM card would cost as much as the STB. The CCI expects that the market will solve the problem once technological improvements bring down prices for CAM cards.[549] More specifically on the tying allegation, the CCI accepts that the service providers are free to buy STBs from manufacturers of their choice and that quality will matter in this regard. The DTH providers will have no interest in excluding manufacturers that offer better quality.[550] In addition, the CCI found no reason for tacit collusion but assumed that there was only parallel behaviour due to the limitations of existing technology and its costs. Furthermore, the CCI considered the provision of the STB and the CAM as an

545 *Id.*, para. 18.21.

546 *Id.*, para. 18.22.

547 *Id.*, paras 18.24-18.26.

548 *Id.*, para. 18.28.

549 *Id.*, para. 18.29.

550 *Id.*, para. 18.30.

intrinsic part of the DTH service.[551] And finally the CCI rejected the allegation of an abuse of market dominance, since Indian law does not apply any concept of collective dominance.[552]

A similar case on the tying of cable TV services with decoders was decided by the Competition Council (*Conseil de la concurrence*) of Luxembourg in the *Coditel* case in 2010.[553] As far as market definition is concerned, the Competition Council distinguished the cable TV market from neighbouring markets where other technologies such as satellite transmission are used. From the cable TV service market, the Competition Council distinguished the market for the decoder and separate markets for individual functions of the decoder. The Commission Council held that Coditel had abused its market-dominant position both by tying the sale of its decoders with its cable TV service, thereby excluding other producers of decoders from the market, and by forcing customers to accept functions, such as programme guides, video on demand and Internet access, although Coditel had a decoder available without these functions. The Competition Council ordered Coditel to refrain from making its cable TV service conditional on the acquisition of its decoders and to offer decoders with minimal functions as an option.

9.12 Discriminatory conduct of dominant distributors, including margin squeeze

There are also cases in which dominant distributors discriminate among their trading partners. Such cases can take the form of margin squeeze, when dominant firms charge higher prices from third parties than from their own subunits active in downstream or related markets.

Such a margin case was decided by the Italian AGCM in the *Conto/Sky* case. In this case, Sky, a dominant satellite operator, charged lower prices to its TV station subunits and thereby enabled them to compete better for broadcasting rights.[554]

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551 *Id.*, para. 18.33.

552 *Id.*, para. 19.

553 Competition Council (*Conseil de la concurrence*) of Luxembourg, Decision no. 2010-FO-02 of 10 December 2010, *Coditel*, *available at:* http://www.concurrence.public.lu/fr/decisions/abus-de-position-dominante/2010/decision-2010-fo-02/Decision-N_2010-FO-02-du-10-decembre-2010.pdf. See also the French summary of the decision, *available at:* http://www.concurrence.public.lu/actualites/articles_communications/2010/12/decision_cablodistribution/index.html. In this case, the Competition Council also had to decide on whether Coditel was liable of excessive pricing (see at 9.14, below).

554 AGCM decision no. 21316 of 7 July 2010, Case A407, *Conto TV/Sky Italia*, Bollettino n. 27/2010, *available at:* http://www.agcm.it/concorrenza/concorrenza-delibere/open/41256297003874BD/3C1FC408D4B09266C125776D002BBF68.html.

In another TV case from Costa Rica that is currently under investigation, a dominant pay-TV provider faces allegation that it violated competition law by offering lower prices to the customers of competitors than it usually charges to its own customers.[555]

In Poland, TP EmiTel, the main Polish provider of terrestrial transmission networks, charged higher transmission fees to public radio broadcasters than to commercial ones. These practices prevented the commercial broadcasters from looking for competing networks. The Polish competition agency considered the pricing strategy of TP EmiTel an abuse of market dominance and imposed a fine of 19 million Złoty.[556]

In Switzerland, the Secretariat of the Competition Commission is currently investigating Cinetrade AG, the owner of Teleclub, a Swiss pay TV programme provider. The investigation relates to the question of whether Cinetrade has abused its potential market dominance by refusing to allow the transmission of some of its programmes relating to sports events on specific TV platforms or by discriminating among such platforms.[557]

A case on discrimination can be reported from Cyprus.[558] There, kiosk operators brought a complaint to the Competition Commission against two press distribution agencies. The Competition Commission held that both agencies held monopoly positions for international and local press in one case and Greek press in the other case. The Competition Commission confirmed that the two distributors had abused their market-dominant position by imposing discriminatory terms on the retailers regarding prices and collaterals.

A rather peculiar case can be reported from Denmark.[559] There, a publisher used the possibility to impose resale prices for books on retailers but simultaneously sold these books at lower prices through its own book clubs. The Danish Competition and Consumer Authority considered this an abuse of market dominance. Thereby, it engaged in a detailed assessment

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555 Comisión para Promover la Competencia, Opening of investigation on 25 October 2011, Case C-02-11, *Telecable Económico TVE S.A. v. AMNET Cable Costa Rica S.A.*, *available at:* http://www.ciberleycr.com:82/ciberinfo/Comisi%C3%B3n%20de%20Promoci%C3%B3n%20de%20la%20Competencia/JURISPRUDENCIA%20COPROCOM%202012/JURISPRUDENCIA/A%C3%91O%202011/ARTICULO%20QUINTO-ACTA%2025-2011-TELECABLE%20vs%20AMNET.pdf.

556 UOKiK, decision of 25 October 2007, Case DOK-95/07, *TP EmiTel*, Annual Report 2007, p. 18.

557 Competition Commission, Annual Report 2012, (2013) 1 *Recht und Politik des Wettbewerbs* (*RPW*) 49, 56. In April 2013, the Secretariat decided to continue investigations after it was able to find more evidence of anti-competitive conduct. See Wettbewerbskommission, "WeKo untersucht die Übertragung von Live-Sport im Pay-TV", Press Release of 4 April 2013, *available at:* http://www.weko.admin.ch/aktuell/00163/00221/index.html?lang=de&msg-id=48360.

558 Commission for the Protection of Competition of Cyprus, Case 11/17/26/2004, *Poulos et al. v Cronos and Hellenic Distribution Agency*, reported by Ioannis Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, paras 6-020 et seq.

559 Danish Competition and Consumer Authority (*Konkurrenceomraadet*), decision of 26 May 2004, *Gyldendal*, Press Release, *available at:* http://www.kfst.dk/en/konkurrenceomraadet/decisions/decisions-2008-and-earlier/national-decisions-2004/konkurrenceraadets-moede-den-26-maj-2004/publishers-must-allow-equal-terms-of-competition-to-book-retailers/

of the relevant markets for books and concluded that the publisher Gyldendal indeed held market-dominant positions in some of these markets. The former system of resale-price maintenance was based on a general dispensation of such practices for books granted by the Authority. The case convinced the Authority to withdraw the dispensation for the limited situation of a publisher deciding to sell its books at lower prices through its own book clubs.[560]

9.13 Rebate and loyalty systems of dominant distributors

In Belgium, the Competition Council held that NMPP/Presstalis, a French newspaper distributor, had abused its market-dominant position by applying a rebate system, thereby violating both Article 102 TFEU and Article 3 of the Belgian Act on the Protection of Economic Competition.[561] The Competition Council held that the rebate system had the objective of inciting French publishers to only use NMPP/Presstalis and its Belgian affiliate AMP for the distribution of their newspapers and magazines with the effect of excluding Belgian distributors from the market. The agency defined the relevant market as the market for the export of individual numbers of French newspapers and magazines to foreign markets.[562] It thereby analysed the effects on both the upstream exporting market (France) and the downstream distribution markets in the importing countries (Belgium, Switzerland, Canada).[563] The agency stressed the close links between the two markets, best demonstrated by the fact that some publishers often directly delivered to distributors in the importing countries.[564] Consequently, the Belgian Competition Council confirmed a dominant position of NMPP/Presstalis in the relevant market of exporting newspapers and magazines from France by relying on previous decisions of the French Competition Council and the Paris Appeals Court, both of 2004, where it was held that the undertaking had a market share of 90%.[565] The rebates were calculated according to all titles of a publisher sold in any of the three countries (Belgium, Switzerland, Canada), based on the sales of one year, granted at the end of this year and set at 2.5% of the total turnover in these three countries.[566] In particular, the fact that the rebates were conditioned on using the service of NMPP/Presstalis for exports to all three countries produced an exclusionary effect on

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560 On the Danish system of resale-price maintenance for books see also at 6.1.5, above.

561 Belgian Competition Council (*Conseil de la concurrence*), decision no. 2012-P/K-20 of 30 July 2012, Case CONC-P/K-03/0006, *Tondeur Diffussion S.A. contre Presstalis S.A.R.L., available at:* http://economie.fgov.be/nl/binaries/2012PK20_Pub_tcm325-195283.pdf.

562 *Id.*, paras 51-53.

563 *Id.*, para. 55.

564 *Id.*, para. 56

565 *Id.*, para. 65.

566 *Id.*, para. 84.

distributors from Belgium and created a competitive advantage for AMP, which is affiliated with NMPP/Presstalis.[567] In other words, on the assumption that 50% of all exports go to Belgium, a Belgian competitor would have to pay a rebate of 5% - instead of 2.5% - in order to compete with NMPP/Presstalis. In line with the judgment of the European Court of Justice in *British Airways*, the Belgian Competition Council allowed in principle a balancing of the pro and anti-competitive effects by accepting the possibility of an objective justification,[568] but ultimately was not convinced by NMPP/Presstalis' arguments that such justification existed. In particular, it was held that NMPP/Presstalis had not managed to show that potential efficiencies of scale required that rebates only be paid if the NMPP/Presstalis service was taken for the entirety of exports to all of the three countries.[569] Finally, the Competition Council imposed a fine on NMPP/Presstalis of € 245,530.

As has already been indicated (see at 9.9.2, above), the French Competition Council (*Conseil de la concurrence*) also received a complaint in 2003 concerning the rebate system applied by NMPP, which later became Presstalis. After very complex proceedings, the Competition Council delivered a final decision in 2008,[570] in which it held that the progressive rebate system as applied in France incited publishers to refrain from switching from NMPP as the press distribution provider before the lapse of three years.[571] Hence, the Competition Council confirmed the anti-competitive character of the rebates granted by NMPP to publishers.[572] In its final decision, the Competition Council imposed a fine on NMPP of € 2.3 million.

In Ireland, the Competition Authority acted against a rebate scheme for advertising implemented by the TV station RTE.[573] The rebate depended on the percentage of the share of the advertising budget a customer allocated to RTE. When the Competition Authority raised concerns regarding a violation of the prohibition of abuse of dominance, RTE agreed to change its rebate scheme and the case was closed with a commitment decision.

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567 *Id.*, para. 85.

568 *Id.*, para. 114. See Case C-95/04 P *British Airways* [2008] ECR I-2331, para. 86.

569 *Id.*, para. 117.

570 French Competition Council (*Conseil de la concurrence*), decision 08-D-04 of 25 February 2008, *MPL v. NMPP and SAEM-TP*, *available at:* http://www.autoritedelaconcurrence.fr/user/avisdec.php?numero=09-D-04.

571 *Id.*, para. 177.

572 *Id.*, para. 200.

573 Irish Competition Authority, Decision No. E/12/001 of 17 January 2012, Case COM/10/02, *RTE's conduct in the market for television advertising*, *available at:* http://www.tca.ie/images/uploaded/documents/E-12-001%20RTE%20Enforcement%20Decision.pdf.

In contrast, a preferential rebate scheme by a dominant TV operator was accepted by the Bulgarian Competition Commission in 2005.[574] In the underlying case, bTV, one of Bulgaria's three TV operators that held a dominant position in the advertising market, had implemented a progressive rebate system under which advertising customers would receive a rebate in proportion to the amount of their TV advertising budget that went to bTV. If the entire budget was spent on bTV, the customer would receive a 10% rebate, while another customer that only spent 70% would only receive a 7% rebate. According to the Competition Commission, this system did not demonstrate any anti-competitive effects. In particular, it did not deter customers from advertising on other channels, nor were the rebates conditioned on any growth rates. In the more recent *Pulsar* decision of 2008, the Commission clarified its position by holding that a rebate system is not considered to be abusive if the rebates are fixed, quantitative and granted to all customers without regard to the past volume of business done with the dominant undertaking.[575]

The Danish Competition and Consumer Authority acted against a rebate scheme of Post Denmark, the dominant distributor of magazines, which, according to the Authority, had the potential of redirecting customers from competitors to Post Denmark.[576]

In Portugal, in 2009, the Competition Authority imposed preliminary measures on ZON Multimedia, which operates both a cable TV network and cinemas.[577] ZON had started to issue fidelity cards to customers of cable TV services that allowed free entry into ZON's cinemas. The Authority held that this amounted to an abuse of market dominance on both markets and ordered ZON to stop its fidelity card campaign.

9.14 Excessive pricing and other exploitative abuse by dominant distributors

Excessive pricing is not only an issue in the case of dominant right-holders. Right-holders can also become victims of excessive pricing of dominant distributors.

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[574] Bulgarian Commission for Protection of Competition (CPC), decision no. 49 of 22 February 2005, *Bulgarian National Television v. Bulgarian News Corp*., as reported by Ioannis Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, paras 5-034 et seq.

[575] Bulgarian Commission for Protection of Competition (CPC), decision no. 623 of 22 July 2008, *Transfer Group v. Pulsar*, as reported by Ioannis Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, paras 5-035.

[576] Danish Competition and Consumer Authority (*Konkurrenceomraadet*), 30 August 2007, *Post Denmark*, Press Release, *available at:* http://www.kfst.dk/en/konkurrenceomraadet/decisions/decisions-2008-and-earlier/national-decisions-2007/konkurrenceraadets-moede-den-30-august-2007/post-denmark-has-abused-its-dominant-position-in-the-market-for-magazine-mail/.

[577] Portuguese Competition Council (*Autoridade da Concorrência*), Decision PRC 12/08 of January 2009, ZON-MyZonCard fidelity campaign, as reported by Ioannis Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, paras 20-023.

Such a case was confirmed in the *Art Gorod* case from Russia,[578] which proves that competition agencies in Russia do take actions against state-owned enterprises (SOEs). In this case, *Art Gorod*, a regional TV channel, brought an excessive-pricing complaint against the Federal State Unitary Enterprise, an SOE that provides broadcasting telecommunication services. The Amur Regional Department of FAS subsequently confirmed a case of excessive, but also discriminatory pricing with regard to several TV channels. Also, the SOE had imposed different contract terms on TV channels for identical service. When the SOE appealed to the Commercial Court, the agency's decision was however annulled. It took two other instances and a decision of the Commercial Court of the Far Eastern District to annul the court decisions and to remand the case to the agency. Then, the Amur Regional Department reaffirmed a case of excessive pricing. Yet, it imposed a very small fine of only €2,500 (100,000 rubles). This decision was then affirmed by the Commercial Court and the Commercial Court of Appeal.

In Georgia, the competition agency (State Anti-Monopoly Service of Georgia, SASG) acted against the dominant and wholly state-owned telecommunication provider Telecentri.[579] The action was taken after a complaint by Caucasia, a TV station that only broadcast in the capital city of Tbilisi. Caucasia complained about excessive pricing on the part of Telecentri since Telecentri tried to impose a tariff price for telecommunication services covering the whole country. Caucasia was only willing to pay a tenth of the price claimed by Telecentri. SASG held that Telecentri had engaged in an abuse of dominance by charging excessive prices and sent Telecentri a cease-and-desist order.

Exploitative abuses may also become an issue with regard to dominant TV channels as users and right-holders as victims. A case in which a competition agency had to assess the conduct of a dominant TV channel vis-à-vis right-holders is presented in a decision of the Turkish Competition Agency of 2011.[580] In the underlying case, a CMO brought a complaint against Turkish broadcasting companies for requesting the authors and performing artists to enter into individual licensing agreements for their works and performances. The Turkish Competition Agency did not find sufficient evidence of an abuse of market dominance and accordingly rejected the complaint. EU practice on collective rights management can help to shed more light on this case. Indeed, there is the risk that users with considerable market power will exercise pressure on individual right-holders to grant direct licences at conditions that are more favourable to the users than those under blanket licences granted by CMOs. In *BRT v SABAM*, the European Court of Justice recognised the purpose of CMOs to protect

[578] Amur Regional Department of FAS, decision of 11 May 2010, *Art-Gorod Ltd. v. Amur ORTPC*. See "Appeal Court confirmed conclusions of the Court of First Instance that "RTRS" unlawfully increased the prices for broadcasting services", FAS (12 August 2011), *available at:* http://en.fas.gov.ru/news/news_31611.html.

[579] See Ketevan Lapachi and Mamuka Tivishvili, Georgia, in: CUTS International, Competition Regimes of the World, 2006, p. 383, 384.

[580] Turkish Competition Authority (*Rekabet Kurumu*), decision 11-52/1318-469 of 13 October 2011, Case 4348.

right-holders against "major exploiters and distributers of musical material, such as radio broadcasting bodies and record manufacturers".[581] The Court therefore stipulated the principle that a CMO does not violate competition law if the assignment of rights by the authors is "required for the association to carry out its activity on the necessary scale".[582] According to EU case-law, CMOs play an important role in protecting individual right-holders against the exploitation by users.[583] The most effective way to reach this goal would be to require right-holders to entrust their rights to the CMO on an exclusivity basis. Yet neither the European Commission nor the European Courts have issued a clear statement as to whether CMOs may require right-holders to entrust their rights on an exclusive basis. It is not the place here to decide whether such practice should be accepted by competition law (see at 11.3.3, below). Rather, the Turkish case demonstrates that if such exclusivity is not allowed, it will be for competition agencies to decide whether, in the framework of direct licences to users, right-holders are exploited by abusive conduct of dominant users.

A politically very sensitive case from Italy relates to the economic conflict between newspaper publishers and Google, whereby the newspaper publishers complained that Google does not pay to link its Google News service with the websites of newspaper publishers. Whereas in other European countries the newspaper publishers are currently advocating introduction of a new related right for newspaper publishers,[584] in Italy the publishers also presented a complaint to the competition agency against Google. This complaint, however, was not brought as a simple refusal-to-pay case. Rather, the publishers argued that Google prevented them from controlling what kind of content, including snippets and images, are shown on Google News by threatening to no longer index their websites through Google's search engine.[585] The proceedings were closed with a commitment decision according to which Google allowed the newspaper publishers to choose what kind of content should not be shown on Google News. At the same time,

[581] *BRT v SABAM*, *supra* n. 113, para 9.

[582] *Id*., para. 10. Note that this approach was also adopted by other competition law jurisdictions. See, in particular, the decision of the Australian Competition Tribunal in Re Australasian Performing Rights Association [1999] ACompT 3 (16 June 1999), also *available at:* http://www.austlii.edu.au/au/cases/cth/ACompT/1999/3.html: "We think the correct approach is to ask whether the particular features of APRA's Articles and Rules which have been questioned as anti-competitive are essential to the operation of APRA as an efficient collecting society. The input and output arrangements, in particular, underpin the functioning of APRA and we consider that without the essential elements of the input and output arrangements the likelihood is that APRA could not continue to operate."

[583] This was also more recently confirmed in principle by the European Commission, Decision of 12 August 2002, Case COMP/C2/37.219 – *Banghalter & Homem Christo v SACEM*, p. 11, *available at:* http://ec.europa.eu/competition/antitrust/cases/dec_docs/37219/37219_11_3.pdf (only available in French).

[584] This is the case in Germany where the legislature has recently introduced a new related right of newspaper publishers for making available of their products on the Internet. See Sections 87f through 87h of the German Copyright Act (version of 7 May 2013; entry into force on 1 August 2013).

[585] AGCM decision no. 21959 of 22 December 2010, Case 420, *Federazione Italiana Editori Giornali/Google*, Bollettino n. 51/2010, *available at:* http://www.agcm.it/concorrenza/concorrenza-delibere/open/41256297003874BD/82463028EDFECAE0C125781C004E895E.html.

Google committed to separating the operation of its search engine from that of Google News.[586] Since the case was concluded by commitments, the alleged infringement of Article 102 TFEU was not thoroughly reasoned. Most appropriately, the case would have to be categorised as one on exploitative abuse.

9.15 Abuse relating to services needed for functioning copyright-related markets

For the provision of copyright-protected content, many additional services may be needed in order for such markets to work. New entrants have to rely on such services in order to compete effectively. If incumbent firms in the market employ these services in their interest, or foreclose access to them, this may have an exclusionary effect on new entrants.

An example is the *Sky/Auditel* case from Italy.[587] In this case, a firm (Auditel) that was dominant in the market for measuring the audience of TV channels refrained from improving its services by impeding the publication of daily data on audiences for each channel and, separately, for different platforms. This caused an over-estimation of the audience of established channels. Since these channels consequently attracted more income from advertising than justified, the conduct of the dominant firm had a negative impact on the competitiveness of new TV channels. The AGCM affirmed an abuse of market dominance by Auditel based on Article 102 TFEU and imposed a fine.

The Italian *E Polis/Audipress* case[588] parallels *Sky/Auditel* in the newspaper industry. Audipress, a dominant firm collecting information on newspaper distribution, refused to publish information on the number of readers of individual newspapers. In this case as well, the AGCM considered this conduct as creating a market barrier for newcomers that had to rely on advertising revenues.

In the Japanese *Hakodate newspaper* case,[589] the newspaper publisher (Hokkaido Shimbun Press) in the Hakodate district on the island of Hokkaido also tried to exclude a newcomer (Hakodate Shimbun) by abusive use of such essential services. This happened by two

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[586] See also AGCM, "A420 – AS787 – Publishing: Antitrust authority accepts Google commitments and implores Parliament to update copyright laws", Press Release of 17 January 2010, *available at:* http://www.agcm.it/en/newsroom/press-releases/1929-a420-as787-publishing-antitrust-authority-accepts-google-commitments-and-implores-parliament-to-update-copyright-laws-.html.

[587] AGCM decision no. 23211 of 14 December 2011, Case A422, *Sky/Auditel*, Bollettino n. 50/2011, *available at:* http://www.agcm.it/concorrenza/concorrenza-delibere/open/41256297003874BD/40FB40FF52A020D7C125797B003171CB.html.

[588] AGCM decision no. 21988 of 20 April 2011, Case A424, *E Polis/Audiopress*, Bollettino n. 16/2011, *available at:* http://www.agcm.it/concorrenza/concorrenza-delibere/open/41256297003874BD/5186C81D70A8658DC125788C004745A6.html.

[589] JFTC, decision of 28 February 2000, *Hokkaido Shimbun Press*. See Masako Wakui, "Intellectual Property Rights and Antimonopoly Act", 2005, p. 13, *available at:* http://www.jftc.go.jp/eacpf/05/jicatext2/0907Ant.pdf.

practices: (1) Hokkaido asked TV stations not to accept advertising from Hakodate; (2) Hokkaido applied for the "Hakodate" trademark to exclude other newspaper publishers from using the term. The JFTC considered both practices acts of monopolization pursuant to Section 3 of the Antimonopoly law. This case has to attract particular attention since JFTC did not require monopoly power. Also, JFTC ordered Hokkaido Shimbun Press to withdraw its trademark application.

9.16 Control of dominant customers

Finally, dominance can also exist on the side of customers at the end of the distribution chain. Such a case, albeit very unusual, can be reported from Bulgaria. There, public law fixes maximum prices for educational textbooks. The Competition Commission issued a statement in which it held that the underlying Decree of the Council of Ministers of 2003 was pro-competitive.[590] The Commission justified this by the fact that textbook publishers participated in the proceedings for fixing such maximum prices, which would ultimately set incentives for better quality in the interests of students. Also, the Commission found a justification of the maximum prices in the budgetary constraints of the state. However, the Commission recommended deleting the limitation to a selection of only three textbooks that, according to the Commission, would seriously restrict the number of competitors and the choice of teachers and students. In this case, the Competition Commission only acted in its advisory function without applying the provisions of the Competition Act. In particular, the Commission made no statement as to whether the state, when financing textbooks, can be considered a dominant undertaking.

9.17 Conclusion

Unilateral-conduct cases affecting copyright-related markets present a large variety of issues and theories of harm. In addition, unilateral conduct rules differ considerably between different jurisdictions. The latter is true especially with regard to exploitative abuse and refusal to license. In both fields, even US and EU law diverge considerably. While EU competition law and the jurisdictions that adopt the European abuse-of-dominance approach also ban exploitative abuse including excessive pricing, US law does not consider such conduct an act of monopolization. While EU law has confirmed that unilateral conduct rules may also be applied under certain, yet rather strict conditions, to a refusal to license, US antitrust law seems to practically exclude application of antitrust law to refusals to license.

[590] Bulgarian Commission for Protection of Competition (CPC), decision 707 of 2 June 2010, Annual Report 2010, p. 30.

Apart from those fundamental differences, what matters more for the purpose of this study is to stress that unilateral conduct rules not only have to play a role with regard to dominant right-holders but also with regard to dominant distributors who, in particular, control bottleneck technologies and networks and therefore may make it more difficult and more expensive for works to reach consumers. Hence, with regard to unilateral conduct rules, competition law enforcement can contribute to the distribution of works and thereby support the goals of copyright policy itself.

Yet unilateral conduct rules are the field where competition law plays the expected role of limiting the exclusivity of the copyright by imposing a duty to license on dominant right-holders. The EU so far is the most important jurisdiction that has produced experience in this regard. Thereby, it is astonishing that this case-law has largely emerged in a copyright context. Yet this case-law is still evolving, and it may be expected that it will migrate more from atypical copyright cases and cases relating to computer programs and interoperability issues to patent-related cases and issues relating to standard-essential patents. Patent-related cases and experience from EU Member States show that refusal to license cases cannot always be explained by a simple leveraging theory. In particular, in many instances, cases may combine aspects of refusal to license, discrimination and exploitative abuse.

Also, the analysis shows that US law may offer remedies outside of antitrust law for refusal-to-license cases. The so-called *eBay* rule of US law, by denying injunctive relief in certain IP infringement cases, may provide a much more effective tool against a refusal to license than the "Euro-defence" under Article 102 TFEU for which the European Court of Justice still has to define the procedural requirements under which a competitor is allowed to use an IPR of a dominant right-holder.

While the same principles on refusal to license are expected to be applied to all forms of IPRs, the law and practice in developing and emerging economies demonstrate a certain tendency to use competition law more vigorously against pharmaceutical patents for the purpose of bringing down drug prices than to other rights. Indeed, despite the EU experience, application of unilateral conduct rules to refusal-to-license cases seem to be less needed for copyright-related markets than in the patent world. The cases in which copyright law protects dominant positions are rather rare and do not relate to traditional areas of copyright protection. The major field of application will remain the software industry, which is substantially characterised by network effects and the need for interoperability.

As to dominant distributors, the analysis shows that even developing and emerging economies now produce cases that relate to modern media technologies. Obviously, information technology and infrastructure largely used for the distribution of copyrighted works has become an important driver of technological development around the world.

From a more political and societal perspective, some additional lessons can be learned from the analysis. Application of competition law to copyright-related industries is also very important for the democratic development of countries. Copyright and copyright-related industries are carriers of ideas and, thereby, promote freedom of expression. In larger countries, and especially those that have a federal constitution, competition law applied by a central (federal) government agency can control anti-democratic “cartels” between local media and politicians. Also, in multi-ethnic societies, as demonstrated by the South African experience, application of unilateral conduct rules to the media industries is extremely important, since radio, TV and newspaper markets coincide with language groups and, therefore, risk being much more concentrated than markets in countries with more homogeneous societies. These two arguments in favour of competition law are also closely related. A multi-ethnic and democratic country is in need of a vigorous competition policy for its highly concentrated media markets in order to guarantee equal participation of all language groups in the democratic process.

10 Concentrations (Merger Control)

Mergers among firms in the copyright industry are frequent. For competition agencies such mergers usually do not present any peculiarities. Hence, in the following, the purpose is not to present the whole practice of competition agencies on mergers in copyright-related industries around the world. Rather, the analysis will concentrate on aspects that distinguish mergers in the copyright industry from other mergers.

10.1 Relationship with sector-specific regulation in the media sector

A first peculiarity concerning copyright industries arises from the existence of sector-specific regulation especially in the media sector. Many jurisdictions grant power to review media mergers to sector-specific regulatory agencies. Also, the criteria for this kind of sector-specific merger control will typically differ from the competition-oriented criteria of merger control as applied by competition agencies.

In principle, regarding media mergers, jurisdictions can choose among three approaches: (1) media mergers are only assessed by sector-specific regulatory agencies; (2) media mergers are only assessed by competition agencies; or (3) media mergers are assessed in parallel by competition agencies and sector-specific regulatory bodies. In the latter case, the two agencies will usually decide according to different substantive standards, while according to the second option the sector-specific regulatory agency is the only body that can protect economic competition in the market.

Moreover, the scope of application of sector-specific merger control may differ among jurisdictions. The media sector comprises several sub-sectors. Sector-specific merger control will mostly cover the TV sector, but will not necessarily exist with regard to the newspaper sector.[591] Also, as a more recent phenomenon, the question arises whether sector-specific merger control should also take into account the emergence of digital media on the internet. This is of particular importance for the future, since traditional forms of media, such as television, are expected to merge with forms of online media.

Sector-specific merger control regimes also exist in the telecommunication sector. Since telecommunication providers play an important role in the distribution of copyrighted works, mergers in this sector can seriously affect the distribution of works. In a recent case from Costa Rica concerning a merger between a former state-owned network operator for electricity and telecommunication on the one side and an Internet access provider on the other side, upon request by the telecommunication authority, the competition agency issued an opinion in which it advised the telecommunication authority to clear the merger subject to certain conditions, including an obligation to grant competitors access to the facility and a limitation on the term of contracts concluded with customers.[592] Under the law of Costa Rica, the telecommunication agency is not under a strict obligation to follow the opinion of the competition agency, but has to justify its decision if it intends to deviate from it.

Yet, in the following, the analysis will exclusively concentrate on the interface with sector-specific merger control in the media sector.

In jurisdictions in which media regulators have exclusive power to review media mergers, the challenge consists in guaranteeing that sufficient consideration will be given to protection of economic competition in the market. Such a system exists, for instance, in Singapore. There, in 2006, the Media Development Authority cleared a merger among two operators of mass-audience TV services subject to the outsourcing of at least 285 hours a year of local content production to independent production companies. The objective of this condition was not only to guarantee competition, but also to enhance cultural diversity in the production.[593]

An example of a jurisdiction where the competition agency also takes into account the specific objectives of media regulation is provided by Austria. According to Section 13 of the Cartel Act 2005, the Cartel Court also has to assess media mergers in the light of the effects on media plurality. Thereby, Section 13(2) clarifies that media plurality is to be understood in

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591 This is the case for instance in Germany where mergers among newspaper publishers are only reviewed by the competition agency.

592 Comisión para Promover la Competencia, Opinión OP-10-12 of 7 August 2012, Istituto Costarricense de Electricidad/Cable Visión de Costa Rica CVCR S.A., *available at:* http://www.coprocom.go.cr/OP-10-12%20CONSULTA%20SUTEL%20SOBRE%20CONCENTRACION%20ICE-CABLE%20VISION.pdf (opinion rendered on request by the Superintendencia de Telecomunicaciones).

593 Media Development Authority, "Mediacorp, SPH Application To Merge Mass-Market Television Operations Approved", Press Release of 6 December 2004, *available at:* http://www.mda.gov.sg/NEWSANDEVENTS/PRESSRELEASE/2004/Pages/06122004.aspx.

the sense of plurality of opinion in the field of information. However, the Cartel Act does not provide any further guidance. The Cartel Court applied the predecessor provision of Section 42c Cartel Act 1988 in the merger case of *Format/Profil*.[594] The merger involved the combination of the publishers of the two leading political magazines in Austria. The Cartel Court concluded that the merger would result in a strengthening of already existing market dominance in the market for political news magazines. In the light of the legislative materials, the Cartel Court held that media diversity would be affected by the disappearance of one of the two magazines or the existence of a serious danger of approximation of the publishing policy of the two magazines. Therefore, the Cartel Court allowed the merger only under the condition that both magazines continue to exist and that the editorial part of Profil fully remains in the hands of the previous owner.

Section 42c of the Austrian Cartel Act 1988 was also applied in the subsequent *Morawa/Mediaprint* case.[595] This merger case related to the creation of a newspaper wholesale joint venture (Morawa Grosso) between Austria's largest newspaper publisher (Mediaprint) with a book and newspaper distributor (Morawa). The Cartel Court held that a restriction of media diversity could also result from a narrowing of the distribution channel. Competition on the distribution level matters enormously, since it is for the distributor to decide which and how many copies of a press product are delivered to certain sale points. Therefore, in the framework of clearing the merger, the Cartel Court imposed a series of conditions to guarantee that Mediaprint does not prevent Morawa Grosso from applying the principle of neutrality in its distribution policy. This case demonstrates that competition law enforcers can simultaneously address concerns relating to economic competition and media diversity.

Specific rules on media mergers can also be found in Ireland. There, Section 23 Competition Act (2002) provides for specific procedural rules. Most important is Section 23(4) Competition Act, which provides the Minister with the power to allow a merger that was blocked by the Authority or block a merger that was cleared by the Authority. Thereby, the Minister can take into account the impact of the merger on plurality of opinions and diversity.

A similar system exists in the United Kingdom. There, the Secretary of State for Trade and Industry can refer a merger among broadcasting entities to the Competition Commission if there are concerns regarding media plurality. This has indeed happened in 2007 with regard to the acquisition of ITV shares through Sky.[596] The Commission both held that the merger

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594 Austrian Cartel Court, 26 January 2001, Case 26 Kt 342, 369, 308-383/00, *Format/Profil*. See Ioannis Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, paras 3-062 to 3-65.

595 Austrian Cartel Court, 5 August 2004, Case 26 Kt 132/04, Mediaprint/Morava. See Ioannis Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, paras 3-066 to 3-070.

596 See Competition Commission, Annual Report and Accounts 2009/10, pp. 32 et seq.

would lead to a substantial lessening of competition and confirmed the concerns of the Secretary of State regarding media plurality. Both aspects of the decision were then challenged by Sky before the Competition Appeal Tribunal (CAT), which upheld the Commission's decision as to the competition assessment, but held that the Commission was wrong on the plurality consideration. On further appeal, the Court of Appeal confirmed the competition assessment of the CAT, but on the media plurality issue it followed the Competition Commission. In its decision, the Court of Appeal however expressed its discontent with the lack of precision of the legal provision on media plurality. Consequently, the Competition Commission recommended that Sky be required to lower its share in ITV to a level that would materially undermine its ability to influence ITV's policy. Sky finally lowered its share in ITV from 17.9% to 7.5%.

Of course, systems that provide for dual merger control through competition agencies and specialised agencies are of a particular interest. Such systems may protect both economic competition in the market and plurality of the media most effectively. But such a dual control system may also result in conflicting decisions, with the consequence that the merger cannot be implemented if only one of the two agencies refuses to clear the merger.

This may easily happen, as can be demonstrated by the following hypothetical situation: Let us assume that, in country A, two private free-of-charge TV operators financed by advertising revenue intend to merge. Country A also has a system of public TV channels that are financed by a levy system imposed on the owners of TV sets. The public TV channels are not allowed to broadcast commercials. According to the law of this jurisdiction, the merger has to be notified both to the competition agency and to a specialised agency for the protection of plurality in the media sector. Given the very different goals of the control exercised by the two agencies, already with regard to market definition, very different approaches are expected to apply. The competition agency, with the mission to protect economic competition in the market, will rely on the market for advertising. In this context, it will exclude the public TV stations but will perhaps consider including advertising in other media such as on the Internet or in newspapers. In contrast, the sector-specific agency will assess the impact of the merger on the audience by applying a concept of the "viewers' market". This market will include the public TV channels.

An interesting example of how such a system works can be provided from Germany. There, in 2006, Springer, Germany's largest newspaper publisher, planned to take over ProSiebenSAT.1, which is one of the two largest private TV companies of the country. The merger was assessed by both the Federal Cartel Office (*Bundeskartellamt*)[597] and the Commission for the Assessment of Concentration in the Media Sector (*Kommission zur*

[597] Federal Cartel Office (*Bundeskartellamt*), Decision of 19 January 2006, *Axel Springer AG/ProSiebenSat.1 Media AG*, *available at:* http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion06/B6-103-05.pdf?navid=98.

Ermittlung der Konzentration im Medienbereich, KEK).[598] Although this was not a merger between two TV companies,[599] both agencies came to the conclusion to stop the merger.

The Federal Cartel Office categorised the merger as a conglomerate one, since the two companies were active in different markets. Yet the agency predicted negative effects across the markets that would (1) strengthen collective market dominance existing in the TV advertising market, and (2) strengthen market dominance of Springer in the readers' market for newspapers sold in streets (tabloids), as well as (3) in the newspaper advertising market.[600] Concerning the TV industry, the Federal Cartel Office only concentrated on the advertising market since viewers do not pay for the free-of-charge channels of ProSiebenSAT.1. Yet the market shares of the different free-of-charge TV companies were assessed in the light of the audience they reach, since it is audience attractiveness that defines market power of the firms with regard to their advertising customers. At the same time, the public TV stations were excluded from the relevant market due to severe limitations regarding the broadcast of commercials.[601] In terms of viewers, ProSiebenSAT.1 (22%) was third after the public TV channels (42%) and Bertelsmann-RTL II (27%).[602] Regarding income from TV advertising, the two largest private TV operators held equally strong market shares (44% each) in 2004.[603] In the light of this, and the lack of effective competition both between the two private TV companies[604] and between these two companies on the one hand and smaller competitors on the other hand,[605] the Federal Cartel Office confirmed collective market dominance of the two private TV companies in the advertising market. Regarding the TV advertising market, the Federal Cartel Office was concerned that the combination with the newspaper publishing industry would have made the two conglomerates structurally even more similar, with Bertelsmann-RTL II also being a major publishing company, and would have made it even less likely that the two would compete more effectively with each other.[606] Regarding the effects on the newspaper

598 KEK, Decisions of 10 January 2006, Cases 293-1 to 293-5, *SAT.1 SatellitenFernsehen GmbH: Übernahme sämtlicher Anteile an der ProSiebenSat.1 Media AG durch die Axel Springer AG*, *available at:* http://www.kek-online.de/cgi-bin/resi/v-ent/index.html. See also KEK, "Übernahme der ProSiebenSAT.1 Media AG durch die Axel Springer AG nicht genehmigungsfähig", Press Release of 10 January 2006, *available at:* http://www.kek-online.de/cgi-bin/resi/i-presse/362.html.

599 Prior to the merger, Springer had already held some shares in ProSiebenSat.1. Also Springer held shares in a local TV channel in Hamburg which was mostly financed by sponsoring, not advertising and several local radio stations. Also, Springer ran some TV production companies.

600 Federal Cartel Office, *supra* note 597, p. 23.

601 *Id.*, pp. 23 et seq.

602 Numbers assessed by KEK for 2004, on which the Federal Cartel Office relied. Federal Cartel Office, *supra* n. 597, p. 24.

603 *Id.*, p. 26.

604 *Id.*, pp. 31-36.

605 *Id.*, pp. 36-38.

606 *Id.*, pp. 38-41.

industry, the Federal Cartel Office distinguished between the two markets of newspapers that are exclusively sold in the streets (tabloids), for which Springer is especially strong with its tabloid "Bild" and a market share of 81%, and subscription newspapers.[607] While the Federal Cartel Office admitted that it could not sum up the market shares in a conglomerate merger, it still held that the merger should not be allowed due to the cross-promotional benefits that stem from both cross-advertising at preferential conditions and newspaper articles on TV programmes and especially shows that raise the attractiveness of the TV programmes.[608] With regard to the newspaper advertising market, the Federal Cartel Office included all different types of printed newspapers in the relevant market, whereby it distinguished between a national market and the regional advertising markets. For the national market, the Federal Cartel Office identified a market share of Springer of more than 40% (50% including the Sunday papers).[609] The Federal Cartel Office was concerned that the merger would strengthen the already existing dominant position of Springer in this market by the ability to run cross-media advertising campaigns in the future.[610] Since the Federal Cartel Office did find itself unable to identify conditions that could be imposed on the merging firms and that would remedy the Office's concerns, it blocked the merger. This decision was later confirmed by the Federal Supreme Court of Germany.[611]

In the *Springer/ProSiebenSAT.1* case, the sector-specific regulatory agency KEK, took a different approach. Its decision is based on a treaty among German states (*Länder*) that regulates broadcasting operations.[612] According to Section 26(1) of this Treaty, no nation-wide operator is allowed to gain "prevailing opinion power" (*vorherrschende Meinungsmacht*). Thereby, Section 26(2) provides for a presumption of such power if an operator reaches a 30% share of the total TV audience in a given year. The threshold is fixed at 25% if the operator holds a market-dominant position in a related media market or if, in the framework of a more global assessment that takes into account activities in other media markets, it can be assumed that the influence this operator has on public opinion equals a 30% share. While the share of ProSiebenSat.1 in the TV market was at 25.43% (by also considering the public TV stations), KEK also took account of Springer's particular influence on public opinion, which arises from its newspapers, and concluded that this added up to a

607 *Id.*, p. 42. "Bild" is the only tabloid that is sold everywhere in Germany.

608 *Id.*, pp. 51-59.

609 *Id.*, p. 61.

610 *Id.*, pp. 62-66.

611 Federal Supreme Court (*Bundesgerichtshof*), Decision of 8 June 2010, Case KVR 4/09, *Springer/Prosieben II*, *available at:* http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=8443a51037210b79f8d8d979f501f103&nr=53625&pos=0&anz=1.

612 Treaty on Broadcasting and Electronic Media (*Staatsvertrag für Rundfunk und Telemedien*) of 31 August 1993 (last amendment of 15/20 December 2010). In Germany, the Federal State has no legislative power in cultural affairs, except copyright. Hence, the Länder were in need of cooperation to regulate broadcasting operations for the whole of the German territory.

share equal to 42% of the TV market. This figure was reached by the following reasoning: newspapers are less effective than TV in influencing public opinion. Therefore, KEK only considered two-thirds of Springer's market share. Since Springer's market share in the nation-wide newspaper market was 26%, KEK added 17% to the TV audience share of ProSiebenSat.1. Accordingly, KEK concluded that the merger was illegal. Since Springer and ProSiebenSAT.1 refused to sell some of the channels and did not want to grant internal autonomy to any of the channels, the merger could not take place.[613]

In a system that exempts such mergers from the merger control regime of competition law (option 2, above), the challenge consists in protecting economic competition in the market through a regulatory agency that may be less experienced and less willing to consider the competition-oriented dimension of the case. In the reverse case of exclusive control under competition law, the challenge is that the merger control regime may be less suited for taking account of non-economic criteria. The German example discussed above, however, illustrates that competition law may well suffice to also protect public opinion against negative effects of the merger, mostly because the market shares of the TV companies will be larger if public TV stations are excluded from the relevant market.[614] Also, the EU has to be listed among those jurisdictions that only provide for a competition-oriented merger-control system for the media. In the light of past experience, one could argue that the European Commission, by prohibiting mergers in the media industry, also helped to protect plurality of opinion in the Member States.[615] With regard to EU law, however, it is to be added that the European Merger Regulation does not exclude the application of specific national merger control regimes pursuant to the laws of the Member States that have the purpose of safeguarding plurality of the media.[616]

Similar to the situation in Germany, in many other jurisdictions, mergers are assessed in parallel by the competition agencies and sector-specific regulators. This includes, for instance, Croatia, where Article 65(1) of the Electronic Media Act safeguards the application of the rules of competition law by simultaneously providing for sector-specific merger control rules in Articles 52-62 with the objective of guaranteeing diversity in the media. The same is the case in Hungary, where media mergers may be in need of two clearances under the competition law and the Act CLXXXV of 2010 on Media Services and on the Mass Media.

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613 KEK, *supra* n. 598.

614 Yet it is to be kept in mind that the market-share thresholds for sector-specific regulation, as is also demonstrated by the German example, can usually be fixed much lower than under competition law. At a market share of 30%, firms are usually not considered dominant under competition law.

615 See, above all, Commission Decision of 27 May 1998, Case No. IV/M.993 – *Bertelsmann/Kirch/Premiere*, C(1998) 1439 final, *available at:* http://ec.europa.eu/competition/mergers/cases/decisions/m993_19980527_610_en.pdf (the Commission justified the prohibition by predicting that the merger would have led to the creation of a market-dominant position in the pay-TV market in Germany).

616 Article 21(4)(1) and (2) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentration between undertakings (the EC Merger Regulation), [2004] OJ No. 24, p. 1.

In Argentina, overlapping competencies of the competition agency and the telecommunication regulator have recently contributed to a major political fight between Grupo Clarín, the country's largest media conglomerate, controlling major newspapers and private TV channels, and the government of Cristina Fernández de Kirchner. Grupo Clarín also owns CableVisión, the country's largest cable TV provider. Ever since 2006, CableVisión has tried to acquire its competitor Multicanal. Despite serious competition concerns, which are also illustrated by a cartel decision of the competition agency discussed above (at 8.3),[617] the Economics Ministry authorised the merger in 2007, towards the end of the presidency of Ernesto Kirchner.[618] This happened with the approval of the competition agency CNDC (*Comisión Naciónal de Defensa de la Competencia*), after CableVisión had accepted conditions according to which it would not charge prices in regions with weak competition that exceed those charged in the Buenos Aires region, where CableVisión had to face more competition.[619] In 2009, however, when Cristina Fernández de Kirchner had already taken over the government, the Federal Broadcasting Committee (COMFER) stepped in and declared the merger illegal.[620] In doing so, COMFER argued that the merger would concentrate more telecommunication licences in the hands of CableVisión than the law allows.[621] This decision belongs to a series of actions that the government has taken against Grupo Clarín. CableVisión went to the courts arguing that CNDC had exclusive power to decide on a merger and that accordingly COMFER had exceeded its powers by setting aside the decision of the CNDC. There are no doubts that, in the given merger case, there were sufficient competition concerns to justify far-reaching intervention as a matter of competition law in the case. Also, the limitation of telecommunication licences per firm can be considered an appropriate tool for safeguarding competition in the market. However, what can be taken from the case as advice for other countries is that, especially in the politically very sensitive media sector, the institutional design should guarantee independent decision-making by the competent agencies. In Argentina, this is neither guaranteed with regard to the competition agency nor the telecommunication regulator.

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[617] See also National Commission of Competition Defence, "Competition problems in the distribution of television programmes in Argentina", February 2007, *available at:* http://www.cndc.gov.ar/comp_television_eng.pdf (with considerable data on the TV market and especially a table that informs on the concentration of cable TV providers in different provinces of Argentina at p. 12).

[618] Secretaria de Comercio Interior, Resolución No. 1011 of 14 December 2009, *available at:* http://www.cndc.gov.ar/dictamenes/resolucion1011_2009.pdf.

[619] On the complex history of the merger see http://es.wikipedia.org/wiki/Cablevisi%C3%B3n_%28Argentina%29.

[620] Comité Federal de Radiodifusión (COMFER), Resolución Nº 577/COMFER/09 of 3 September 2009, *available at:* http://ebookbrowse.com/resolucion-577-09-comfer-cablevision-pdf-d390528777.

[621] Pursuant to Article 43 of the Law on Telecommunication. See also "Las razones del Comfer para voltear la fusión Cablevision-Multicanal", *lapolicaonline*, 4 September 2009, *available at:* http://lapoliticaonline.com/noticias/val/59889/las-razones-del-comfer-para-voltear-la-fusion-cablevision-multicanal.html.

In Tunisia, the Competition Council has recently used its advisory role under the Competition Act to stress that media mergers of TV and radio stations fall within the exclusive competence of the Minister of Trade pursuant to Article 7 of the Competition Act.[622] This move of the Competition Council was obviously triggered by the creation of two new independent authorities in the aftermath of the Tunisian revolution, namely, the National Authority to Reform Information and Communication (*Instance Nationale pour la Réforme de l'Information et de la Communication*, INRIC)[623] and the High Independent Authority for Audiovisual Communication *(Haute Autorité Indépendante de la Communication Audiovisuelle*, HAICA).[624] Due to its immediate adoption after the Tunisian revolution, the law creating INRIC has a largely provisional character and mostly provides the new authority with advisory functions. What comes closest in this law to merger control is Article 2, last indent, which provides for provisional power of the new agency to issue its opinion on requests for the creation of new radio and TV channels, prior to the adoption of new legal provisions in this regard. This provision may be read in the sense that it also provides an advisory function to INRIC in merger review cases before the Competition Council. Indeed, INRIC, which has meanwhile been established,[625] intends to put a particular focus on the broadcasting sector (radio and TV), which, prior to the revolution, was largely misused for political propaganda.[626] As regards HAICA, which is in the process of being established,[627] it is not quite clear how far its powers reach with regard to controlling media mergers. Indeed, as indicated in the abovementioned opinion of the Competition Council, the powers of HAICA mostly relate to the grant of licences for TV and radio channels and the control of the content of the programmes. But the underlying law clarifies that HAICA's functions also include protecting plurality and freedom of expression (Article 15), that media licences cannot be transferred without authorisation by HAICA and that HAICA, in exercising its powers, has to guarantee freedom of expression and plurality of ideas and opinions, particularly with regard to political information distributed via the private and public sector of the audiovisual media(Article 16). These provisions may well be used by HAICA in the

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622 Opinion No. 112434 of 19 January 2012, as reported by the Tunisian Competition Council.

623 See *Décret-loi n° 2011-10 du 2 mars 2011, portant création d'une instance nationale indépendante pour la réforme du secteur de l'information et de la communication*, *available at:* http://www.legislation-securite.tn/fr/node/30763.

624 *Décret-loi N° 2011-116 du 2 novembre 2011, relatif à la liberté de la communication audiovisuelle et portant création d'une Haute Autorité Indépendante de la Communication Audiovisuelle (HAICA), available at:* http://www.inric.tn/fr/decret.pdf.

625 See its website at: http://www.inric.tn/fr/.

626 See National Authority to Reform Information and Communication, General Report, 2012, p. 29, *available at:* http://www.inric.tn/rapports/en/flip/index.html.

627 The nine members of HAICA were appointed in May 2013. See Béchir Lakani, "Composition de la Haute autorité indépendante de la communication audiovisuelle", *l'Economiste Maghrébin*, 4 May 2013, *available at:* http://www.leconomistemaghrebin.com/2013/05/04/composition-de-la-haute-autorite-independante-de-la-communication-audio-visuelle/.

future to build up a specific second-tier merger-control system for the protection of such non-economic guarantees.

10.2 The concept of a concentration

The first question that arises in merger control cases is whether there is a concentration (or a merger in the broad sense). Concentrations can take different forms. Mergers in the narrow sense, namely, a merger of separate corporate entities into a single new entity, are just one form of concentration that is captured by merger-control regimes. Another form of concentration exists in form of the acquisition of assets if this leads to the change of control over another firm.[628]

This is where copyrights may play an important role, since also the acquisition of IPRs can confer control over another firm.[629] In the context of EU merger control, the acquisition of IPRs can only be considered a concentration if the acquired rights constitute the "whole or part of an undertaking, *i.e.* a business with a market presence, to which a market turnover can be attributed."[630] Licences can only fulfil these criteria if they are exclusive.[631] These conditions can be fulfilled for various intellectual property rights, such as trademarks[632] or patents.[633]

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628 See, for instance, Article 3(1)(b) EU Merger Control Regulation, *supra* n. 616.

629 On this see Andreas Heinemann, "Intellectual property rights and merger control: How to secure incentives to innovate in the long run", in: Josef Drexl et al. (eds), *Technology and Competition – Contributions in Honour of Hanns Ullrich*, Larcier: Brussels, 2009, p. 601, 602-604.

630 European Commission, Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004, 10 July 2007, [2008] OJ No. C 95, p. 1, para. 24. The acquisition of IPRs as a potential case of a concentration is discussed by the merger guidelines of several agencies. See, for instance, Finnish Competition Authority, Guidelines on Merger Control, 2011, para. 3.3, *available at:* http://www.kilpailuvirasto.fi/tiedostot/Suuntaviivat-1-2011-Yrityskauppavalvonta-EN.pdf; or Article 14(b) of the Honduran Competition Law (*Reglamento de la Ley para la Defensa y Promoción de la Competencia*).

631 European Commission, Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 (*supra* n. 630), para. 24.

632 See, for example, Federal Supreme Court (*Bundesgerichtshof*), Decision of 7 June 1992, Case KVR 14/91, *FRAPAN*, 119 BGHZ 117.

633 See, for example, the most recent dispute about the acquisition of Motorola by Google. Commission Decision of 13 February 2012, Case No COMP/M.6381 – *Google/Motorola Mobility*, C(2012) 1068, *available at:* http://ec.europa.eu/competition/mergers/cases/decisions/m6381_20120213_20310_2277480_EN.pdf. See also European Commission, "Mergers: Commission approves acquisition of Motorola Mobility by Google", Press Release IP/12/129 of 13 February 2012, *available at:* http://Europa.eu/rapid/press-release_IP-12-129_en.htm. This merger was not based on the acquisition of Motorola patents, but of Motorola shares. Yet, one of the major competition concerns in the case was whether the indirect acquisition of the standard-essential IT patents held by Motorola would significantly change the accessibility of these patents for the producers of mobile phone devices. This concern would also have arisen if Google had only acquired Motorola's patents. The Commission answered this question in the negative and, consequently, cleared the merger.

Such cases can also be imagined in the copyright-related industries and, in particular, in the publishing industry. If a publisher sells the title or the trademark of a newspaper or a magazine, this can be equivalent to selling part of its business. The German Federal Supreme Court, however, argued against such a case in *National Geographic.*[634] In this case, a German publisher acquired the exclusive licence for the trademark "National Geographic" for publishing a German version of the magazine that, so far, had not existed. In contrast to the Federal Cartel Office, the Court answered the question whether this licence amounted to a concentration in the sense of German competition law in the negative. A licence will only lead to the acquisition of control over the licensor's business or part of it if the licence relates to rights that constitute the foundation of the existing market position of the licensor in the relevant market.[635] This requirement was not held to be fulfilled in the case since the licensor was only known for its English edition in Germany and had never made use of the possibility to publish a German version before. Hence, there was no pre-existing market position that was transferred by the licence.[636] The Court also explained the purpose of this approach by the need to distinguish between internal and external growth of a firm. The licence was seen in the same way as the acquisition of any other input that the publisher is in need of to conduct its business. Even if this input had the effect of restraining competition for competitors of the licensee, the licence, as part of "internal growth", would not fall within the scope of merger control.[637]

In this context, the Court also alluded to a similar situation in the film industry by comparing the National Geographic licence with the acquisition of the rights for a blockbuster movie by a film distributor. This case is likewise categorised by the Court as a transaction belonging to internal growth that will not be captured by merger control.[638] Indeed, any exclusive licensing of copyright would otherwise quickly fall within the scope of merger control laws, although the transaction only aims at bringing the movie to the market. If merger control rules were applied to such cases, exploitation of copyrighted works would be seriously hampered.

From this case, however, one has to distinguish the transfer of parts of a repertoire of a music publisher to another music publisher, or from one film distributor to another distributor. Those transactions are not designed to bring works to the market, but to restructure the given industry by transfer of assets. Indeed, it should not make any

634 Federal Supreme Court (*Bundesgerichtshof*), Decision of 10 October 2010, Case KVR 32/05, *National Geographic*, 170 BGHZ 130, *available at:* http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=63e39f03e6b0ae85974b126cfa350a20&nr=39316&pos=1&anz=2.

635 *Id*., para. 16.

636 *Id*., para. 17.

637 *Id*., para. 13.

638 *Id*.

difference for the applicability of merger-control rules whether two music publishers merge or whether one music publisher acquires the rights for a significant part of another publisher's repertoire.

10.3 Notification thresholds

Once a case of a "concentration" is established, the next question is whether this concentration needs to be notified to the competition agencies. For this purpose, competition laws define notification thresholds. Thereby, competition jurisdictions may pay particular attention to the particularities of copyright industries. This happens in two regards: first, some competition jurisdictions have special thresholds for specific copyright industries. Second, ownership of IPRs, including ownership of copyrights and related rights, may play a role in assessing whether the notification thresholds are met.

Special turnover thresholds can be found in the merger control regime of Germany. There, newly revised Section 38(3) of the Act against of Restraints of Competition provides that, for the calculation of the annual turnover, in the field of publication, production and distribution of newspapers, magazines and parts thereof the actual turnover of the merging firms is to be multiplied by 8, while in the field of the production, distribution and broadcasting of radio and television programmes and the sale of radio and television advertising time, the actual turnover of the merging firms is to be multiplied by 20.[639] Hence, in the field of media (newspapers and magazines, radio and TV) the general turnover requirements are lowered to 12.5% and 5%, respectively! While mergers need to be notified to the Federal Cartel Office if the aggregate worldwide turnover is more than €500 million, the domestic turnover of at least one undertaking is more than €25 million and that of the other undertaking more than €5 million, the respective numbers for newspaper mergers are €62.5 million for worldwide turnover and €3.125 million and €625,000 for domestic turnover and, in the case of TV mergers, only €25 million for worldwide turnover and €1.25 million and €250.000 for domestic turnover. The reasons for having this special rule are two: first, media markets can be very concentrated on a local scale, in particular, as far as the local newspaper and radio business is concerned. Hence, many mergers of a local reach that raise competition concerns would escape merger control if the regular turnover requirements applied. Second, with this rule, the German legislature has taken into account that media markets have a political dimension. By considerably lowering the thresholds for these sectors, the legislature has increased the probability that competition agencies will intervene, which would also have positive results for the protection of plurality in the media on the local level. As indicated above (at 10.1), competition law can indirectly safeguard plurality by directly protecting economic competition. Moreover, against the backdrop of the constitutional equal-

[639] Amendment of 26 June 2013; OJ (*Bundegesetzblatt*) Vol. I, p. 1750. Prior to the amendment, the multiplier was 20 for all these sectors.

treatment principle, the political dimension of these markets justifies application of the multiplier rule to only the media sector and not to other sectors that are also highly concentrated on a local and regional level. The "multiplier rule" has probably contributed significantly to a newspaper landscape in Germany that is very different from those of other European countries. Yet the multiplier rule does not protect against internal growth of firms and, hence, has not prevented the very strong market position of "Bild" in the tabloids market. From an international perspective, however, the multiplier rule may have prevented multinational firms from entering the German media market easily. Conversely, it may also have created incentives for German newspaper publishers to expand to foreign markets. By lowering the multiplier for newspaper mergers from 20 to 8 in the framework of the most recent reform of the German Act in June 2013, the German government expects a reduction of the merger control cases in the sector by 20% and cost savings both for the firms concerned and for the Federal Cartel Office.[640] Moreover, the government justifies its proposal by the objective to allow especially smaller publishers to merge more easily and to compete better with newly emerging forms of media, especially on the Internet.[641] Still, this latter reasoning is not unproblematic. After all, the amendment's legal effect will be to also allow some mergers that raise competition concerns and that would be blocked under still existing law. This can hardly be justified by the need of raising competitiveness of the merging firms.

A multiplier rule can also be found in Austria. There, according to Section 9(3) Cartel Act, the turnover of media undertakings – as defined by Section 8 Cartel Act – are multiplied by 200 (!), which brings down the annual turnover requirements for global turnover from €300 million to €1.5 million and for national turnover from €30 million to €150,000. In addition, at least two of the merging firms need to achieve a global turnover of more than €25.000 annually.

In some jurisdictions, copyright ownership can be relevant for the assessment of whether the merging firms have to notify. Such a case is presented by India. India's notification thresholds, pursuant to Section 5 of the Competition Act, are not only defined in terms of the turnover of the merging firms but also, alternatively, in terms of the asset value of the merging firms. This often requires a difficult valuation of intellectual property rights that the merging firms hold. The Statutory Explanation (lit. c)), which is part of the Act, states that the value of the assets "shall be determined by taking the book value of the assets" and, furthermore, explicitly states that it should include the value of copyright and some other intellectual property rights. Section 4 of the Combination Regulation of 2011[642] read with

640 *Id.*, p. 18.

641 *Id.*, p. 20.

642 The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 11 May 2011, *available at:* http://www.cci.gov.in/images/media/Regulations/CCI_Combinations_Regulations_2011_11_05_2011.pdf.

para. 4 of Schedule I to this regulation clarifies that those assets will not have to be taken into account if they do not lead to control of the enterprise whose assets are acquired, unless these assets represent substantial business operations, especially for a particular product or service. This very unusual, and also unnecessary, way of formulating the notification requirement considerably reduces legal certainty for firms in the copyright industry when they have to determine whether they have to notify or not.

10.4 The role of copyright in assessing the effects of the merger on competition

Intellectual property law can play a major role in the framework of assessing the pro and anti-competitive effects of a merger. This is especially true for patents, for which the dynamic aspects of competition, i.e. incentives for innovation, need to be taken into account.[643] Yet copyrights also can influence the assessment of mergers.

10.4.1 Merger guidelines and regulations

Different jurisdictions use slightly different criteria for merger assessment. The US applies the substantial lessening of competition (SLC) test. The European Union used to apply a market-dominance test, but switched to the significant-impediment-of-effective-competition (SIEC) test in 2004.[644] Most Member States have by now also adopted this test.[645] Switzerland is currently considering harmonisation of its control criteria with the EU test.[646] Beyond the differences between these tests, which may influence the outcome in individual cases, there is a general understanding that the specific form of a merger can be used as a starting point for the assessment of the effects on competition. In this regard, a distinction has to be made between horizontal, vertical and conglomerate mergers. This distinction, on which the following analysis will also rely (at 10.4.2 to 10.4.4, below), is usually further explained by merger guidelines and regulations adopted by the competition agencies.[647] Under the application of such general guidelines, IPRs and copyrights in particular come into the picture in the framework of assessing potential barriers to entry.

643 As an example see the European *Google/Motorola* case, *supra* n. 633, in which standard-essential patents and the incentives of previous and new owner of the patents played a major role.

644 Article 2(2) and (3) EU Merger Control Regulation, *supra* n. 616.

645 In Germany, harmonisation with the EU standard was implemented in June 2013. See the amendment of 26 June 2013, OJ (*Bundesgesetzblatt*) Vol. I, p. 1750.

646 Government Bill of 22 February 2012. See "Mediendokumentation zur Botschaft zur Revision des Kartellgesetzes", para. 2.3., *available at:* http://www.news.admin.ch/NSBSubscriber/message/attachments/25957.pdf.

647 In the EU, the Commission has adopted two merger guidelines, namely on horizontal and on non-horizontal mergers. See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, [2004] OJ No. C 31, p. 5; Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, [2008] OJ No. C 265, p. 6. The US agencies have only adopted guidelines on horizontal mergers. See U.S.

In this context, merger guidelines often explicitly refer to IPRs. This is the case for the European Guidelines on horizontal mergers.[648] Similarly, in 2012, the *Fiscalía Nacional Económica* (FNE) of Chile presented a new draft guide on horizontal mergers according to which patent rights and licences can cause legal barriers in particular.[649] Also in Chile, the *Tribunal de Defensa de la Libre Competencia* (TDLC), according to its internal regulations,[650] requires merging parties to provide information on intellectual property and/or copyright as a cause for entry barriers in their merger notification. On the same line, merging firms are required by the Competition Commission of India to inform on the restrictions of market entry that may arise from IP rights and licences.[651] In Mexico, the competition agency has recognised the role of different kinds of IPRs as entry barriers in several merger decisions. These decisions relate to trade marks,[652] patents[653] and geographical indications.[654] Yet Mexico, so far, is still waiting for a similar copyright case.

In contrast to the European Guidelines on horizontal mergers, the US Horizontal Merger Guidelines of 2010 mention IPRs in a completely different context, namely, in the framework of the efficiency defence. According to the US Guidelines, efficiencies may in particular arise from innovation. In this regard, IPRs are considered by the US agencies as important tools that allow a firm to appropriate the benefits of its innovation.[655] IPRs as entry barriers make it less likely that the agency will clear the merger without conditions, namely, without an obligation to divest certain rights; IPRs as a tool to appropriate innovation help to justify the efficiency defence and, thereby, make clearance more likely. This difference between the

Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines, August 19, 2010, *available at:* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

648 European Guidelines on horizontal mergers, *supra* n. 647, para. 71(b) (listing patents in particular).

649 Fiscalía Nacional Económica, Guía para el Análisis de Operaciones de Concentración, 29 June 2012, p. 15, *available at:* http://www.fne.gob.cl/wp-content/uploads/2012/07/Guia-Fusiones1.pdf.

650 Internal Regulation No. 12/2009.

651 See The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (No. 3 of 2011): Form II for merger control based on Article 5(2) Regulations, Point 11.10(d), *available at:* http://www.cci.gov.in/images/media/Regulations/CombinationRegulation110511.pdf.

652 See Comisión Federal de Competencia, Decision of 29 April 1999, Case CNT-166-1998, *The Coca Cola Company/Cadbury Schweppes*, *available at:* http://www.cfc.gob.mx/cfcresoluciones/Docs/Concentraciones/V387/30/1493244.PDF. In this case, the agency recognised brand loyalty and, finally, refused to clear the case.

653 Comisión Federal de Competencia, Decision of 7 September 2000, Case CNT-76-2000, *Glaxo Wellcome/SmithKline Beecham*, *available at:* http://www.cfc.gob.mx/cfcresoluciones/Docs/Concentraciones/V387/29/1492764.PDF. Here, the agency recognised patents as entry barriers to the market for pharmaceutical. The merger was allowed subject to the divestiture of several patents.

654 Comisión Federal de Competencia, Case CNT-22-2003, *José Curevo/Becle/Diageo Highlands Holdings/ Don Julio*, *available at:* http://www.cfc.gob.mx/cfcresoluciones/Docs/Concentraciones/V387/29/1492437.PDF. Despite the recognition of the geographical indication of Tequila as an entry barrier, the merger was cleared.

655 US Horizontal Merger Guidelines, *supra* n. 647, chapter 10 (p. 31).

European and the US-American guidelines, however, should not be understood as a fundamental conflict about the principles of merger-control law. The agencies on both sides of the Atlantic would certainly agree that IPRs demonstrate an ambivalent character in the framework of merger control. Yet the guidelines on both sides of the Atlantic certainly demonstrate slightly diverging philosophies on the overall positive or negative effects of IPRs on competition.

Some agencies have also adopted more specific guidelines that are of particular relevance for the assessment of mergers in copyright-related markets. This is the case, for instance, in Taiwan, where the FTC has adopted Disposal Directions on cable television and related industries.[656]

10.4.2 Horizontal mergers

Copyrights may play a considerable role in horizontal mergers of right-holders. As explained above (at 7.1), individual copyrighted works usually do not constitute a relevant market and, therefore, should not be equated with a monopoly. Hence, copyrighted works compete in product markets. This makes clear that horizontal mergers among companies that hold large repertoires of copyrighted works has to lead to competition concerns.

Repertoires can be built up in different ways. A publisher, for instance, who competes better by attracting more successful authors than other publishers will not have to face control by merger control bodies. If, however, music publishers merge, thereby increasing the concentration of publishers in the market, such external growth needs to be scrutinised.

As the example shows, mergers in the copyright industry typically take place among intermediaries. Such intermediaries act in two directions. Music publishers, for instance, are expected to promote authors and performing artists as well as their works and performances. Likewise, a book publisher is not just a licensee with regard to the work; the publisher also enables the author to get the book published, in the interest of the author. Concentrations in the publishing industry, therefore, affect the economic interests of authors and performing artists by increasing the market power of the publishers and, thereby, can decrease incentives for creativity. In the other direction, concentration of copyrights in the hands of intermediaries affects the interest of users and other downstream licensees. If, for instance, the market of film distribution is highly concentrated, cinema operators will have less choice among distributors and, consequently, prices for cinema tickets will increase. Hence, especially in downstream markets, the composition of the repertoires matters enormously. In the film distributor example, market power of the individual distributors cannot simply be assessed by the number of films in which they hold copyright. Rather, market power will have to be assessed in the light of the attractiveness of

[656] Fair Trade Commission Disposal Directions (Policy Statements) on Cable Television and Related Industry of 24 December 1996, *available at:* http://www.apeccp.org.tw/doc/Taipei/Decision/ctdec017.htm.

the individual works and the comprehensive repertoire for potential users and finally the audience.

Mergers between music publishing companies are among the most frequent horizontal mergers that have been dealt with by competition agencies. In 2004, the number of the so-called "major companies" (large music publishing and record companies) was brought down from five to four when Sony Music Entertainment merged with Bertelsmann Music Group to become BMG Music Entertainment.[657] Due to its global impact, this merger was assessed by many competition agencies around the world. The European Commission cleared the merger without any conditions.[658] The US FTC cleared the merger nine days later.[659] The merger made Sony BMG the second-largest music publishing and record company, only slightly behind Universal. After this merger, the remaining four major companies controlled 75% of the world music market – with Universal and Sony BMG each controlling 25% of the market – and even 80% of the European market. The merging firms justified their merger by the need to save costs under the impression of decreasing income due to collapsing record and CD markets. Clearance of this case in the EU contrasts with the previous handling of the intended merger between Warner and EMI.[660] Yet, in *Sony/BMG*, the Commission did not find that the reduction of the number of major labels from five to four would have a serious impact on competition and did not foresee the emergence or the strengthening of collective market dominance. However, the Commission Decision did not immediately close the case in Europe. The association of smaller independent labels opposed the clearance of the merger and brought an annulment action against the Commission to the former Court of First Instance (CFI, now General Court). Indeed, the CFI annulled the Decision in 2006, criticising the Commission for not having sufficiently reasoned its decision in the light of the requisite legal standard.[661] In particular, the CFI was not satisfied with the Commission's coordinated-effects analysis on the basis of which it rejected the emergence of collective market dominance. As a consequence, the merging firms had to request the Commission to approve the merger a second time. Thus, the CFI judgment led to a second merger decision of the

657 The two parent companies, Sony and Bertelsmann, were both holding 50% of the shares. Some years later, in 2008, Sony took over all shares from Bertelsmann and so Sony BMG became Sony Entertainment.

658 Commission Decision of 20 July 2004, Case No COMP/M.3333 – *Sony/BMG, C(2004) 2815*, *available at:* http://ec.europa.eu/competition/mergers/cases/decisions/m3333_20040719_590_en.pdf.

659 See Federal Trade Commission, "FTC Closes Investigation of Joint Venture Between Bertelsmann AG and Sony Corporation of America", Press Release of 28 July 2004, *available at:* http://www.ftc.gov/opa/2004/07/sonybmg.shtm.

660 When the Commission decided to start full investigation in 2000, Time Warner and EMI decided to give up the merger. On the competition concerns of this merger see European Commission, "Commission opens full investigation into Time Warner/EMI merger", Press Release IP/00/617 of 14 June 2000, *available at:* http://europa.eu/rapid/press-release_IP-00-617_en.htm.

661 Case T-464/04 *IMPALA v Commission* [2006] ECR II-2289.

Commission, in which it confirmed its earlier clearance.[662] In this decision, the Commission performed a most complex econometric analysis of the merger on prices for consumers. Hence, the focus remained on the static effects of the merger on the downstream music market. What the Commission did not evaluate was the potential negative effect on creativity and, hence, dynamic competition. The very purpose of this merger was to cut down the repertoire with the objective of making it less cost-intensive. This included the termination of contracts with musicians and singers. As a consequence, higher market concentration made it even more difficult for new authors and performers to enter the market through publishing companies. This may well have a negative impact on innovative music and product (cultural) diversity.[663]

The *Sony/BMG* merger was not the last merger among major music publishing companies that can be witnessed. Most recently, both the US FTC and the European Commission had to decide on two other mergers of major music companies, namely, the Sony/EMI merger and the Universal/EMI merger. In Europe, the European Commission cleared both mergers in 2012. This led to the disappearance of EMI from the market, bringing the number of major companies down to three. The Sony/EMI merger related to the acquisition of the music publishing business of EMI in form of "EMI Music Publishing", which held the EMI copyright repertoire. The Universal/EMI merger related to the acquisition of the music production business of EMI (EMI Music) by Universal. Hence, from a copyright perspective, the Sony/EMI merger appears as the more interesting one.[664] In this case, the Commission had serious concerns about the impact of the merger on the licensing of online rights of Anglo-American chart hits. For users that offer music download services, this Anglo-American repertoire, which, in Europe, is meanwhile licensed through platforms that offer multi-territorial licences,[665] appears to be indispensable. In the UK and Ireland, the merger would have given Sony control over more than half of the chart hits. Therefore, the Commission only cleared this merger after the parties committed to divesting the rights of a number of labels and authors such as Robbie Williams. It is interesting to see that the Commission, in

[662] Commission Decision of 3 October 2007, Case No COMP/M.3333 – *Sony/BMG*, C(2007) 4507, *available at:* http://ec.europa.eu/competition/mergers/cases/decisions/m3333_20071003_590_en.pdf.

[663] In this regard see also Gisela Aigner, Oliver Budzinski & Arndt Christiansen, "The Analysis of Coordinated Effects in EU Merger Control: Where Do We Stand after Sony/BMG and Impala?", (2010) 2 *Eur. Comp. J.* 331 (with an analysis of the negative correlation between the concentration and the level of product diversity in the market for music).

[664] Commission Decision of 19 April 2012, Case No COMP/M.6459 – *Sony/Mubadala Development/EMI Music Publishing*, C(2012) 2745, *available at:* http://ec.europa.eu/competition/mergers/cases/decisions/m6459_20120419_20212_2499936_EN.pdf. The third partner to the merger (Mubadala) is an investment firm from Abu Dhabi which is completely owned by the Government of the Emirate of Abu Dhabi. According to the deal, Sony and Mubadala would jointly control EMI Music Publishing.

[665] See especially CELAS (www.celas.eu) which is a licencing platform for pan-European licences operated as a joint venture of the German CMO GEMA with the British CMO PRS for Music for the Anglo-American repertoire of EMI.

making its decision, was not only concerned about prices but also justified its decision with the objective of guaranteeing cultural diversity.[666] In the Universal/EMI merger, the concerns of the Commission went in a similar direction, namely that Universal would be able to raise prices for Internet download services for music and that, therefore, the merger would negatively influence the possibilities for online service providers to develop innovative business models on the Internet and, thereby, reduce consumers' choice for music as well as cultural diversity in the European market. This is why the Commission only accepted the Universal/EMI merger after the commitment to divest substantial parts of the EMI music recording assets.[667] In the US, the two mergers were equally cleared by the FTC. In the *Sony/EMI* merger, the FTC also imposed the divestiture of parts of the repertoire.[668] However, on the Universal/EMI merger, the FTC did not impose any conditions on the mergers in view of controlling Sony's and Universal's power to control online services in the future.[669] This more generous stance was heavily criticised in the US.[670] The difference seems to consist in the following: the US FTC continues to put its focus on price competition and holds that divestiture will not lead to lower prices since, even after a divestiture, the repertoire of Universal would be indispensable for online music platform operators and, therefore, Universal could still charge monopoly prices. In contrast, the European Commission may tend to have a somewhat flawed understanding of the pricing mechanism. But its concerns relate more to the development of new innovative business models and to the objective of keeping the market open for more culturally diverse productions. Thereby,

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666 See the quote of Competition Commissioner Joaquín Almunia in European Commission, Mergers: Commission approves Sony and Mubadala's takeover of EMI's music publishing business, subject to conditions", Press Release IP/12/387 of 19 April 2012, *available at:* http://europa.eu/rapid/press-release_IP-12-387_en.htm.

667 See "Commitments to the European Commission", Case M.6458 – *Universal Music Group/EMI Music*, *available at:* http://ec.europa.eu/competition/mergers/cases/decisions/m6458_20120921_20600_2878583_EN.pdf. See also European Commission, "Mergers: Commission clears Universal's acquisition of EMI's recorded music business, subject to conditions", Press Release of 21 September 2012, *available at:* http://europa.eu/rapid/press-release_IP-12-999_en.htm.

668 See "Sony consortium acquires EMI Publishing after getting FTC approval", CompleteMusicUpdate (2 July 2012), *available at:* http://www.thecmuwebsite.com/article/sony-consortium-acquires-emi-publishing-after-getting-ftc-approval/.

669 On the Universal/EMI mergers see Federal Trade Commission, "FTC Closes Its Investigation into Vivendi; S.A.'s Proposed Acquisition of EMI Recorded Music", Press Release of 21 September 2012, *available at:* http://www.ftc.gov/opa/2012/09/emi.shtm.

670 The American Antitrust Institute had recommended blocking the Universal/EMI merger: Flavia T. Fortes, "Music Industry Consolidation: The likely anticompetitive Effects of the Universal/EMI Merger", AAI White Paper, August 30, 2012, *available at:* http://www.antitrustinstitute.org/content/aai-white-paper-analyzing-emi-universal-music. On the discussion see, also, Zach Carter, "Universal-EMI Merger Approved As FTC Greenlights Controversial Deal", huffingtonpost.com (21 September 2012), *available at:* http://www.huffingtonpost.com/2012/09/21/universal-emi-merger-ftc-_n_1903776.html; Geoffrey Manne, "Let The Music Play: Critics Of Universal-EMI Merger Are Singing Off-Key", forbes.com (20 September 2012), *available at:* http://www.forbes.com/sites/beltway/2012/09/20/let-the-music-play-critics-of-universal-emi-merger-are-off-key/.

the Commission focuses more on the dynamic aspects of competition, which clearly distinguishes the handling of the two 2012 mergers from the reasoning in the *Sony/BMG* merger some years earlier, where the static price-focused analysis was still very dominant.

Of course, due to their global outreach, these *Sony/EMI* and *Universal/EMI* mergers also needed to be notified in other jurisdictions. The mergers attracted particular resistance in Brazil, where the CADE blocked both mergers at the end of 2012.[671] In contrast, the *Universal/EMI* merger was cleared without problems in New Zealand.[672]

Horizontal media mergers can be reported from numerous jurisdictions. In Brazil, a merger among pay-TV providers was cleared in 2010 subject to the condition that the terms of contracts granted to the consumers of the acquired company be continued for at least 18 months.[673] From Chile, several recent mergers in the TV market and radio market can be reported. In particular, the *Fiscalía Nacional Económica* recently cleared the acquisition of a TV channel by a foreign company.[674] The Competition Tribunal cleared a large merger that bundled numerous radio channels in the hands of one firm under strict conditions.[675] In a most recent case, the Competition Tribunal cleared another merger in the radio sector under certain conditions in view of possible market dominance regarding the control of multi-platform radio services in the future.[676] In Poland, the competition agency recently cleared a merger among competing cable TV operators subject to the sale of parts of the network in the two cities of Warsaw and Krakow.[677]

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671 See "Brazil competition regulator limits Universal and Sony's EMI acquisitions", *CompleteMusicUpdate* (8 November 2012), *available at:* http://www.thecmuwebsite.com/article/brazil-competition-regulator-limits-universal-and-sonys-emi-acquisitions/.

672 Commerce Commission of New Zealand, *Universal Music Holding Ltd and EMI Group Global Ltd* [2012] NZCC 14. See also Commerce Commission of New Zealand, "Universal Music granted clearance to acquire recorded music business of EMI Music", Media Release (22 June 2012), *available at:* http://www.comcom.govt.nz/regulated-industries/regulated-industries-media-releases/detail/2012/universal-music-granted-clearance-to-acquire-recorded-music-businesses-of-emi-music

673 CADE, Decision of 7 August 2010, Ato de Concentraçao n° 53500.001477/2008 – *Net Serviços de Comunicaçao S.A e 614 Telecomunicaçaos Ltda*.

674 Fiscalía Nacional Económico, Clearance Report of 24 September 2010, *Bancard Inversiones /Red de Televisión Chilevisión*, *available at:* http://www.fne.gob.cl/wp-content/uploads/2011/03/ilpr_0036_2010_01.pdf.

675 Tribunal de Defensa de la Libre Competencia, Resolución N° 20/2007 of 27 July 2007, *GLR Chile Ltda/Iberoamerican Radio Chile S.A.*, *available at:* http://www.tdlc.cl/DocumentosMultiples/Resoluci%C3%B3n-20-2007.pdf. This judgment was confirmed by the Supreme Court. See Supreme Court of Chile (Corte Suprema) of 22 November 2007, *available at: http://www.tdlc.cl/DocumentosMultiples/Resolucion_20_Corte_Suprema.pdf.*

676 Tribunal de Defensa de la Libre Competencia, Resolución N° 41/2012 of 27 September 2012, *Radiodivusíon SpA/Comunicaciones Horizonte Ltda*, *available at:* http://www.tdlc.cl/DocumentosMultiples/Resoluci%C3%B3n%20N%C2%B0%2041-2012.pdf.

677 UOKiK, Decision no. DKK-101/2011, *UPC Polska/Aster*, Annual Report 2011, pp. 16 et seq. This decision was based on the sector inquiry in the pay-TV market which included 185 firms providing pay-TV services. See Annual Report 2011, p. 19.

In Latvia, the Competition Council reviewed the merger between the two largest privately owned TV companies in 2012.[678] The Competition Council identified a series of markets that were affected, namely the markets for free-to-air TV retail distribution, for pay-TV wholesale distribution, for pay-TV retail distribution, for the supply of content for TV channels and for broadcasting commercials. The Competition Council was concerned that the merger would create or strengthen a dominant position and reduce media diversity. Therefore, the merger was only cleared with a number of behavioural conditions that were designed to prevent the emerging undertaking from increasing prices or abusing its dominant position by discriminating between customers or refusing to supply. Also, the Competition Council rejected the failing-firm defence in this case.

In Belgium, the Competition Council cleared a merger of two cable operators despite concerns that the merger would considerably increase the bargaining power of the new entity in relation to the content TV programme providers in the market for the acquisition of content. The Competition Council imposed conditions on the new entity with the objective of guaranteeing full and non-discriminatory access of TV programmes to the distribution platform and the objective of excluding the risk of any exclusionary effect on competing platform operators. These conditions included a prohibition of entering into exclusivity agreements with any programme provider, which would otherwise produce an exclusionary effect on competing distribution platforms, and an obligation to allow access to all programme providers to its own distribution platform without discrimination.[679]

In another merger case involving the publishers of French-speaking newspapers, the Belgian Competition Council stated serious competition concerns but still allowed the merger subject to conditions.[680] The Competition Council assessed effects on both the market for newspapers and advertising. Yet, on appeal, the Brussels Court of Appeal annulled this decision for several reasons without however finding itself able to decide on the legality of the merger due to its limited jurisdiction.[681] This was the first time ever that the Court annulled a merger decision of the Competition Council. Later on, the merger arrangement

678 Latvian Competition Council, decision of 11 May 2012, *MTG/LNT*, as reported by the Competition Council.

679 Belgian Competition Council (Conseil de la concurrence), decision no. 2008-C/C-16 of 25 April 2008, Case CONC-C/C-07/0028, *Tecteo/Brutele – Câble Wallon*, paras 31-34, *available at:* http://economie.fgov.be/nl/binaries/162008CC16_TECTEO_Phase2_PUB_tcm325-35703.pdf.

680 Belgian Competition Council (*Conseil de la concurrence*), decision 2004-C/C-16 of 26 January 2004, *Rossel/De Persgroep/Editeco*, *available at:* http://www.etaamb.be/fr/document_n2004011072.html. See Ioannis Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, paras 4.056 et seq.

681 Brussels Court of Appeal (*Cour d'appel de Bruxelles*), 15 September 2005, (2005) 4 *Revue trimestrielle de jurisprudence du Conseil de la concurrence* 53. See also Ioannis Kokkoris, *supra* n. 680.

was changed and a new notification was submitted. Again, the Competition Council allowed the merger subject to conditions.[682]

The Bulgarian Competition Commission also reviewed a merger of TV stations, in 2010.[683] The merger was based on the acquisition of two TV and radio companies – Balkan New Corporation (BNC), Sofia and TV Europe, Netherlands – by Central European Media Enterprises, incorporated in the Bermudas. The Competition Commission assessed the impact of the merger on the TV advertising market. In the light of a combined market share well above 50%, the Commission concluded that the merger would lead to an oligopolistic market structure. It also took account of the impact of the merger on the content of TV programmes and on the radio market. Yet the Commission allowed the merger since it would not considerably alter the already existing market position of BNC. Also, the Commission stressed that it expected a very dynamic development of the market through digital technology.

In Spain, in 2005, the Supreme Court confirmed the conditional approval of the acquisition of Vía Digital, a Spanish pay-TV platform, by Sogecable.[684] The merger would have raised the market share of Sogecable to more than 80%. In its report to the Council of Ministers the Competition Tribunal therefore highlighted serious competition concerns especially relating to the ability of competitors to gain access to necessary TV rights, including for soccer matches. Yet the Council of Minsters cleared the merger by imposing structural remedies. Both Sogecable and its competitors appealed to the Supreme Court, which upheld the decision by arguing that, in merger control, conditional clearance as the less restrictive decision should be preferred to a complete prohibition.

In Canada, a merger of cinema operators consisting in the acquisition of Famous Players by Cineplex Galaxy, was cleared after the merging firms agreed on the divestiture of 35 cinemas out of a total of 163.[685] This decision is explained by the definition of the geographical market. The Competition Bureau defined these markets as regional and therefore tried to respond to the competitive concerns in some of these regions by imposing the divestiture of cinemas.

In *BBM Canada/Nielsen Media Research*, the Canadian Competition Bureau allowed a merger between the only two firms active in the market of providing electronic audience

682 Belgian Competition Council (*Conseil de la concurrence*), decision 2005-C/C-56 of 20 December 2005, *Editeco*. See also Kokkoris, *supra* n. 680.

683 Bulgarian Commission for Protection of Competition (CPC), decision 385/08 of April 2010, Annual Report 2010, p. 28.

684 Spanish Supreme Court, judgment of 7 November 2005, *Sogecable/Vía Digital*, as reported by Ioannis Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, paras 27-064 et seq.

685 See Competition Bureau, "Acquisition of Famous Players by Cineplex Galaxy", July 2005, *available at:* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01921.html.

measurement in Canada. This was justified by expected cost-savings and the expectation that these savings would be passed on to customers.

Hungary provides an interesting case in which the Competition Council initially tried to prohibit a newspaper merger.[686] The merger included the acquisition of the publisher of the major Hungarian political daily newspaper, with a market share above 50% by the Hungarian subsidiary Tabora of the Ringier group, which is based in Switzerland but active in many newspaper markets even outside Europe. Tabora was active in all different press sub-markets. It also owned the third nationwide political daily newspaper in Hungary. The Competition Council analysed the effect of the merger both on the readers and the advertising market. The relevant market was defined as the one for national political daily newspapers. Thereby, other sources of information such as the Internet were excluded. The Competition Council held that the acquisition would have caused Tabora's market share to go up from 13% to 87%. With regard to the advertising market, the Competition Council also took into account the very strong market position of Tabora in the market for tabloids and sports newspapers and, therefore, was concerned by the emerging large portfolio of press products. Since the Competition Council found that partial divestiture of some titles would not have remedied its concerns, it prohibited the merger. On appeal, the Municipal Court criticised the agency for not having taken into account potential supply-side substitution. According to the Court, market entry barriers were relatively low, and especially regional newspapers could easily enter the market for national political newspapers. The Competition Council did not further appeal, but finally approved the merger. Meanwhile, Tabora had sold its original nationwide political newspaper. Hence, the Competition Council only imposed behavioural remedies regarding the pricing of advertising space.

An interesting radio merger case can be reported from South Africa. In the *Primedia* case, the Competition Commission first unconditionally cleared the merger, but had to decide a second time after its initial decision had been remanded for reconsideration by the Competition Appeal Court. The merger related to the acquisition of indirect control of the Kaya FM Radio station through Primedia, which was already a major player in the radio market prior to the merger. Primedia intended to acquire 100% of the shares of the investment firm NAIL, whose only asset was 24.9% of the shares in Kaya FM. The Competition Commission was concerned about unilateral anti-competitive effects due to higher concentration, but cleared the merger subject to conditions. In its first decision, the Competition Tribunal held that Primedia would not be able to exercise control and, therefore, gave clearance without conditions. In its second decision,[687] the Competition

[686] Hungarian Competition Council, Case Vj-59/2003, *Tabora/Népszabadság*; Municipal Court, Case K.33364/2003/10; Hungarian Competition Council, Case Vj-169/2004; as reported by Ioannis Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, paras 10-070 to 10-073.

[687] *Primedia Limited, Capricorn Capital Partners (Pty) Ltd, New Africa Investments Limited v The Competition Commission*, Competition Tribunal, Decision of 9 May 2008, Case 39/AM/MAY06, *available at:* http://www.comptrib.co.za/cases/intermediate-merger/retrieve_case/825.

Tribunal reviewed the market definition more carefully. Since radio stations provide their service to the audience free of charge, the case regarded the advertising market.[688] However, since market power in the radio advertising market depends on the attractiveness of the programmes to the audience, the advertising market is to be limited to the audience reach of the given radio station. Therefore, the Commission defined the market very narrowly, as "the LSM 6-10 audience for advertisers, in the Gauteng market for adult contemporary music radio stations, broadcasting predominantly in English".[689] The major reason for this narrow definition was that advertisers would not pay for the programmes if they did not reach the audience.[690] The Tribunal considered market definition as an "inordinately difficult" task in this case.[691] Evidence on the cross-elasticity of demand was not available.[692] The Tribunal therefore relied on internal marketing material for identifying the closest competitor. This is how Metro FM turned out as the closest competitor;[693] it was only in a second circle that four other stations, one of which was completely owned by Primedia, were considered as competitors.[694] The analysis of the Tribunal on market definition highlights the challenges a competition agency has to face in competition cases relating to media markets in the highly heterogeneous South African society. Since Primedia was not able to control the pricing decisions of Kaya FM, the other issue was whether the mere acquisition of a financial interest in Kaya FM could produce anti-competitive unilateral effects.[695] Indeed, the appellant to the Competition Appeal Court had argued that Primedia could raise prices through its other radio channel and still would not lose income since advertising customers would be diverted to Kaya FM.[696] The Competition Tribunal rejected this theory and held that even with a narrow market definition no anti-competitive unilateral effects could be identified.[697] Therefore, it cleared the merger again without imposing any conditions.[698]

Of course, mergers among newspaper publishers are frequent around the world. In a Brazilian case, CADE allowed the acquisition of a newspaper by a competing newspaper

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688 *Id.*, para. 31.

689 *Id.*, para. 36.

690 *Id.*, para. 39.

691 *Id.*, para. 56.

692 *Id.*, para. 57.

693 *Id.*, para. 69

694 *Id.*, para. 73.

695 *Id.*, para. 81.

696 *Id.*, para. 82.

697 *Id.*, para. 132.

698 *Id.*, para. 133.

publisher in the State of Santa Clara on the condition that the non-compete clause imposed on the seller was limited to five years.[699]

In a recent case, the Polish competition agency prohibited a merger between online retailers of non-professional books and music CDs. According to the agency, this merger would have seriously restricted competition in the domestic book market by creating the largest online book retailer in the country, with the second-largest online retailer following at a considerable distance. The decision was based on the largest market inquiry that the agency has so far ever conducted.[700]

In Lithuania, the Competition Council reviewed two horizontal mergers among wholesale distributors of newspapers in 2005 and 2007. In the first case, the Competition Council was concerned about the strengthening of market dominance of the acquisition of a Lithuanian newspaper distributor through a Finnish company that already held large shares in another Lithuanian newspaper distributor. This merger would have made this firm to the only wholesale distributor in some parts of the country. Yet the Competition Council allowed the merger, while imposing a series of behavioural remedies, including a commitment that the acquiring firm would allow newspaper publishers full access to its distribution service at non-discriminatory terms.[701] However, quite immediately after the merger took place, a new dispute arose because the acquiring firm did not respect these remedies. In the second case, the Competition Council had to review the increase of the same Finnish parent company's shares in the other Lithuanian newspaper distributor.[702] In this case also, the Competition Council only allowed the merger subject to behavioural remedies, which probably were more influenced by the failure to deal with the first merger more effectively than by new competition concerns that were caused specifically by the second merger.[703]

Indeed, competing content providers may want to cooperate when it comes to the distribution of their content. Such a need may be recognised in particular in the newspaper industry since building up home delivery systems is highly cost-intensive. Hence, this explains why, for instance, the Danish Competition and Consumer Authority allowed a joint venture among newspaper publishers in Jutland that was meant to operate a distribution system. However, the Authority made the authorisation subject to conditions which

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[699] CADE, Decision of 4 September 2007, Ato de Concentraçao n° 53500.001477/2008 – *A Notícia/Zero Hora.*

[700] UOKiK, Decision no. DKK-12/2011, *NFI Empik/Merlin*, Annual Report 2011, p. 17.

[701] Lithuanian Competition Council, decision of 27 October 2005, Case No. 1S-121, *Rautakirja/Lietuvos spauda*. See Ioannis Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, paras 18-085 et seq.

[702] Lithuanian Competition Council, decision of 29 December 2007, Case No. 1S-190, *Rautakirja/Impress Teva II*. See Ioannis Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, paras 18-087 et seq.

[703] See the critique by Ioannis Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, para. 18-088.

guarantee that other newspaper publishers will have full and non-discriminatory access to the distribution system.[704]

In a quite similar case of 2008, the Spanish Competition Commission had to decide on the establishment of a joint venture of four publishers for the distribution of newspapers and magazines in the Madrid region.[705] Before the integration of the distribution in the new company, the four publishers entertained their own distribution systems. In its decision the Commission expressed major competition concerns mostly relating to the emergence of a dominant distribution company that is vertically integrated with newspaper publishers as well as relating to the new company's market power vis-à-vis retailers. The Commission certainly accepted the efficiencies produced by the joint venture, but required the efficiencies to be passed to consumers. Finally, the Commission cleared the merger subject to conditions, which, similar to the Danish decision, included a commitment of non-discriminatory access of competing publishers to the services of the distributor.

In a more recent merger case of 2011, the Office for Competition of Malta had to assess the international merger between Amazon and Book Repository International, a company that is incorporated in Cyprus.[706] Since the merger met the turnover requirements of the Maltese merger control provisions, Amazon had to notify the acquisition of shares of Book Repository, which runs an online shop for books and many other items in about 100 countries, similar to Amazon's business. The case attracted attention because in Malta, a small jurisdiction, the book retail market risks being highly concentrated. But market definition faced considerable challenges. In particular, the question was whether different types of retailers should be distinguished. Yet the Office of Competition held that the offers of online book shops and stationary book shops were substitutable since customers often free ride on the information they get from one channel to then buy from the other channel. Hence, there was considerable competition between the two.[707] Also, the Office of Competition argued from a supply-side perspective that barriers to entry for new online retailers are relatively low.[708] Accordingly, the Office included both kinds of retailers in the relevant market. The geographic market was limited to Malta, since competitive pressure

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[704] Danish Competition and Consumer Authority, 28 February 2007, *Jyllands-Posten Distribution et al.*, Press Release, *available at:* http://www.kfst.dk/en/konkurrenceomraadet/decisions/decisions-2008-and-earlier/national-decisions-2007/konkurrenceraadets-moede-den-28-februar-2007/joint-venture-newspaper-distribution-in-jutland-dansk-avis-omdeling/

[705] Spanish Competition Commission (*Comisión Nacional de la Competencia*), Decision No. C-0119/08 of 27 November 2008, *Distrirutas/Gelesa/Siglo XXI/Logintegral*, reported by Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, paras 27-066 to 27-68.

[706] Maltese Office of Competition, Decision No. Comp-CCD/35/11 of 13 August 2011, *Amazon.com, Inc./The Book Depository International Ltd*, *available at:* http://www.mccaa.org.mt.

[707] *Id*., paras 17-20.

[708] *Id*., para. 21.

from stationary book shops could only come from the local level.[709] Given the broad market definition, the merger was allowed without any conditions.

Another rather peculiar merger had to be assessed by the Office for Competition of Malta in 2007.[710] Maltacom, a telecommunication provider, notified the acquisition of shares of Multiplus, a Maltese provider of digital TV channels. The Office for Competition recognised that the two firms were not active competitors in the same market. But Maltacom was the second undertaking that held licences for the provision of digital TV, which it had not used so far. Hence, Maltacom had to be considered a potential competitor in the market for provision of digital TV. Accordingly, the Office for Competition was concerned about the exclusionary effect of the merger on other potential competitors. The Office for Competition finally approved the acquisition subject to the condition that Maltacom gave up one of the two licences.

10.4.3 Vertical mergers

Vertical mergers are usually considered less problematic in competition law than horizontal mergers.[711] Just like vertical agreements, they do not produce any direct negative impact on competition.[712] Vertical mergers may produce a series of economic efficiencies such as in particular the saving of transaction costs between different levels of supply.[713]

Yet, in copyright-related markets, as has already become clear from the analysis of anti-competitive unilateral conduct (at 8, above), the risk of market foreclosure, due to many bottleneck situations affecting the distribution of works, is of a particular concern. For instance, while integration of film distributors with cinemas may be efficient, such vertical integration raises competition law concerns if the distributor is dominant and, through the merger, receives the power to exclude independent cinemas from the market and thereby not only monopolises the downstream cinema market, but also makes entry in the film distribution market more difficult for potential competitors.

An example of such a merger can be reported from Belgium. There, the Competition Council allowed a vertical merger between Telenet, a cable operator in Flanders with the pay-TV operator Canal+. Telenet was considered dominant in the market of telecommunication capacity for TV broadcasting since it held 2/3 of the Flemish telecommunication capacity. The Belgian Competition Council allowed the merger subject to remedies, including a duty to

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[709] *Id.*, para. 23.

[710] Maltese Office for Fair Competition, Decision CCD/368/06 of 26 January 2007, *Maltacom/Multiplus*, reported by Ioannis Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, paras 20.061 to 20.063.

[711] Guidelines on non-horizontal mergers, *supra* n. 647, para. 11.

[712] *Id.*, para. 12.

[713] On the economic arising from vertical and conglomerate mergers see Guidelines on non-horizontal mergers, *supra* n. 647, paras 13 et seq.

give access to new pay-TV operators and a prohibition of entering into exclusivity agreements with the three major operators of free-of-charge TV channels in Flanders. The latter was motivated by the fact that consumers do not accept a pay-TV service if they cannot receive the free-of-charge channels via the same telecommunication service. Yet the case was remanded back to the Competition Council on appeal by the Brussels Court of Appeal to clarify the impact of the acquisition of major football broadcasting rights.[714]

A somewhat unusual case on vertical integration, which was presented in a case of a merger among competitors, can be reported from South Africa. In the *Media 24* case,[715] the merger was among newspaper publishers. Both of the merging firms held shares in a printing company which also provided services for a number of other newspaper publishers. Due to the acquisition, the share of the acquiring firm in the printing company would have gone up to 80%. Hence, the competitive concern was that the merger would have allowed the acquiring firm to exclude competitors that have to rely on access to the service of the printing company from the newspaper market. The Competition Commission allowed the merger subject to conditions. Some regional competitors appealed to the Competition Tribunal. The Tribunal imposed additional conditions, including long-term contracts with a group of small independent publishers, maximum prices charged to the publishers for the printing services and the establishment of an additional printing press.

10.4.4 Conglomerate mergers

Conglomerate mergers differ from horizontal and vertical mergers in that the merging firms are neither competitors nor active on different levels of supply. However, competition law concerns may arise if the merging firms are active in closely related markets.

An example of a conglomerate merger has already been discussed with regard to the German case concerning the merger of a newspaper publisher (Springer) with a private TV company (ProSiebenSat.1) (at 10.1, above). This case demonstrates that, first, conglomerate mergers are highly complex and, second, they may come very close to horizontal mergers. Whether in the *Springer/ProSiebenSat.1* case discussed above one has to distinguish between an advertising market on private TV channels and an advertising market for newspapers is not a question which can easily be answered. Even if one answers the question in the negative, there is a close link between the publishing of newspapers and the operation of TV channels that explains why competition agencies should scrutinise such cases carefully.

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[714] Belgian Competition Council (*Conseil de la concurrence*), decision no. 2008-C/C-11 of 25 March 2008, *Telenet/Canal+;* confirmed by Brussels Court of Appeal (Cour d'appel de Bruxelles), 22 June 2009. See Ioannis Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, paras 4-051 et seq.

[715] *Media 24 & Paarl Coldset and Natal Witness Printing and Publishing Comp.*, Competition Tribunal, Decision of 14 May 2012, *available at:* http://www.comptrib.co.za/assets/Uploads/15LMMar11.pdf.

A very complex merger that included elements of a horizontal, vertical and conglomerate character in the media industry of Chile went up to the country's Supreme Court. The merger took place between an international broadband telecommunication supplier and a domestic pay-TV operator that was also the leading cable operator with market dominance and a broadband access provider. The Competition Tribunal cleared the merger in view of the need to spread broadband services to the whole national territory, but imposed severe conditions.[716] The judgment of the Competition Tribunal was then challenged before the Supreme Court on constitutional grounds, *inter alia*, based on the argument that the merger resulted in an 88% concentration in the cable TV market. However, the Supreme Court rejected the action as non-admissible.[717]

Of course, the concept of conglomerate mergers also includes those between firms that are active in completely unrelated markets. An example of such a case can be provided from Brazil, where the competition agency CADE nevertheless imposed conditions. In the *HSM* case,[718] HSM, a company producing magazines, CDs and DVDs, was acquired by an investment fund that had no prior relationship to the markets in which HSM was active. Although the case did not present any direct competitive concerns, CADE only cleared the merger subject to a reduction of the term of the non-compete clause imposed on the seller from 99 to 5 years.

10.4.5 Mergers regarding CMOs

Although collective rights management organisations (CMOs) and the application of competition law to them will be discussed in the next sub-chapter (at 11, below), it should be mentioned here that merger control may also come into play with regard to the establishment of CMOs. This is a topic of competition law relating to copyright-related markets which is not very much developed and hardly ever discussed.

Yet all CMOs can be considered as joint ventures of the right-holders who take the initiative to establish a CMO. Joint ventures constitute one of several forms of concentrations. According to Article 3(4) of the European Merger Control Regulation No. 139/2004, joint ventures are however only considered to be concentrations in the sense of EU merger control law if they perform “on a long lasting basis all the functions of an autonomous economic entity” (so-called “full functions joint venture”). In case of the establishment of a CMO, this is typically not the case. Right-holders, although they can be considered as

[716] Tribunal de Defensa de la Libre Competencia, Resolución N° 01/2004 of 25 October 2004, *Liberty Comunicaciones de Chile Uno Ltda/Cristalchile Comunicaciones S.A.*, *available at:* http://www.tdlc.cl/DocumentosMultiples/Resoluci%C3%B3n-1-2004.pdf.

[717] Supreme Court (*Corte Suprema*) of 10 March 2005, *available at:* http://www.tdlc.cl/DocumentosMultiples/Resolucion_01_Corte_Suprema.pdf.

[718] CADE, Decision of 25 November 2009, Ato de Concentraçao 08012.007066/2009-40, *Fundo BR Educacional e HSM Holding*. See also CADE, “Boletim da 456° Sessão Ordinária do Cade”, Press Release, *available at:* http://www.cade.gov.br/Default.aspx?8cbf4edb35ea01021421380d20.

addressees of competition law,[719] only entrust the licensing of certain rights to CMOs, but not all of their economic activities. Hence, in most cases, the establishment of CMOs will have to be assessed under the rules of restrictive agreements (see at 11.1, below).

Yet, in special cases, merger control law can still come into the picture. In 2002, the European Commission was requested to review the establishment of a CMO under merger control rules with regard to VG Media, the German collecting society for the copyrights and related rights of broadcasting companies.[720] VG Media was initially established as a subsidiary fully owned by one of the two major private TV operators, ProSiebenSat.1, in Germany. It was founded as a German limited company (GmbH). At the beginning, it did not become operational, since it did not apply for authorisation as a CMO under German law, although it was established for this purpose. Before the authorisation was applied for, the other major private TV operator, RTL Television GmbH, wanted to acquire 50% of the shares of VG Media with ProSiebenSat.1. Since RTL belongs to Bertelsmann, a large multi-national media conglomerate, the transaction was notified to the Commission under the EU Merger Control Regulation. The Commission did not categorise the merger as the establishment of a joint venture, but due to the specific features of the transaction, it was classified as a case of acquisition of control according to Article 3(1)(b) of the former Merger Control Regulation No 4064/89.[721] In substance, the Commission cleared the merger without imposing any conditions. Most interestingly, the Commission dissipated any concerns regarding a potential anti-competitive effect of the merger by hinting at the German law on collective rights management which contains an obligation according to which CMOs are under a duty to accept all right-holders in the field of their business activity.[722] The Commission therefore concluded that the two shareholders would be prevented from foreclosing access of competing TV operators to the system of collective rights management.[723] Indeed, VG Media nowadays has 13 shareholders, with ProSiebenSat.1 still holding 50%, and 134 domestic and foreign TV and radio channel operators as right-holders represented by this CMO.[724]

Yet, most recently, this merger case has become relevant again before German courts. Some time ago, VG Media introduced a special tariff for the use of pictures and texts that TV operators make available as advertising material in their digital media lounges. While this material was licensed for free to the publishers of printed TV guides, the tariff applied to operators of so-called electronic programme guides (EPGs). This form of price policy created

[719] For instance, under European competition law, also individual authors are considered "undertakings" to the extent that they do not create works as part of their duties as employees.

[720] Commission Decision of 21 May 2002, Case COMP/M.2723 – *RTL/ProSiebenSat.1/VG Media*, SG (2002) 229867, *available at:* http://ec.europa.eu/competition/mergers/cases/decisions/m2723_de.pdf.

[721] *Id.*, para. 9.

[722] Section 6 German Act on Collective Rights Management (*Urheberwahrnehmungsgesetz*).

[723] *RTL/Prosiebensat.1/VG Media*, *supra* n. 720, paras 15-17.

[724] Information taken from the website of VG Media. See http://www.vg-media.de.

counter-reactions by the EPG operators. In particular, the German association of magazine publishers sued VG Media on behalf of four EPG operators who are members of this association before the Cologne District Court. The plaintiff brought a declaratory action according to which the court was requested to confirm that the four EPG operators could use the advertising material without any obligation to pay for it. The Court decided in favour of the plaintiff.[725] In particular, the Court held that VG Media could not claim any rights. Since the European Commission had only argued its merger decision of 2002 in the light of the cable retransmission rights, the Court held that the clearance decision did not cover the extension of the fields of activity of VG Media to the making-available rights. Since such extension would require another merger control procedure and since VG Media has so far failed to notify the merger again, all transactions regarding this extension of business activities have to be considered void under European merger control law. Yet the decision was reversed on appeal by the Düsseldorf Court of Appeals for completely different reasons. This Court held that the charter of the plaintiff did not provide standing to assert the rights of only four members.[726] In yet other proceedings, VG Media sued one of the EPG providers for copyright infringement since this EPG had downloaded copyright-protected material from the media lounges of the TV channel operators. The first two instances decided in favour of VG Media.[727] Both courts took a formal approach to the European Commission's merger decision of 2002. They held that the application for merger clearance did not contain any restriction as to the kind of copyrights that VG Media would manage and also the decision itself, in contrast to the reasoning of Commission, did not indicate any limitations as to the kinds of rights that VG Media would be allowed to manage in the future. At last, the Federal Supreme Court refrained from a clear answer when it received the appeal on this latter case. Indeed, the Court seemed to support the holdings of the first two instance courts, but also held, in the framework of remanding the case, in part for other reasons, that the Court of Appeals will have to assess whether a second merger notification was needed due to later changes of the composition of the partners of VG Media.[728] Accordingly, the Court seems to reject the idea that an extension of the field of activities by VG Media as such can constitute a reason for the need of a second merger control decision. Yet the Federal Supreme Court returned to the reasons why the initial merger was notified to the

[725] Cologne District Court (*Landgericht Köln*) of 23 December 2009, Case 28 O (Kart) 479/08, (2010) *Zeitschrift für Urheber- und Medienrecht-Rechtsprechungsdienst* (*ZUM-RD*) 283, *available at:* http://openjur.de/u/140813.html.

[726] Düsseldorf Court of Appeals (*Oberlandesgericht Düsseldorf*) of 2 November 2010, Case VI-U (Kart) 15/10, (2011) *Gewerblicher Rechtsschutz und Urheberrecht-Rechtsprechungsreport* (*GRUR-RR*), *available at:* https://openjur.de/u/148803.html

[727] Leipzig District Court (*Landgericht Leipzig*) of 22 May 2009, Case 05 O 2742/08, (2009) *Zeitschrift für Urheber- und Medienrecht* (*ZUM*) 980; Dresden Court of Appeals (*Oberlandesgericht Dresden*) of 15 December 2009, Case 14 U 818/09, (2011) *Gewerblicher Rechtsschutz und Urheberrecht* (*GRUR*) 448.

[728] Federal Supreme Court (*Bundesgerichtshof*) of 27 March 2012, Case KZR 108/10, (2012) *Gewerblicher Rechtsschutz und Urheberrecht* (*GRUR*) 1062, para. 39; *available at:* http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=61327&pos=0&anz=1.

Commission, namely the acquisition of shares. It is still open how the second-instance court, the Dresden Court of Appeals, will decide.

10.5 Remedies

Copyrights can also play a role on the level of imposing merger remedies. As has already been demonstrated (at 10.4.2, above), in specific cases, agencies may require the merging firms to divest parts of their business by selling certain rights as a condition for the authorisation of the merger. In particular, the recent *Universal/EMI* merger decision of the European Commission (at 10.4.2, above) provides a good example where such a remedy required divesting parts of the merging firms' copyrights. Similarly, the Finnish Competition Authority, with later approval by the Market Court, made the merger of the two major pay-TV providers in Finland subject to the condition to sell parts of the broadcasting rights for the matches of the Finnish ice hockey league.[729]

10.6 Conclusion

At first glance, merger control seems to be a field of competition law that is of little importance for copyright-related markets. Whereas in the field of unilateral conduct, the exclusivity of the right can be at the very origin of the anti-competitive conduct, the anti-competitive effect of concentrations are caused by the transactions the merging firms intend to implement. Yet intellectual property in general and copyrights in particular may play a role at different stages of the assessment of mergers.

Thereby, two particular aspects arise from the analysis for copyright-related markets: first, horizontal mergers can lead to the creation of large repertoires of copyrighted works in the hands of institutional right-holders such as music publishing companies. The formation of such repertoires controlled by single firms excludes price competition among the works belonging to the repertoire. Yet the holder of such repertoires will have to be considered to be in a monopoly position despite the fact that there are other repertoires, provided that the potential licensees of such repertoires cannot afford to do their business in the downstream market where such works are used without requesting licences for the individual repertoires. Control over the formation of such repertoires through the means of merger control is therefore required. Yet, due to the lack of substitutability of the repertoires of the large music publishing industries, competition agencies may have

[729] See Finnish Competition Authority, decision of 8 August 2008, Case no. 579/81/2008, *TV4 AB/C More Group AB*; Finnish Competition Authority, decision of 27 November 2008, Case 579/81/2008, *TV4 AB/C More Group AB*; Market Court, decision of 30 October 2009, Case no. 525/09, *TV4 AB/C More Group AB*; as reported by Ioannis Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, paras 5-038 et seq.

problems to justify anti-competitive effects of further mergers based on static price-analysis alone. Second, merger control plays a major role in the field of copyright-related markets where mergers increase market power of distributors. Increasing concentration can impede access of works to the market and access of consumers to works, with adverse effects on the diversity of rights as the foundation of dynamic competition in copyright-related markets.

In general, merger analysis traditionally focuses on price effects (static efficiency) and tends to delegate the dynamic effects to the efficiency defence. This can be explained by the need to make reliable predictions on the future effects of a concentration on competition in the relevant market as a basis for any merger control decision. Based on economic models, including merger simulation models, economics is nowadays relatively well-equipped to produce reliable forecasts on the price effects, whereas it is hardly possible to predict what will be lost in the form of innovation and creativity prior to a merger. Yet such dynamic considerations matter; harm to competition can also consist in a restraint of dynamic competition. Hence, competition agencies should also ask whether a given merger will limit creativity and access of creative productions to the market, and should not content themselves with findings on the effects of the merger on consumer prices.

11 Collective Rights Management Organisations (CMOs)

The application of competition law to collective rights management is a very peculiar field of competition law enforcement. No doubt, collective rights management poses particular challenges to competition agencies. National copyright law often recognises the work of CMOs as important features of the domestic copyright system, while to many competition law experts the bundled licensing of copyrights for a multitude of right-holders at uniform royalty rates blatantly conflicts with the fundamental principle that price-fixing agreements among competitors must be considered anti-competitive. What is therefore needed is a thorough understanding of the virtues of CMOs, the economics of collective rights management and justified competitive concerns. This is especially a challenge for the agencies of younger and smaller jurisdictions that, usually, have limited means to also hire specialised staff knowledgeable in collective rights management in the light of the little case-law they may get in this field.

In addition, collective rights management systems differ a lot among jurisdictions. This is so for two reasons: first, collective rights management is very much influenced by substantive copyright law. A jurisdiction that substantially relies on statutory remuneration rights is more likely to attribute to CMOs a public-interest dimension, not just with a view to the well-functioning of the management of these rights but even more so in respect of the underlying cultural and social objectives. Social objectives enter the picture in particular if the statutory remuneration rights also aim at guaranteeing fair compensation to the authors and performing artists and, thereby, protect these original right-holders against a buy-out of their rights vis-à-vis publishers and other firms of the so-called copyright industry. Second, but in the same context, countries apply very different approaches to sector-specific regulation of CMOs. Such regulatory systems may be inspired by a series of considerations. Apart from cultural and social considerations the fact that CMOs usually hold monopoly positions in the given jurisdiction may play a most important role. This is important to state right at the beginning of the analysis. In a jurisdiction that addresses competitive concerns in the framework of effective sector-specific regulation, competition law enforcers are much less likely to be confronted with issues of collective rights management. Conversely, it is to be expected that competition agencies of jurisdictions that do not have any regulation on collective rights management will be more frequently requested to act against dominant CMOs. The latter is also proven by the experience in the EU, where competition law has produced vast practice on the conduct of CMOs. It is only today that the EU legislature is considering specific secondary copyright legislation on collective rights management.[730]

The following analysis will concentrate both on the competition-oriented issues of collective rights management and the practice of competition agencies in this field. Thereby, the analysis will also take into account sector-specific regulation in individual jurisdictions to the extent that this is required to reach the overall goals of the analysis. The analysis may also help to provide guidance to policy makers and the legislature as to the question of whether certain issues are better addressed in the framework of sector-specific regulation or competition law.

11.1 CMOs as a "necessary evil"

In this first sub-chapter, which precedes the major part of the discussion of the case-law, the analysis will explain the economic foundations of collective rights management. From the perspective of competition law, CMOs may appear as a "necessary evil". This very preliminary statement can be broken up into four considerations which will guide the analysis of this sub-chapter and influence the further analysis: first, CMOs are allowed as a matter of competition law, although they seem to fulfil all the requirements of price-fixing agreements among competing right-holders. Legality of collective rights management conflicts with the deeply enshrined belief under competition law that price cartels are always anti-competitive. Yet, in respect of many uses, a licensing market could not emerge without collective rights management. The second consideration relates to the economics of collective rights management that strongly pushes the market towards a (natural)

[730] See the recent Commission Proposal of 11 July 2012 for a Directive of the European Parliament and the Council on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market, COM(2012) 372, *available at:* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0372:FIN:EN:PDF. This Proposal has received a number of critical comments. See only the Comments by the Max Planck Institute for Intellectual Property and Competition Law, *available at:* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208971.

monopoly. Competition law should not fight against the emergence of natural monopolies since natural monopolies will lead to more efficient results than enforced competition. Yet natural monopolies are in need of control. Third, CMOs usually hold national monopolies. Yet the question remains whether cross-border competition could be used to promote more competition in the market. Fourth, legislatures react very differently to the economic features of collective rights management. Some jurisdictions even seem to reject the notion of a "necessary evil" by going so far as to prescribe a legal monopoly for CMOs.

11.1.1 Why CMOs should not be considered unlawful price cartels

As pointed out above, CMOs seem to fulfil all the requirements of a horizontal price-fixing agreement. When CMOs fix tariffs for the use of the works of their repertoire and grant a blanket license for this repertoire they appear as an association of undertakings that excludes competition among competing right-holders as its members. Therefore, the very first, and not so naïve, question is why do competition agencies not act against such cartels?

The question on the conformity of CMOs and collective rights management was most explicitly considered and answered by the US Supreme Court in *BMI v. CBS* in 1979.[731] CMOs had to pose a major problem under US antitrust law in particular, since horizontal price-fixing agreements constitute the most undisputed case to which US enforcers have always applied Section 1 of the Sherman Act in the sense of a *per se* prohibition. In *BMI v. CBS*, the US broadcasting company CBS brought action against the two major collecting societies ASCAP and BMI, alleging that their blanket licences and the composition of the fees were indeed to be regarded as a violation of the *per se* prohibition of price-fixing agreements. Yet the Supreme Court refused to outlaw blanket licences. The Court justified this result by defining the concept of an unlawful price-fixing agreement extremely narrowly, namely in the light of the purposes of the *per se* prohibition. Accordingly, an agreement can only be considered a price fixing if the agreement appears as a "naked restraint of trade with no purpose except stifling competition".[732] By refusing to call the grant of blanket licences a price-fixing cartel, the Court, at the same time, succeeded in upholding the *per se* prohibition for general price-fixing agreements. What is more important is that the Court most clearly identified the pro-competitive reasons for accepting CMOs and blanket licences under US antitrust law by stating as follows:

> As we have already indicated, ASCAP and the blanket license developed together out of the practical situation in the marketplace: thousands of users, thousands of copyright owners, and millions of compositions. Most users want unplanned, rapid and indemnified access to any and all of the repertory of compositions, and the owners want a reliable method of collecting for the use of their copyrights. Individual sales transactions in this industry are quite expensive, as would be individual monitoring and

731 *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979).

732 *Id.*, p. 20 (citing *White Motor Co. v. United States*, 372 U.S. 253, 363 (1963)).

> enforcement, especially in light of the resources of single composers. Indeed …, the costs are prohibitive for licenses with individual radio stations, nightclubs, and restaurants, … and it was in that milieu that the blanket license arose.[733]

In more modern terms, the Court hereby explained collective rights management as a spontaneous market solution for saving transaction costs. The Court made clear that collective rights management is a prerequisite, especially in the field of mass uses of copyright, for licensing markets to emerge. If competition law banned collective rights management, right-holders would not be able to license and to monitor mass uses of their rights, and the users, due to prohibitive search and other transaction costs, would not seek any licences. From a copyright perspective, intervention of competition law would prevent fair compensation of right-holders for their creative achievements, increase the problem of piracy and, finally, harm the incentive structure of copyright which is meant to promote creativity. In its further reasoning the Court justified not only collective rights management, but also the system of blanket licences that includes a licence to use the whole repertoire and the imposition of a uniform royalty rate for the use of all works of the repertoire. The Court justified the blanket licence by its cost-saving character.[734] In the context of the blanket licence, the Court added another, highly important idea:

> Here, the whole is truly greater than the sum of its parts; it is, to some extent, a *different product*. The blanket license has certain unique characteristics: it allows the licensee immediate use of covered compositions, without the delay of prior individual negotiations, and great flexibility in the choice of musical material. Many consumers prefer the characteristics and cost advantages of this marketable package, and even small performing rights societies that have occasionally arisen to compete with ASCAP and BMI have offered blanket licenses. Thus, to the extent the blanket license is a different product, *ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material*. ASCAP, in short, made a market in which individual composers are inherently unable to compete fully effectively.[735]

Whereas the first statement that an agreement cannot be regarded as a price fixing unless it is not limited to a naked restraint seems to circumvent competitive concerns by a terminological trick, the idea that the blanket licence corresponds to a new product is confirmed by market reality and sound economics. Mass users, such as radio stations, do not want to get a licence for the sum of individual works. Rather, they are in need of access to large and constantly changing repertoires that allow them to choose among works most freely and flexibly in order to offer their audience the most attractive programme possible. In this regard, it also seems appropriate to distinguish between a regular price-fixing

733 *Id.*

734 *Id*, pp. 20 et seq.

735 *Id*., pp. 21-23. (Footnotes deleted; emphasis added).

agreement and the offer of a blanket licence for the use of the whole repertoire of a CMO. Also, the Supreme Court points out that, although ASCAP sets a uniform price for the blanket licence, this licence is very different from anything that an individual right-holder could grant as a licence.[736]

The US decision in *BMI v. CBS*, however, does not exempt CMOs from competition law. It only established the rule that the grant of blanket licences will not be *per se* illegal as a price-fixing agreement. CMOs and their contractual relationships are controlled under the rule of reason of US antitrust law. Indeed, the Department of Justice (DoJ) Antitrust Division's first actions date back to 1937, but were later abandoned. It was in 1941 that the two major CMOs, ASCAP and BMI, agreed to settle antitrust cases brought to the courts by the DoJ in the form of so-called "consent decrees" as court settlements including binding orders of the court. Thereby, the two CMOs accepted oversight by the antitrust agencies with regard to both their membership rules and licensing practices. These consent decrees have been amended several times,[737] but still today constitute the tool to regulate the conduct of CMOs in the US. Therefore, the US, similar to the EU, is just another jurisdiction that, due to the absence of sector-specific regulation, has to rely on general antitrust principles to control what CMOs are doing.

Many years after the *BMI v. CBS* judgment, the European Commission adopted the same idea of a "new product" in its *IFPI Simulcasting* decision.[738] The IFPI Simulcasting agreement was a new model for reciprocal representation agreements among the collecting societies in the field of related rights that was designed to overcome the territorial restrictions of licensing by allowing each CMO to grant a multi-territorial license for simulcasting and webcasting of music belonging to the repertoires of the CMOs with which such agreements exist (so-called "one-stop shop" for the grant of multi-territorial and, at the same time, multi-repertoire licences). The Commission was requested by these CMOs to grant an individual exemption from the cartel prohibition under ex-Article 81(3) EC (now Article 101(3) TFEU). The problem thereby was that the CMOs fixed the royalty rates based on an addition of the tariffs of the CMOs in the different countries of destination. Hence, price competition was largely excluded; the IFPI Simulcasting agreement only allowed the user to choose the CMO that would grant the licence. Yet the Commission accepted the price restraint by arguing that otherwise the different national CMOs would not agree to enter

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[736] *Id.*, p. 23.

[737] See ASCAP Consent Decree: Second Amended Final Judgment entered in *United States v. ASCAP* (S.D. N.Y. 2001), *available at:* http://www.justice.gov/atr/cases/f6300/6396.htm.

[738] Decision of the European Commission of 8 October 2002, Case No COMP/C2/38.014 – *IFPI 'Simulcasting'*, [2003] OJ No. L 107, p. 58.

into such a system that would enable the grant of multi-territorial and multi-repertoire licences as a "new product" for the first time.[739]

Indeed, EU competition law seems to be better prepared for accommodating collective rights management in Article 101 TFEU, since even restraints "by object", i.e. those including naked restraints such as price fixing, could at least in principle be exempted under Article 101(3) TFEU. Yet the first case in which the European Court of Justice had to review the lawfulness of collective rights management, namely *BRT v SABAM*,[740] was a dominance case and related to the control of the membership rules set by the Belgian CMO SABAM. In this case, the ECJ did recognise a positive function of CMOs. Yet the Court also emphasised the role of competition law to ensure "a balance between the requirements of maximum freedom for authors, composers, and publishers to dispose of their works and that of effective management of their rights".[741] Thereby, the ECJ recognised that the "object" of a CMO is to protect their members from the market power of major users of their works and thus sought to justify the monopoly position of CMOs by the interest of the represented right-holders.[742] Literally, the Court stated that the object of CMOs consists in protecting "the rights and interests of its individual members against, in particular, major exploiters and distributers of musical material, such as radio broadcasting bodies and record manufacturers."[743] From this the ECJ concluded that a CMO "must enjoy a position based on the assignment in its favour, by the associated authors, of their rights to the extent required for the association to carry out its activity on the necessary scale."[744] This led to a test according to which a CMO can only impose those restrictions on the freedom to right-holders, including the right to withdraw one's copyrights from the CMO, that are "absolutely necessary" for the enjoyment of a position required for the CMO to carry out its activity.[745] In sum, the *BRT* judgment of the ECJ is very much influenced by the question referred to the Court and the provision to be applied in this context. In it, the Court both recognised a positive role of collective rights management, but also clarified that European competition law will be used to control the conduct of market-dominant CMOs under Article 102 TFEU. Thereby, the Court also made clear that CMOs do not provide a service in the "general

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739 *Id.*, paras 62, 88, 113 and 118. As can be seen, the Commission uses the "new product" argument at different stages of the application of Article 101 TFEU, including the concept of a restriction of competition under Article 101(1) TFEU and the different requirements for an exemption under Article 101(3) TFEU.

740 Case 127-73 *BRT v SABAM* [1974] ECR 313.

741 *Id.*, para. 8.

742 This rationale was more convincing at the time of the decision since, at that time, broadcasting was still monopolised for public TV stations in European countries. With the introduction of private TV and private radio, the situation has changed quite considerably.

743 *Id.*, para. 9.

744 *Id.*, para 10.

745 *Id.*, para. 11. In this regard, the ECJ specifically criticised the assignment of the rights over an extended period after the member's withdrawal from the CMO. *Id.*, para. 12.

economic interest" and that, therefore, the application of competition law is not restricted by Article 106(2) TFEU (see also at 6.1.7, above).

Statements according to which CMOs are recognised as legitimate entities under competition law can also be found in other jurisdictions. For instance, the Austrian Supreme Court accepted the legal monopoly of CMOs under Austrian law as being reconcilable with the competition law of the European Union, as such a position is granted for a legitimate end. It also distinguished the monopoly position of a CMO from the monopoly position of any other commercial entity since CMOs also serve the interests of users.[746]

In Israel, CMOs are usually considered to be restrictive agreements. However, CMOs may qualify to be granted an exemption. This was confirmed by the Antitrust Tribunal in the *ACUM* case in favour of the Israeli Federation of the Phonographic Industry (ACUM) and the Israeli and Mediterranean Music Federation.[747] The exemption was only granted on a temporary basis.

11.1.2 The economics of collective rights management

Competition law protects competition in markets. CMOs are intermediaries between right-holders and users. Accordingly they provide services in two markets, namely, collective rights management services to right-holders and licensing services to users. Hence, when competition law enforcers apply competition law to CMOs, the primary question is whether they apply the law with a view to protecting the market for collective rights management services or the licensing market.

This distinction also matters when CMOs are said to hold monopoly positions. With regard to both markets, collective rights management has a strong tendency toward monopolies. The reason for this is the very cost-saving effect and function of collective rights management. Collective rights management causes high fixed costs but relatively low marginal costs for the management of an additional work. This means that the economies of scale enable a larger CMO to compete better. In a market in which several CMOs compete for right-holders, right-holders will be more likely to join the larger CMO since this CMO will be able to distribute the fixed costs on more shoulders and the individual right-holder will accordingly incur much lower deductions from the royalties taken in by the CMO. Conversely, in a market where one CMO is already established as a monopolist, prohibitively high entry barriers will make it impossible for potential competitors to enter the market. Hence, collective rights management tends toward a natural monopoly.

[746] Supreme Court (*Oberster Gerichtshof*) of 16 January 2011, Case 4 Ob 291/00y, *WUV II*, (2001) *Medien und Recht* 35.

[747] Israeli Antitrust Tribunal, Decisions of 1 and 4 June 2009, Case DAF/COMP(2009)15, *ACUM v. Director of the Israeli Antitrust Authority*, reported by Israeli Antitrust Authority, Annual Report 2008-09, paras 49-53.

In the US, however, for copyrighted works in music, three CMOs compete for right-holders, namely, ASCAP (American Society of Composers, Authors and Publishers), Broadcast Music, Inc. (BMI) and the Society of European Stage Authors and Composers (SESAC). This market structure is surprising, especially in the light of the fact that, at the beginning of the development, ASCAP (established in 1914) was the only CMO. However, there were historical reasons why the other two were able to find their place in the market. In 1930, SESAC was established as the CMO of European right-holders, whom ASCAP refused to accept as right-holders. In 1940, ASCAP tried to double its tariffs for radio broadcasts. This prompted the radio broadcasters to boycott ASCAP and to establish a separate CMO, namely BMI. During the boycott, the radio broadcasters started to play regional music and styles, such as rhythm and blues or country, since the authors of this music were not represented by ASCAP. Again, the restrictive membership policy of ASCAP enabled new competitors to enter the market by attracting the "discontented". In was only in the consent decree of 1941 that ASCAP agreed to accept all right-holders on a non-discriminatory basis.[748] Today, ASCAP and BMI seem to be able to coexist as equally strong market players, while the much smaller SESAC styles itself as the CMO that provides better and more individual service. Yet US CMOs only compete for right-holders. When it comes to the licensing of rights to users, such as radio stations, each of the three repertoires represented by these CMO may well be indispensable for the users to offer an attractive programme to the audience. Hence, even in the US, despite existence of the three collecting societies, the licensing market is monopolised since the individual repertoires of the CMOs have to be considered as distinct product markets.[749] Indeed, radio stations typically request licences from all three CMOs.

11.1.3 Is there room for cross-border competition to develop?

The analysis so far has focused on the economics within jurisdictions. Yet it is also clear that, nowadays more than ever, exploitation of many works, especially in the music and film industry, is a truly international phenomenon. Given the fact that there are numerous domestic CMOs, the question is whether there is room for enhancing competition by relying on cross-border service provision by CMOs. This has always been a topic for the European Union that strives to establish an internal market for collective rights management services and systems of cross-border licensing. But the phenomenon also has a global dimension, since works are exploited globally and also CMOs cooperate globally.

The international system of collective rights management is based on and has to accept the coexistence of a multitude of territorially limited domestic copyrights. This means that an author who creates a work does not only acquire one copyright governed by the law of one jurisdiction but as many copyrights as there are copyright jurisdictions. This also has the

[748] Para. X. A. of the ASCAP Consent Decree, *supra* n. 737.

[749] This is also why the consent decree of the DOJ with ASCAP focuses on the licensing conditions in particular. See at n. 737, above.

consequence that, for instance, an operator of an Internet radio station potentially uses copyrights not only under one national law, but potentially according to all jurisdictions of those countries from where the service of the radio provider can be accessed (so-called country-of-destination principle).[750] This situation requires the Internet radio operator to acquire licences for all those countries.

But where does such a user get the licences from? In the light of the very purposes of collective rights management, in the example of the Internet radio operator, one would wish for a one-stop-shop system that would allow this operator to get a licence for the use of the rights of all right-holders and for all jurisdictions through the conclusion of one licensing contract.[751] Beyond this example, the starting point of any system of collective rights management is the original right-holder from whom all national rights derive. Right-holders also tend to avoid unnecessary transactions and therefore usually entrust all their rights under the different national jurisdictions to a single CMO. Hence, if a French composer joins the French SACEM, SACEM will in principle be able to grant licences for the use of the works not only in France but also in all other countries of the world. However, SACEM may have good reasons for not wanting to grant such cross-border licences. The monitoring of the use of such licences quite frequently requires the establishment of a local monitoring system, especially when it comes to the use of works in local premises such as nightclubs, restaurants, hotels or supermarkets. The most efficient system for managing rights in this regard has emerged in the form of a collaboration among national CMOs based on so-called "reciprocal representation agreements". Under such agreements, collecting societies authorise each other to grant territorially limited licences to users for their respective repertoires. Hence, SACEM would, for instance, authorise the Spanish SGAE to grant licences and to collect royalties for the use of SACEM's repertoire in Spain and vice versa. Especially in the field of music, such agreements have established an international network of collaboration among national CMOs – namely, in the framework of the International Confederation of the Societies of Authors and Composers (CISAC) – that allows for most efficient international exploitation of territorially limited copyrights under the law of different jurisdictions. Quite similar to collaboration of right-holders within a domestic CMO, such international collaboration among a multitude of domestic CMOs has to be an issue for competition law.[752]

750 There has been, and still is, an intensive debate in copyright law whether it is possible to concentrate online use of works to the applicability of one jurisdiction. Yet such attempts have generally turned out to circumvent the balance of interest that the law in the country of destination seeks to apply by creating too much leeway for forum shopping in favour of the user.

751 Such a one-stop shop is indeed pursued by the already mentioned IFPI Simulcasting Agreement in the field of related rights. *Supra* n. 738.

752 EU competition law enforcers in particular have acquired considerable experience and case-law on the control of these reciprocal representation agreements. In contrast, other jurisdictions, although they may have considerable practice on CMOs, seem to ignore the challenges created by such agreements.

Yet authors and other right-holders, including publishers and producers who may have acquired rights from the authors, are not at all forced to entrust their rights to their respective national society. Right-holders may prefer "their" domestic society for language reasons. Also, in the field of written works, the language barriers may make it practically mandatory that authors prefer their national collecting societies to foreign ones, among other reasons because the home country will regularly be the principal place of exploitation. Yet, especially in the field of music, individual right-holders sometimes prefer foreign CMOs to the domestic ones. For instance, many Latin American composers, lyrics writers or singers and musicians of popular music prefer to become members of US-American societies or of the Spanish SGAE so as to have better and direct access to licensing in the economically more important markets.[753] Accordingly, even in countries where there is only one CMO managing a specific category of rights, this CMO does not necessarily have to be a 100% monopolist in the market for collective rights management services. Especially nationals of countries who find their major markets for exploitation abroad, who have also acquired some international fame and reputation or who may simply want to evade inefficient domestic CMOs are more likely to join foreign CMOs.

Yet, the market structure is very different with regard to the licensing market. In this regard, a distinction needs to be made as to whether licensing requires a national monitoring system or not. In the field of music, for instance, a line could be drawn between the public performance in local premises, such as nightclubs or supermarkets, on the one hand and online distribution or satellite transmission, on the other hand. With regard to the former, as has already been explained, CMOs will refuse to license their repertoires directly to foreign users, since they will not be able to finance a system of controlling such premises abroad. This makes the local CMO, which also grants licences for foreign repertoires based on reciprocal representation agreements, the only source of licences and therefore a monopolist. With regard to online distribution and satellite transmission, the question is whether there is a valid reason why collecting societies should refuse to grant a cross-border licence if foreign users request such a licence.[754]

In some instances, it seems that cross-border licensing is indeed taking place. For instance, the German VG Media, representing the copyrights and related rights of broadcasting companies, recently brought a complaint to the European Commission alleging that Spanish

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[753] The US American ASCAP has even created a Latin membership department to attract Latin American right-holders.

[754] This is why the European Commission more recently acted against exclusivity provisions in traditional reciprocal representation agreements that prevent the source society from granting licences to users abroad for the three sectors of online, satellite and cable distribution of works. See Decision of the European Commission of 16 September 2008, Case COMP/C2/38.698 – *CISAC*, C(2008) 3435 final (prohibition decision), *available at:* http://ec.europa.eu/competition/antitrust/cases/dec_docs/38698/38698_4567_1.pdf. See also the Summary Decision, [2008] OJ No. C 323, p. 12. On the subsequent judgment of the General Court, in which the Commission decision was annulled, see at 11.4, below.

courts did not recognise its legal standing in contravention of the EU Service Directive.[755] Seemingly, VG Media tried to enforce direct licensing of German programmes – most likely to cable network operators – in Spain. The considerable number of German-speaking people now living in Spain seems to make direct licensing of German programmes economically interesting. A similar case, in which however Germany is the country of use, can be reported from the Cologne Court of Appeals.[756] In this case, a Turkish CMO brought a claim for copyright infringement against the operator of a Turkish-language online platform in Germany that offered downloads for mobile phone ringtones. The first-instance Cologne District Court had rejected the claim since the plaintiff had transferred all rights to the German GEMA on an exclusive basis.[757] The Court of Appeals also rejected the claim, but for another reason. According to this court, the plaintiff had no legal standing in German courts due to Section 1(2) of the German Act on Collective Rights Management, since the plaintiff did not hold an authorisation as a CMO for managing rights recognised under German law. These two cases demonstrate another feature of the international system. Domestic sector-specific regulation may create legal barriers to entry for foreign CMOs. For this and other reasons, the international system has to rely on reciprocal representation agreements among domestic CMOs.

Of course, digital use of copyrights on the Internet changes things quite dramatically. The traditional system of granting territorial rights would require Internet users to request licences from a multitude of different national CMOs. Already about 10 years ago, the CMOs acknowledged that such a system was not in the interest of right-holders either, since it creates incentives for infringement. This explains why a system for the implementation of an international one-stop shop, such as that based on the IFPI Simulcasting model agreement, was initiated by the industry itself.[758] IFPI Simulcasting, however, only relates to related rights. The CMOs managing authors' rights established a similar one-stop system based on the Santiago and Barcelona Agreements.[759] In contrast to IFPI Simulcasting, these agreements did not allow the user to choose among the different domestic CMOs but, under the so-called "national residence clause", only authorised CMOs to grant multi-territorial licences to users established in their national territory. When the European Commission

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[755] Directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 on services in the internal market [2006] OJ No. L 376, p. 36. See the response letter of the Commission to VG Media, *available at:* http://www.vg-media.de/images/stories/downloads/121130_european-commission_vgm.pdf.

[756] Cologne Court of Appeals (*Oberlandesgericht Köln*) of 28 September 2007, *Ausländische Wahrnehmungsgesellschaft*, (2008) *Gewerblicher Rechtsschutz und Urheberrecht* (*GRUR*) 69.

[757] Of course, the question to be asked would be whether such an exclusivity clause is in line with competition law. In its judgment, the Court of Appeals does not indicate whether the District Court even considered the competition law question at all. The decision of the District Court is not publicly available.

[758] IFPI is the International Federation of the Phonogram Industry. Phonogram producers are original owners of related rights.

[759] These two agreements related to the making available right and the reproduction (also „mechanical") right respectively. Both rights are usually affected by online uses.

decided to oppose this clause as a matter of EU competition law,[760] the authors' rights societies decided to discontinue the application of the Santiago and Barcelona agreements and as a consequence the users again had to rely on the grant of nationally restricted rights. In the following, the European development moved in a different direction. In 2005, the Commission recommended the right-holders to withdraw their rights and to renegotiate systems of multi-territorial licensing with individual CMOs.[761] The idea was that CMOs should compete for right-holders by offering new schemes of multi-territorial licensing for such individual repertoires. As a consequence of this 2005 Recommendation, some major music publishing companies withdrew their rights and, in cooperation with individual CMOs, established such platforms for the centralised grant of multi-territorial licences.[762] This situation has not produced the most efficient licensing model. Rather, it has made the system even more complex. First, the traditional arrangement of territorial systems still applies for all those rights that have not been withdrawn. Second, those territorial licences contain less than before since they no longer grant access to the repertoires of all right-holders. Third, users have to conclude additional agreements for multi-territorial licences that have been withdrawn. In addition, those new multi-territorial platforms for single repertoires are not internationally comprehensive. While the IFPI Simulcasting model agreement is also meant to provide licences for use outside the EU or Europe, the new multi-territorial licences only cover European countries, meaning that for other countries, users still need territorial licences granted according to the old system.[763] In its current attempt to regulate collective rights management in Europe, the Commission not only wants

760 Although the IFPI Simulcasting licences build on the tariffs set by the CMOs of the different countries of destination, the Commission preferred this model to Santiago and Barcelona, since IFPI Simulcasting allowed at least some price competition that would control the administrative costs of the societies granting such licences. See also *IFPI Simulcasting*, *supra* n. 738.

761 See Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services, [2005] OJ No. 276, p. 54. Note that the date of mentioned in the publication (18 May 2005) was later corrected. See Corrigendum [2005] OJ No. L 284, p. 10.

762 The most prominent is probably CELAS, which is based on a joint-venture of the German GEMA and the British PRS for Music. CELAS offers multi-territorial licences for online use for the Anglo-American repertoire of EMI for European countries at uniform prices. See http://www.celas.eu. Another, somewhat different platform is Armonia, which was established by the French SACEM, the Spanish SGAE and the Italian SIAE and grants pan-European licences for online use not only for publishers but also for composers and songwriters from France, Spain, Italy and Portugal. Yet, it was only in 2011 that Armonia signed its first licence agreement, namely with the download provider Beatport. See SACEM, "Three authors' societies (Sacem, Sgae, Siae), members of Armonia signed with Beatport Midem", 2011, Press Release, *available at:* http://www.sacem.fr/cms/site/en/lang/en/home/about-sacem/documentation/2011-press-releases/three-authors-societies-sacem-sgae-siae_1.

763 In the case of CELAS, *supra* n. 762, this means that a download provider will get the licences for downloads in Europe from CELAS, but has to request a license from the Canadian CMO for downloads that are made by consumers in Canada. Note that CELAS licences go beyond EU territory by also including a series of other European countries such as Norway, Switzerland or Serbia, but not Turkey and Russia.

to maintain this new system, but even wants to make it “binding” by implementing the principles of the 2005 Recommendation.[764]

For the purposes of this Report, what matters is the competition assessment of this more recent European development. What has to be stressed in this regard is that the Commission’s approach to multi-territorial licences is not to implement a most efficient licensing system at relatively low prices in favour of users. These objectives, which were dominant when the Commission applied competition law to the IFPI Simulcasting model in 2002,[765] were explicitly set aside by the Commission in the 2005 Recommendation when it compared the two “options” and then made a very conscious decision in favour of a system that is predominantly designed to serve the interests of right-holders. This also means that the incentives for individual right-holders to withdraw their repertoires is not so much driven by the efficiencies gained through multi-territorial licences, but by extracting their repertoires from the blanket licences and by negotiating individual licences at higher royalty rates with individual users. This EU development also provides an example of the policy clashes that may arise between sector-specific regulators and competition agencies. The Commission’s preference in favour of the one-stop-shop model of IFPI Simulcasting, which also characterises the Commission’s *CISAC* decision,[766] was promoted by the Directorate General for competition, while the preference for the “right-holders model” of 2005 was conceived in the Directorate General for the Internal Market, which also prepared the most recent Proposal for a Directive on collective rights management.[767] The Commission tends to justify its approach of 2005 by the objective of bringing more competition to the market, but it thereby only focused on one market, namely, the market for collective rights management services, and simultaneously ignored the need to also protect the market for licensing services.

To sum up: the analysis shows that the potential for cross-border competition among different CMOs is clearly limited. Right-holders can improve their situation to some degree by joining foreign CMOs. This possibility certainly puts some competitive constraints on especially smaller CMOs that may more easily lose members. In the future, it can also be expected that CMOs will also grant licences across borders where there is a sufficient economic interest in doing so and if there is no need to build up one’s own monitoring system. Cross-border licensing, however, does not lead to competition, given the differences between the repertoires.

764 See Commission Proposal for a Directive, *supra* n. 24. The rules on multi-territorial licenses for online use of musical works are included in Title III of the Proposal.

765 *Supra* n. 738.

766 *CISAC*, *supra* n. 754. This decision even contains very critical remarks on the 2005 Recommendation. *Id.*, paras 108 (rejecting reliance of the CMOs on the Staff Working Paper explaining the policy of the 2005 Recommendation, since this Paper has not been adopted by the Commission) and 110 (clarifying that the Recommendation cannot set aside the competition provisions of the TFEU).

767 Commission Proposal for a Directive, *supra* n. 24.

From the analysis, also some conclusions can be drawn on existing imbalances between developing and developed jurisdictions. In developing jurisdictions, CMOs still need to develop and become effective. Right-holders from those countries will therefore often "emigrate" and join collecting societies in developed jurisdictions, among other things because it will often be there that they find their major markets of exploitation. This, in turn, will make it even more difficult for CMOs in developing countries to build up their monitoring systems, since the loss of right-holders reduces their ability to invest in such systems. These structural weaknesses of collective rights management in developing and emerging jurisdictions also negatively impacts right-holders and their CMOs in the developed world, since developing and emerging economies are becoming increasingly important consumer markets for copyrighted works as well. Hence, there is an interest of all right-holders of the world that the system of collective rights management should function everywhere. The question remains whether there are ways to achieve a more balanced system. A traditional way of addressing this issue is the inclusion of membership restrictions in reciprocal representation agreements. According to such clauses, the contracting CMOs are not allowed to accept nationals of the other country as members. Of course, such a clause can easily be considered a market-sharing agreement that violates competition law. Indeed, practice under EU law has always banned such clauses as illegal.[768] In the recent *CISAC* decision, the Commission also argued that such restrictions do not only restrain competition in the market for collective rights management services. The argument was that the repertoires of different national CMOs would look more alike, and therefore would also be more likely to compete with each other as substitutes, if right-holders increasingly joined foreign CMOs.[769] At the same time, the Commission gives no consideration to the potential economic imbalances that could be mitigated by membership restrictions. It may well be that the Commission ignored the problem or that the CMOs did not put the argument forward. Yet the Commission may still be right to prohibit such clauses. Even if one accepted some pro-competitive effects, the clauses are at least not indispensable in the sense of Article 101(3) TFEU. Such an imbalance does not exist in all bilateral relationships, and there is also a less restrictive option, namely, the conclusion of so-called "type B agreements". These agreements exclude the transfer of income between the contracting two CMOs. Type B agreements are chosen with regard to younger CMOs, mostly in developing and emerging economies, to create an incentive for still inefficient CMOs to build up monitoring systems and to collect royalties for the additional foreign repertoires without a duty to transfer this income abroad. From an international perspective, a system that prevents membership restrictions on the basis of competition law, but allows type B reciprocal representation agreements, may be the best way forward. On the one hand, this system does not discriminate against right-holders from other countries who want to join foreign CMOs and,

768 Membership restrictions were still found by the European Commission in its investigation that led to its *CISAC* decision. See *CISAC*, *supra* n. 754, paras 127-137. The Commission regards membership restrictions as a restriction "by object" (*id*., para. 127).

769 *Id*., para. 126.

on the other hand, it does not harm the owners of works of a foreign repertoire by excluding royalty transfer since without type B contracts no royalties would be collected at all.

11.1.4 CMOs as legal monopolies in some states

Whereas CMOs hold *de facto* monopoly positions in some states, there are also some jurisdictions that provide for a legal monopoly in the field of collective rights management. Even among these jurisdictions important differences exist. Some of them entrust collective rights management to a state agency. Other jurisdictions recognise an individual private entity as the only CMO in the country. Yet others may base their system on a concession system that allows regulatory bodies to choose among different applicants.

Within the EU, the majority of Member States does not restrict the establishment of CMOs. Yet, there are also some jurisdictions that provide for a legal monopoly. The most prominent example is Italy, where the Copyright Act recognises the legal monopoly of the SIAE (Società Italiana degli Autori ed Editori).[770] The SIAE is constituted as a membership-based public entity. It was established as a private association of right-holders as early as 1882, and was given its status as a legal monopoly in 1941. Hence, SIAE's legal monopoly appears as a legacy of Italian corporatism that has survived the years. For the management of related rights of performing artists, a similar CMO with legal monopoly existed in the form of IMAIE (*Istituto Mutualistico per la tutela degli Artisti Interpreti ed Esecutori*). Founded in 1977, it was shut down and liquidated in 2009, after it became known that IMAIE had accumulated funds in the amount of €118 million without transferring these to the relatively low number of 1,613 artists.[771] A new monopolistic CMO was then re-established in 2010 as the "new IMAIE" ("*Nuova IMAIE*").[772] But the legislature most recently decided to liberalise the market for collective management of related rights as of 21 December 2012. Performing artists are now allowed to choose their CMOs freely. Critics of IMAE among performing artists immediately launched "*Associazione Artisti 7607*" as a new CMO.[773] Yet the monopoly of SIAE continues to exist. Italian authors can only avoid the monopoly by either joining a foreign CMO or, as the law allows, by granting individual licences directly to users.

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[770] Article 180 of the Italian Law No. 22 of 1941 on copyrights and related rights.

[771] See Guido Scorza, "L'estinzione dell'IMAIE: una lezione di cui far Tesoro", *punto-inforatico.it* (11 May 2009), *accessible at:* http://punto-informatico.it/2619281/PI/Commenti/estinzione-dell-imaie-una-lezione-cui-far-tesoro.aspx.

[772] See Article 7 of the Decree Law of 30 April 2010, n. 64, on urgent provisions concerning cultural performances and activities. See the Italian text, *accessible at:* http://www.dirittodeiservizipubblici.it/legislazione/provvedimento.asp?sezione=dettprov&id=654.

[773] See Paolo Peluffo, "Diritti d'autore: da oggi gli artisti liberi di scegliere", *ilfattoqutotidiano.it* (20 December 2012), *available at:* http://www.ilfattoquotidiano.it/2012/12/20/diritti-dautore-da-oggi-artisti-liberi-di-scegliere/.

Very similar is the situation in Morocco, where the Copyright Office is established as an entity that is granted the legal monopoly of a CMO[774] under the supervision of the Ministry of Culture and Communication.[775]

Also similar to the Italian situation, Argentina has recognised the legal monopoly of CMOs through specific laws.[776] These laws, however, which also constitute the basis of public regulation of these CMOs, do not contain any competition-law-oriented provisions. Since CMOs are not exempted from its application, competition law is to be considered applicable to these monopoly societies. But Argentinian competition law has not yet produced any case-law relating to CMOs.

Another EU Member State that has more recently made a decision in favour of a national monopoly is Austria. There, Section 3(2) of the relatively new "Collecting Societies Act" of 2006[777] explicitly prescribes that the competent state supervisory body will grant the authority to act as a CMO to only one society for a specific field of activity. If more than one society applies for the authorisation, the authorisation is given to the applicant that can be expected to best fulfil the tasks and duties regarding collective rights management. According to a legal presumption, an already established CMO will be considered to guarantee better fulfilment of these tasks and duties than other applicants. According to Section 4(1) of the Act, the authorisation is given for an unlimited period; the supervisory body only has to review its authorisation decision after 10 years as to whether the conditions for the initial grant are still present. Austria today has eight CMOs specialising in the management of rights for different categories of works. The legal monopoly relates to both statutory remuneration rights and the grant of licences. Also in Austria, the right-holder can evade the monopoly by granting a direct individual licence to users, provided that the law does not make collective management mandatory, such as in the case of cable retransmission. In Austria, it is disputed whether the recognition of the monopoly position of CMOs is in conformity with EU Law.[778] Both the rule of Austrian law according to which only entities established in Austria may be chosen as a CMO as well as the monopoly[779] could

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774 Dahir (law) No. 2.64.406 of 8 March 1965.

775 Information *available at:* http://euromedaudiovisuel.net/p.aspx?t=general&mid=53&l=en&did=85.

776 See Ley 17.648 of 1968 on the Sociedad Argentina de Autores y Compositores de Música (SADAIC), Ley 20.115 of 1973 on Sociedad General de Autores de la Argentina (ARGENTORES). ARGENTORES is a non-specialised authors' society that manages the rights of all categories of works except works of music.

777 *Verwertungsgesellschaftengesetz*, BGBl. I 9/2006, last amended by BGBl. I 50/2010.

778 See Karl Riesenhuber, *Das österreichische Verwertungsgesellschaftengesetz 2006*, Nomos: Baden-Baden, 2006, pp. 21-25; Michel Walter, *Urheberrechtsgesetz 2006*, Verlag Medien und Recht: Vienna, 2007, pp. 303 et seq. with further references.

779 Arguing in favour of conformity of both aspects with the Service Directive: Marisa Scholz, "Dienstleistungsrichtlinie und Verwertungsgesellschaften. Kann die Dienstleistungsrichtlinie das nationale Monopol der Verwertungsgesellschaften aushebeln?" (2011) *Medien und Recht* 73.

conflict with the EU Service Directive.[780] In practical terms, however, the law of 2006 did not have a major impact on the structure of CMOs in Austria, since the existing ones already held a *de facto* monopoly prior to the entry into force of the new law in 2006 and now continue to maintain it as a legally protected monopoly. Yet the law makes a difference with regard to cross-border licensing. The need to have prior authorisation, in principle, prevents foreign CMOs from granting licences under Austrian law.[781] Section 2(2) of the Act allows the supervisory body to close down a CMO that acts without an authorisation. Yet this seemingly harsh sanction will be of little use if the CMO is established abroad. But the law also makes legal standing of a CMO dependant on the authorisation. Therefore, CMOs without authorisation cannot sue for copyright infringement in Austria. Introduction of the legal monopoly in Austria was motivated by the interests of users. The legislature wanted to facilitate rights clearance for users by keeping the number of CMOs as small as possible.

In Austria, the question remains whether competition law is applied to CMOs. In various decisions the Austrian Supreme Court has confirmed the applicability of the country's competition law in principle, but then applied competition law in a very cautious way. Some of these decisions will be discussed further below. In an additional decision the Supreme Court held that a CMO could not be held liable under competition law if the specific conduct is mandated by the law.[782] According to the Court, the CMO's conduct is not based on an independent business decision. However, the Court left open whether, in the specific case, EU competition law would apply. Yet within the scope of application of EU competition law it is to be stressed that national law, due to the principle of supremacy of EU law, may not be applied where it contradicts EU competition law. Since, in such instances, Austrian law cannot order CMOs to act in a particular way, their conduct can be addressed directly under EU competition law.[783]

Legal monopolies similar to the Austrian one can be found in a number of other Central and South East European countries. Article 159(1) of the Croatian Copyright and Related Rights Act provides that collective rights management with respect to one single category of right-holders can only be entrusted by the State Intellectual Property Office to one CMO. Yet this has not prevented the Croatian competition agency from controlling the royalty rates of CMOs (see at 11.3.1, below).

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780 *Supra* n. 754.

781 Section 1 of the Act defines the term of „collecting societies" very broadly, namely as any undertaking that, in a "bundled manner", allows the use of rights under the Austrian Copyright Act to others against payment or that asserts other rights under the Copyright Act. But the law provides that only non-profit cooperatives or corporations can get the authorisation; this excludes competition by profit-oriented CMOs.

782 Supreme Court (*Oberster Gerichtshof*), 15 September 2005, Case 4 Ob 166/05y, *Die Bakchantinnen*, (2005) *Medien und Recht* 431.

783 See Case C-198/01 *Consorzio Industrie Fiammiferi (CIF)* [2003] ECR I-8055.

In the Czech Republic, Article 98(6)(c) Copyright Act provides that the Ministry of Culture will only grant authorisation to a CMO if "no other person has acquired authorisation for the same item of protection and, in the case of works, no other person has acquired authorisation for the exercise of rights in respect of the same type of work". Yet this legal monopoly does not restrict the application of competition law to CMOs. Rather, Article 103(10) Copyright Act explicitly confirms the power of the Competition Office to apply competition law to CMOs despite sector-specific supervision of CMOs through the Ministry of Culture.

In Macedonia, the Ministry of Culture can only issue a licence to one CMO for the management of one single type of rights or use of rights (Article 149(2) Law on Copyright and Related Rights). If several requests are submitted, the licence will be granted to the entity that guarantees more successful management in the light of the legal requirements for running a CMO (Article 149(4) Law on Copyright and Related Rights). Practically the same kind of provisions can be found in Serbia (Article 157(2) Law on Copyright and Related Rights).

In Hungary, the former copyright law only allowed the registration of one CMO for the management of the rights for certain categories of works and right-holders. However, with effect on 1 January 2012, a reform of the law abolished this rule.

In Bulgaria, the legal situation is rather peculiar. While the establishment of CMOs seemed to have been free in the past and only a registration system was in place, under a more recent amendment of the Copyright Act, which entered into force on 25 March 2011, the Ministry of Culture will now, according to Article 40b(4) Copyright Act, only register a new CMO that intends to manage a category of rights or works for which a registered CMO has already been active for at least five years if this new CMO can present an agreement with the established one that authorises one of the two CMOs to also collect royalties for the members of the other CMO. Yet this rule only applies to some rights and works.

Other countries where legal monopolies guaranteed by copyright law can be found include Albania and Bosnia and Herzegovina.[784]

In Belarus, Article 49(3) of the Act on Copyright and Related Rights provides that royalties can only be collected by one CMO that is accredited for carrying out activities in the corresponding sphere of collective rights.

In the Kyrgyz Republic, according to Article 44(2) of the Law on Copyright and Related Rights (1999), CMOs may be freely established, but only one CMO per category of rights or right-holders is allowed. By adopting a Decree on 10 February 2012, the government of the Kyrgyz Republic obviously tried to consolidate the total number of nine CMOs. Article 5 of this

784 Article 6(3) of the Copyright Act.

Decree mandates the State Service for Intellectual Property and Innovation by the Government of the Kyrgyz Republic to assist authors and holders of related rights in creating a new public body called "Authors Society".

Also, in Kenya, the Copyright Board is not empowered to approve another CMO in respect of the same rights or category of works if there already exists another CMO that has been licensed and functions to the satisfaction of its members (Section 46(5) Copyright Act).

An authorisation system can also be found in Switzerland. There, Section 42(2) of the Copyright Act stipulates that the Swiss Institute for Intellectual Property will “regularly” grant the authorisation to only one CMO for the management of specific rights. The authorisation is however only required to the extent that specific rights, namely, the statutory remuneration rights and the public performance rights, can only be administered by a CMO. Similar to the situation in Austria, a CMO only qualifies for the authorisation if it is incorporated under Swiss law and has its headquarters in Switzerland. The purpose of the law is indeed to exclude competition. The Swiss legislature was of the opinion that competition would only lead to inefficiencies. As in the Austrian case, however, Swiss nationals have the choice to join CMOs abroad, which is a tempting option since there are no language barriers to Germany and France and these neighbouring countries may in many instances constitute the much more important markets for works of Swiss nationals.

Systems similar to the Swiss one can be found in other countries. In Taiwan, the authorities “may” deny the authorisation of a CMO if there is an overlap of the rights with an already existing CMO.[785] In India, the Central Government “shall not ordinarily register more than one copyright society … in respect of the same class of works.”[786]

In China, under the Regulations on Copyright Administration of 2004, the situation is somewhat less transparent and clear. On the one hand, these Regulations allow all Chinese citizens and legal entities holding copyrights to establish a CMO (Article 7). However, it also arises quite clearly that the Chinese legislature wants to protect legal monopolies of these CMOs. Article 7(2) prohibits any overlap of the operation of newly established CMOs with the operation of any other CMO that has been registered previously according to the law. Indeed, the Regulations also provide for an obligation of any new CMO to get approval from the administrative department of copyright under the State Council (Article 10). From this it arises that no approval can be expected for CMOs if there is any overlap with pre-existing CMOs. This, at least, guarantees factual monopoly positions for CMOs.

In Brazil, the system of collective rights management has long been characterised by very peculiar features. CMOs were allowed to operate without any need of an authorisation. Former Article 99 of the Copyright Act, however, allowed all CMOs to establish a central

785 Article 8(2) Act on Copyright Collective Management Organisations.

786 Section 33(3)(2) Copyright Act 1957.

association. This has led to the creation of ECAD as an association of nine CMOs. Following many complaints by consumers and authors, congressional investigations were launched on the practices of ECAD in 2011 and ended with the discovery of a series of crimes within ECAD and the indictment of 15 persons.[787] Among others, the investigators discovered forms of price fixing regarding the deductions of the individual associated CMOs, and that 76 % of the royalties were not passed on to the authors.[788] These scandals within ECAD can be attributed to the existence of a system that promoted the emergence of a highly opaque monopoly coupled with complete absence of control. Finally, Brazil has now reconsidered its system of collective rights management and reformed its copyright law at large. The new law adopted in August 2013 also creates a new public supervisory body with the task to control the activities of CMOs.[789]

In none of these jurisdictions was recognition of legal monopolies a reason for excluding the application of competition law. Also, in China, SAIC's 5th Draft for IP Guidelines provides for a provision that would lead to competition-oriented control of the monopoly power of CMOs under the rules of the Chinese Anti-Monopoly Law.[790]

However, the situation is different in Russia, where copyright law provides that only one CMO may receive accreditation for the management of statutory remuneration rights. In the context of the regulation of copyright law, Article 1244(2)(3) of the Civil Code exempts this accredited CMO from the application of competition law. The scope of the exemption does not seem to be limited to the administration of remuneration rights. Hence, if this understanding is correct, this CMO does not have to respect competition law even in areas where it may have to compete with other CMOs that are not accredited, namely, for the management of exclusive rights. Russian law thereby creates an unjustified privilege for accredited CMOs, although the accreditation system by itself already has the effect of distorting competition. Right-holders who have to rely on the accredited CMO for the management of their statutory rights are anyhow hardly likely to entrust their exclusive rights to another CMO.

Finally, also in Canada, a specific and limited form of exemption of CMOs from the application of the Competition Act can be found. There, Section 70.5(2) of the Copyright Act exempts licensing agreements of CMOs from the prohibition of restrictive agreements of the

787 See Attilio Gorini, "Brazilian collection society under scrutiny", Entertainment Law Brazil (2 May 2012), *available at:* http://entertainmentlawbrazil.com.br/2012/05/02/brazilian-collection-society-under-scrutiny/#more-1010.

788 See, for instance, Timothy B. Lee, "Not just pirates: Brazilian rights holders indicted for ripping off artists", arstechnica.com (2 May 2012), *available at:* http://arstechnica.com/tech-policy/2012/05/copyright-cops-behaving-badly/.

789 Amendment Bill of 15 August 2013. See Carri Swann, „Brazil amends copyright law", ipprotheinternet.com (23 August 2013), *available at:* http://www.ipprotheinternet.com/ipprotheinternetnews/copyrightarticle.php?article_id=3196.

790 Article 24 of SAIC's 5th Draft on AML Enforcement in the Field of IPR. See also *supra* n. 65.

Competition Act if they are filed by the CMO or the other party to the Copyright Board. The reason for this is that the Canadian legislature decided to concentrate control of such agreements within this specialised body. The exemption from competition law is counter-balanced by Section 70.5(5) of the Copyright Act by the power of the Commissioner for Competition to request the Copyright Board to examine the agreement.[791]

To sum up: Several jurisdictions provide for legal monopolies for collective rights management. The reasons for this are mostly based on efficiency considerations. It is usually held that monopolistic societies may serve users better than competing CMOs. In Germany, the legislature considered introducing a legal monopoly when the country adopted its new copyright law and an Act on Collective Rights Management in 1965. At that time, the legislature decided against such a system for constitutional reasons. It was held that such a monopoly would violate the fundamental right of professional freedom.[792] However, the reasons for considering introduction of a legal monopoly were more copyright-oriented, mostly based on the argument that collective rights management also has a role to play in guaranteeing fair remuneration to right-holders vis-à-vis large users, not least the then dominant public broadcasting stations and the record industry.[793] The legislature finally contented itself with the conviction that the economics of the relevant markets will anyhow lead to a *de facto* monopoly.

Because of the tendency of collective rights management to a natural monopoly, legal monopolies may have very limited impact. Legal monopolies go beyond the effect of *de facto* monopolies by also prohibiting the grant of cross-border licences by foreign CMOs for the national territory. This is a most problematic effect within the EU in particular. Apart from this, legal monopolies hardly provide any advantages as compared to *de facto* monopolies. Jurisdictions that rely on an authorisation system can at least use this authorisation to control the reliability and the later conduct of the monopolistic CMO. Yet also jurisdictions that refrain from introducing a legal monopoly can still require CMOs, including foreign ones,[794] to apply for an authorisation before they begin to manage rights for the domestic territory. As can be seen from the analysis, legal monopolies may become a major problem if the monopoly is not coupled with an effective system of supervision and control. In sum, the better arguments reason against introducing a legal monopoly. From a competition law perspective, the major challenge consists in applying competition law to

[791] For a critical analysis of this institutional design see at 11.5, below.

[792] See Jörg Reinbothe, in: Gerhard Schricker & Ulrich Loewenheim, *Urheberrecht, Kommentar*, 4th edn, 2010, Vor §§ 1 ff. WahrnG para. 10.

[793] *Id.*, para. 7.

[794] German law does not exclude foreign CMOs from receiving the authorization. There is one CMO in Germany that is established as a subsidiary of an international organisation, namely AGICOA (Association de Gestion Internationale Collective des Oeuvres Audiovisuelles). The German subsidiary is called AGICOA Urheberrechtsschutz GmbH.

CMOs with a market-dominant position, whether market dominance derives from a legislative monopoly or a natural monopoly.

11.2 Competition in the market for collective rights management services

Since CMOs are active in two different markets, sector-specific regulation and competition law can also overlap with regard to both of these markets. Both fields of law can address the same issues. However, the objectives that are pursued can have a different focus. Competition law aims at protecting undistorted competition in an objective sense, whereas sector-specific regulation takes a more subjective approach by protecting the interests of the right-holders, as regards the conduct of CMOs in the market for collective rights management services, and the interests of users, as regards the licensing market. Yet, in both fields of law, the dominant position of CMOs may play a major role for intervention.

Within this sub-chapter, the analysis will first turn to the protection of competition in the market for collective rights management services. Several issues are dealt with in this regard by sector-specific regulation or competition law.

11.2.1 The corporate structure of CMOs

In view of the fact that CMOs typically hold monopoly positions and at the same time are supposed to act as trustees for right-holders, some jurisdictions aim to limit the risk of abusive conduct by regulating the corporate structure of CMOs in a way that is conducive to limiting incentives of the CMO to prefer its own corporate interests, including the personal interests of the persons in its managing boards, to the interests of right-holders.

Competition law is not well equipped to fulfil such a function. Competition law can control the establishment of a new corporate entity only on the basis of merger-control rules or the general prohibition on restrictive agreements. Merger-control rules, so far, have not played a major role in the field of collective rights management. Merger-control decisions regarding CMOs are rare and may even take account of the existence of sector-specific regulation.[795] Merger-control laws, just like the prohibition on restrictive agreements, also have the deficiency that they only establish negative control in the sense that they ban certain transactions that harm competition. It is more difficult to prescribe specific corporate structures of CMOs in the framework of competition law. Although competition agencies might be more willing and also able to go in this direction, for instance, with conditions imposed in the framework of merger control, or in the framework of commitment decisions, which are increasingly used in European jurisdictions, or consent decrees used in the US,

[795] This was the approach of the European Commission in the *RTL/ProSiebenSat.1/VG Media* case, *supra* n. 720, where the Commission dissipated competition concerns relating to the foreclosure of competition broadcasting corporations to the service of the CMO by hinting at the obligation of CMOs under German law to manage the rights of all right-holders. See also at 10.4 .5, above.

these instruments are yet not well explored with regard to the corporate structure of CMOs. Hence, sector-specific regulation might be the better approach to limiting the risk of abuse to the detriment of right-holders by regulating the corporate structure of CMOs.

There are basically two ways to achieve this goal. First, the law can prescribe that the internal structure of CMOs has to be membership-driven. Co-decision of the right-holders as "members" of the CMO may indeed guarantee that CMOs do not exploit right-holders, in the worst case by keeping back royalties that belong to the right-holders. Second, the law can prescribe that CMOs must be organised as non-profit entities. This is inspired by the idea that CMOs should manage rights as trustees of the right-holders. An obligation to run CMOs as non-profit organisations may especially be useful if a jurisdiction has established general structures for the control of non-profit organisations, especially as regards financial control. Such control could be exercised, for instance, by tax authorities and save states from having to establish sector-specific agencies that cause additional costs.

Indeed, a limitation of the corporate structure of CMOs to non-profit organisations can be found in many jurisdictions such as Austria, Brazil, Bulgaria, Colombia, Estonia, Georgia, Kenya, Lithuania, Macedonia, Mexico, Panama, Peru, Russia, where the Civil Code requires CMOs to be "non-commercial partnership organisations", Slovakia, Spain and Uruguay.[796] Many jurisdictions provide that CMOs need to be private law associations of right-holders such as in Brazil, Bulgaria, Columbia, Croatia, Georgia, Hungary, Moldova, Panama, Peru, Poland, Turkey and Uruguay; in Turkey, the law describes CMOs as "professional unions" of right-holders. The Austrian Act on Collecting Societies of 2006 even limits the legal form to CMOs to cooperatives and private-law corporations, while CMOs in Austria were mostly established as private law associations of right-holders in the past (Section 3(1) of the Act).[797]

In contrast, even in countries that have otherwise rather detailed systems of sector-specific regulation of CMOs, the law does not restrict CMOs in their choice of the corporate structure. This is the case in both Germany, where the largest authors' rights CMOs are private law associations,[798] and Switzerland, where the majority of the CMOs are

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796 Note, however, that the Spanish Competition Commission has recently argued that the status of a non-profit organization is neither required nor helpful from a competition law perspective. See Comisión Nacional de la Competencia, Report on the Collective Management of Intellectual Property Rights, 2009, p. 79.

797 Nowadays, two out of eight CMOs are established as cooperatives. The other six are limited private companies.

798 In Germany, only four out of 12 authorised CMOs are private law associations, including GEMA (for music), VG Wort (for written works) and VG Bild-Kunst (for visual arts). The other twelve are limited companies under German law (GmbH). This, however, does not mean that the latter cannot be membership-driven. In the case of GVL, the CMO that administers the related rights of performing artists and phonogram producers, there is indirect influence of individual right-holders on the management of the CMO since the two partners of company are the German professional association of musicians and the German association of the music industry representing the performing artists and the phonogram producers.

nevertheless membership-driven private-law associations of right-holders.[799] In contrast, Greece is an example of a country where CMOs are typically incorporated as profit-oriented business corporations.

The idea of limiting the corporate structure of CMOs to membership-driven organisations, such as private-law associations or cooperatives, is also inspired by the historical development. Especially the older CMOs, those established more than a hundred years ago, developed on the private initiative of authors who wanted to guarantee that royalties were paid, especially in the case of public performance of their works. Therefore, membership-driven organisations are the traditional form of CMOs. Still today, this seems to guide the European Commission, which obviously assumes in the framework of its recent Proposal for a Directive on collective rights management that CMOs are always membership-driven.[800] There are, however, arguments in favour of not regulating the corporate structure. First, in systems in which the corporate structure of CMOs is not legally prescribed, such as in Germany, CMOs have very different corporate structures. The reasons for this are not necessarily only historical ones. Membership-driven structures are more appropriate for the administration of the rights of the authors and performing artists, who are extremely large in number and who fluctuate enormously.[801] Membership-driven organisations allow authors and performing artists to enter and exit these organisations very flexibly and with great ease. On the other hand, there is also the need for CMOs for the administration of the rights of film producers or broadcasting corporations, who are only a few and who do not fluctuate a lot over time. Also, for such collecting societies, the objective of reaching compromises regarding the distribution of royalties among different categories of right-holders may not play a major or even any role. To allow such CMOs to choose a corporate structure that suits undertakings better, such as the status of a limited corporation, can also enhance the efficiency of the administration of the CMO. Second, a membership-driven structure creates its own problems. A major question is who qualifies to become a member. While it is true that everybody who creates works should have access to the system of collective rights management, especially in a copyright system that provides for statutory remuneration

[799] In Switzerland these are four out of five CMOs.

[800] See Articles 6 to 8 of the Commission Proposal, *supra* n. 24. It is puzzling to see that the Proposal contains detailed principles on the role of members in the administration of CMOs, but does not provide for any obligation of the Member States to restrict the corporate structure of CMOs to membership-driven ones. This may be explained by the fact that the Commission does not want to regulate corporate law in the framework of this Directive. Yet the Commission was immediately criticised by those CMOs in particular that are not organized as open associations but, for instance, as limited companies with stable partners. See, for instance, the comments of the German VG Media on the Commission Proposal: VG Media, "Stellungnahme zum Vorschlag für eine Richtlinie des Europäischen Parlaments und des Rates über kollektive Wahrnehmung von Urheber- und verwandten Schutzrechten", Part III, 31 August 2012, *available at:* http://www.vg-media.de/images/stories/pdfs/aktuelles/120831_stellungnahme%20vgm%20wg.%20rili-entwurf.pdf (with a plea to leave it to the CMO to choose its legal status).

[801] Yet a business corporate structure can also be implemented in an indirect manner if the different professional organisations of the right-holders become partners of the business corporation. See the example of the German GVL, *supra* n. 798.

rights, it is to be acknowledged that not all authors create works permanently and as the major professional basis of their life. Hence, a distinction has to be made between right-holders who are allowed to become members and those who are only recipients of collective rights management services as non-members. Sector-specific regulation may set rules on membership qualification, but rarely does so.[802] Competition law may play a role in this regard, since the refusal to accept a right-holder as a member, especially if the refusal has a discriminatory character, may be considered as an abuse of market dominance. Yet, since right-holders are predominantly interested in getting their rights managed by the CMO, enforcement of competition law should primarily be directed against the refusal to manage the rights of an individual right-holder and not against the refusal to accept right-holders as members. Yet US antitrust law goes a step further. The US consent decrees stipulate that every songwriter who has created at least one work that is regularly performed qualifies to become a member.[803]

11.2.2 Duty to manage the rights of all right-holders

According to the preceding analysis, competition law may have to play a major role when CMOs refuse to manage the rights of individual right-holders. In the light of the economics of competition law, one wonders whether a CMO has any incentive to reject right-holders, since accepting more right-holders and works only seems to create economies of scale that will make the CMO more efficient. There are, however, several reasons why CMOs may want to reject authors. The first reason is that the costs of managing the rights of economically unimportant works and right-holders may still cause higher marginal costs than benefits. Second, CMOs may be interested in specialising in a particular kind of repertoire, such as a particular style of music, and therefore discriminate against certain right-holders. This may also explain why, third, CMOs have an incentive to reject foreign right-holders. The administration of the rights may cause higher costs than the administration of the rights of nationals, and CMOs may consider themselves less experienced in evaluating works that are culturally distinct. As has already been pointed out above (at 11.1.3), discrimination against foreigners can also be stipulated in reciprocal representation agreements concluded among CMOs. In this latter case, the refusal to accept foreign right-holders may not only contravene provisions on abuse of market dominance but also on restrictive agreements.

A rare example of a jurisdiction where CMOs have traditionally been very selective in accepting right-holders is the United States (see also at 11.1.2, above). There, ASCAP with its traditionally restrictive approach may even have caused the loss of its monopoly position and, thereby, may have contributed to the internationally rather exceptional situation that in a single country several CMOs compete for the same right-holder. Had the competition

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[802] Article 6(2) of the Commission Proposal for a Directive on collective rights management, *supra* n. 24, only stipulates that requests for membership can only be rejected on the basis of objective criteria, and that these criteria shall be included in the statute or the membership terms and shall be made publicly available.

[803] Para. XI. A. 1. of the ASCAP Consent Decree, *supra* n. 737.

authorities intervened before the emergence of SECAM and BMI and imposed a duty to accept all right-holders on ASCAP as a matter of US antitrust law, the US today would be more likely to have a monopoly of collective rights administration. However, the Consent Decrees of 1941 put an end to such discriminatory practice by obliging ASCAP to accept all songwriters as members.

Sector-specific regulation often imposes a duty on CMOs to accept all right-holders. Such rules will often be inspired by competition concerns. Thereby, the legislature acknowledges that a monopolistic CMO is an essential facility for right-holders to get their rights managed in a given jurisdiction. Yet other considerations may also play a role. If a national competition law relies significantly on statutory remuneration rights and even provides that those rights can only be administered by CMOs, this jurisdiction also has to guarantee that collective rights management services are provided to all right-holders. In jurisdictions where such a statutory duty to deal exists, competition law enforcers may never be confronted by right-holders to impose a duty to deal based on abuse-of-dominance provisions.

Yet European law has produced quite a bit of practice on access of right-holders to the service of national CMOs. Most interestingly, such case-law developed with regard to the situation in Germany, where Section 6 of the Act on Collective Rights Management of 1965 recognises an obligation of CMOs to accept all right-holders. Yet this provision was once limited to German right-holders. The practice of German CMOs to reject direct management of the rights of foreigners led to the first competition decision of the European Commission on collective rights management in *GEMA I*.[804] In this case, the Commission criticised that GEMA discriminated against foreigners in particular with regard to the rules on who could become a member of GEMA, since membership was important for how much a right-holder would receive.[805] The discrimination was even more severe for foreign publishers, who were excluded from membership altogether.[806] Some years later, the Commission also attacked a similar refusal of GVL, the German CMO of performing artists and phonogram producers, to manage the rights of foreign artists.[807] This decision was then appealed by GVL to the ECJ that consequently had to decide whether such refusal violated ex-Article 86 EEC Treaty (now Article 102 TFEU).[808]

In its decision, the Court not only rejected the possibility of GVL to claim privileged treatment under European competition law as a provider of services in the general economic

[804] Decision 71/224/EEC of the Commission of 2 June 1971, Case IV/26.760 – *GEMA*, [1971] OJ 134, p. 15 (only German, French, Italian and Dutch version available).

[805] *Id.*, at II. C. 1. a) (p. 219).

[806] *Id.*, at II. C. 1. b) (p. 219).

[807] Decision of the Commission of 29 October 1981, Case IV/29.839 – *GVL*, [1981] OJ No. L 370, p. 49.

[808] *GVL v Commission*, *supra* n. 114.

interest (now Article 106(2) TFEU).[809] The Court also clarified the application of the prohibition on abuse of dominance to a CMO that holds a monopoly position in a given Member State. First, also in the context of this prohibition, the Court confirmed that that conduct of a domestic CMO that has the effect of partitioning the European market has to be considered capable of affecting trade between Member States and therefore falls within the scope of application of ex-Article 86 EEC Treaty.[810] Since the refusal of GVL consisted in the provision of services to right-holders in other Member States, the Court confirmed the applicability of ex-Article 86 EEC Treaty in this case.[811] Second, as to the application of ex-Article 86, the ECJ accepted the Commission's analysis according to which GVL held a *de facto* monopoly in the market for services relating to the collective management of secondary exploitation rights of performing artists and phonogram producers in Germany.[812] As to the abuse, GVL tried to rely on Section 6 of the German Act on Collective Rights Management. In this regard, the Court simply pointed out that German law did not require GVL to reject the management of rights of foreigners and that the freedom of GVL to do so was limited by European competition law.[813] Accordingly, the Court confirmed the decision of the Commission considering the refusal to accept foreign artists as an outright abuse in the form of discrimination. GVL tried to justify its refusal by hinting at the difficulties related to the need to clarify whether foreigners could indeed assert rights. The Court rejected this argument since GVL rejected the management of rights for foreigners in general without any consideration as to whether there were doubts concerning the entitlement. Most importantly, the Court stated that the refusal to deal prevented artists from collecting royalties from Germany.[814]

The Court did not refer in any way to the possibility to collect royalties from Germany indirectly, through CMOs in other Member States. However, the reasons for this are well explained in the Commission's decision. The case dated from a period when the law on related rights of performing artists was not yet harmonised between the Member States.[815] Accordingly, many foreign right-holders could have asserted related rights in Germany but not in their home countries. Indeed, several Member States at that time had not yet recognised protection of performing artists regarding secondary use of their

809 *Id*., paras 29-30. See, in more detail, at 6.1.7, above.

810 *Id*., para 38. In this regard, the ECJ relied on its previous judgment in Case 22/79 *Greenwich Film Production v SACEM* [1979] ECR 3275, para. 12.

811 *Id*., para. 39.

812 *Id*., para. 44 et seq.

813 *Id*., para. 53.

814 *GVL v Commission*, *supra* n. 114, para. 54.

815 See Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights regarding rights related to copyright in the field of intellectual property (codified version), [2006] OJ No. L 376, p. 28. This directive re-codified the initial Council Directive 92/100/EEC of 19 November 1992.

performances.[816] Accordingly, reliance on CMOs in their home countries and possible reciprocal representation agreements was not an option for many foreign performing artists.[817] Consequently, the Commission pointed out that GVL's refusal placed foreign right-holders at a disadvantage in competition with German right-holders.[818]

This argument would even be convincing today for the situation in which right-holders are able to collect royalties indirectly through the use of reciprocal representation agreements. Reciprocal representation agreements still lead to the deduction of administrative costs by two CMOs instead of only one. Hence, even in such a case, foreign right-holders would incur a disadvantage if they were rejected by CMOs.

German legislation was amended quite some time ago. After the *Phil Collins* decision of the European Court of Justice,[819] which clarified that Member States are not allowed to discriminate against owners of copyrights and related rights who are nationals of other Member States as a matter of the general non-discrimination clause of EU law (now Article 18(1) TFEU), Germany changed its law and now provides in Section 6 of its Act on Collective Rights Management that CMOs must also manage the rights of all right-holders who are nationals of the Member States of the EU or of the European Economic Area (EEA).[820]

The remaining question is whether right-holders who come from outside the EU or the EEA can also claim to get their rights directly managed by CMOs within the EU. Practice in this regard, especially of EU institutions, is not available. Yet the question should be answered in the affirmative, both as a matter of competition law and of international law. EU competition law protects undistorted competition as such. EU law therefore applies equally whether the alleged infringer or the victim of the restraints comes from inside or outside the EU. The only question is whether EU law applies or only national law. The latter may be the case since the rejection of a right-holder from outside the EU, under regular circumstances,[821] will not necessarily affect trade between the Member States in the sense of Article 102 TFEU. In such a case, at least, national competition law of the relevant Member State will provide protection. In addition, it can be argued that a state that obliges

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816 This argument was explicitly relied upon by the Commission in its *GVL* decision, *supra* n. 807, paras 7 and 11 (also hinting at the fact that, at that time, not all Member States had become contracting parties of the Rome Convention on the protection of performing artists).

817 Note that even today GVL does not entertain reciprocal representation agreements with CMOs from all EU Member States. According to the information delivered on GVL's website (www.gvl.de) there are only 13 agreements with CMOs from other Member States that include an exchange of royalties (type A agreements).

818 *GVL*, *supra* n. 807, para. 55.

819 Joined Cases C-92/92 and C-326/92 *Phil Collins and Patricia In- und Export* [1993] ECR I-5145.

820 Also other EU Member States that provide for a duty to manage rights of all right-holders as part of their regulatory laws have extended this obligation to nationals of EU and EEA Member States. See, for instance, Section 11(1) of the Austrian Law on Collecting Societies, *supra* n. 777.

821 The case is different if the right-holder is resident in another Member State. In such a case, the refusal would affect the free movement of services between Member States.

CMOs to contract only with nationals – and EU and EEA – right-holders as part of its sector-specific regulation violates the national-treatment obligation of international copyright conventions.[822]

European case-law only relates to discriminatory refusal to license in countries that provide for a duty to license as part of their sector-specific regulation. This leaves the question unanswered whether, in a jurisdiction that is characterised at least by *de facto* monopolies but does not have any special provision in its copyright legislation regarding a duty of CMOs to accept all right-holders,[823] rejected right-holders can claim a duty to contract under competition rules.

From the duty of CMOs to manage the rights of all right-holders, one has to distinguish restrictive membership rules with effects on the voting rights of individual right-holders. The Irish Competition Authority reviewed the membership requirements of the PRS, the British CMO for authors and publishers of works of music, and concluded that the adoption of non-discriminatory rules based on thresholds of income from the CMO was not restrictive of competition in the sense of Irish competition law.[824]

11.2.3 Restrictions on the economic freedom of right-holders in general

As the analysis has shown so far, right-holders may complain that they have insufficient access to existing CMOs. However, the reverse case seems to be much more of a practical problem. CMOs may go too far in claiming rights from right-holders. Restrictions in this regard can either be contained in the membership terms of CMOs or in the standard contract terms of the collective rights management agreements that also regulate the transfer of rights to the CMO.

Such restrictions on right-holders can vary considerably. Relevant questions are: should the CMO be allowed to claim the rights for the whole world, for all uses and for all existing and future works? Where are the limits to restricting the right-holders' abilities to terminate the relationship with a CMO and to entrust the rights to another CMO? And finally: should a CMO be allowed to claim the transfer of the rights based on exclusivity, so that the right-holder would be prevented from granting direct licences to users?

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[822] See, for instance, Article 5(1) of the Berne Convention for the Protection of Literary and Artistic Works; *available at:* http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf. This also seems to be the dominant opinion in legal writing in Germany. See, for instance, Jörg Reinbothe, in: Gerhard Schricker & Ulrich Loewenheim (eds.), *Urheberrecht, Kommentar*, 4th ed., C.H. Beck: Munich, 2010, § 6 UrhWG para. 9.

[823] Note that the Commission Proposal for a Directive, *supra* n. 24, is not clear in this regard. According to Article 5(2) of the Proposal, right-holders are to be given a "right to authorise a collecting society of their choice to manage the rights". This may imply a duty to contract of the CMO that the right-holder chooses, but could also be understood as a mere reference to the freedom of contract of right-holders.

[824] Irish Competition Authority, Decision No. 326 of 18 May 1994, Notification No. CA/2/91E – *Performing Right Society and individual creators/publishers (Assignment of Copyright)*, para. 86.

All of these questions could of course also be addressed by sector-specific regulation or, many of them, on the basis of the general contract law principles regarding the control of standard contract terms.

As regards the EU, it was in the early *GEMA I* decision that the Commission for the first time looked into these issues in detail and developed, based on a very case-specific assessment of the rules and practices of the German GEMA, in the light of the prohibition of abuse of market dominance, a European framework for the control of the conduct of dominant CMOs that restrict the ability of right-holders to choose among different CMOs.[825]

Yet, in *GEMA I*, the Commission did not provide general criteria for drawing the line between what CMOs are allowed to require as competition on the merits and what would be considered as an abuse. This was left to the European Court of Justice in *BRT v SABAM*.[826] In this judgment, which has already been presented above (at 11.1.1), the Court relied on a two-step approach. First, the Court defined the objectives that justify restrictions on the economic freedom of right-holders. The Court requires that these restrictions preserve the interests of the individual right-holders against powerful exploiters and distributors of their works.[827] And second, the Court relies on a proportionality test. CMOs can only impose restrictions on right-holders that are "absolutely necessary" for the enjoyment of a position required for the CMO to carry out its activity.[828] What complicates the application of the test, however, is that the ECJ in *BRT v SABAM*, unlike the Commission in *GEMA I*, refrains from declaring certain restrictions as *per se* abusive, but rather informs the referring court that the abusive nature of the different clauses needs to be determined in the light of their individual and combined effect.[829] Accordingly, the Court did not provide any clear answer regarding the legality of the clauses that were to be assessed in the underlying case.

In the following, the analysis will turn to three groups of restrictions, namely, regarding the scope of transfer of rights (at 11.2.4, below), the freedom to withdraw rights from a CMO (at 11.2.5, below) and finally the exclusivity of the transfer of rights to the CMO (at 11.2.6, below).

11.2.4 The scope of rights conferred to the CMO

In *GEMA I*, the Commission looked at different aspects of the scope of the transfer of rights and answered the question of whether CMOs may force right-holders to transfer rights for the whole world, for all uses and, finally, for all existing and future works. The Commission

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825 *GEMA I*, *supra* n. 804.

826 *BRT v SABAM*, *supra* n. 113

827 *Id.*, para. 9.

828 *Id.*, para. 11.

829 *Id.*, para. 13.

considered the first two requirements as abusive, while it allowed the transfer of rights for all existing and even future works.

The Commission was especially critical on the obligation of right-holders to entrust GEMA with the rights for the whole world. Indeed, this would have prevented right-holders from entering into contracts with different national CMOs that would manage the right-holder's rights directly in the different markets. In addition, GEMA had required the transfer of rights even for countries in which it did not directly manage the rights and, maybe, could not even guarantee that royalties would be collected for the right-holder due to the absence of reciprocal representation agreements. Because of these obvious economic disadvantages and the exclusionary effect on foreign CMOs, the Commission quite rightly considered such a requirement an abuse.[830]

Moreover, in *GEMA I*, the Commission also considered the mandatory transfer of rights for all types of uses an abuse of market dominance.[831] According to the Commission, the right-holder for musical works should have a choice, for instance, to entrust the broadcasting rights to one CMO and the rights for use of the music in films to another CMO. Also from the perspective of the later *BRT v SABAM* decision of the ECJ,[832] such a rule seems to make sense. Indeed, in *BRT v SABAM*, the ECJ tended to consider the mandatory transfer of all copyrights without distinction between the different types of uses an "unfair condition",[833] but finally left it to the referring court to assess the individual case.[834] Indeed, CMOs grant licences only for particular uses and often to specialised users. Likewise, broadcasting companies are in need of licences for broadcasting music and not for film production. And the film producers are not in need of the broadcasting rights in order to use the music for the film production.

This also explains why the Commission is more generous with regard to the transfer of rights for all works, including future works. This allows CMOs to build up attractive repertoires in competition with other national CMOs that they may then license for mass use in particular.[835] The creation of larger repertoires also serves the interest of the right-holders, who will benefit from the increased economic value of this repertoire.

Some more practice in the EU is provided by the national jurisdictions. In Austria, the Supreme Court held that CMOs are not under an obligation to only manage one specific remuneration right, but that they can claim the management of all exclusive rights and

830 *GEMA I*, *supra* n. 804, at II. C. 2. a) (p. 22).

831 *Id.*

832 *BRT v SABAM*, *supra* n. 113.

833 *Id.*, para. 12.

834 *Id.*, para. 13.

835 *GEMA I*, *supra* n. 804, at II. C. 2. a) (pp. 22 et seq.).

remuneration rights.[836] It is to be pointed out that the new Austrian Act on Collecting Societies of 2006 provides for a general duty to conclude rights management agreements on the request of the right-holders on reasonable terms (Section 11(1) of the Act).

In the US, the consent decrees enjoin ASCAP and BMI from claiming rights other than for public performance.[837] This establishes the US CMOs as "public performance organizations" and is inspired by the idea that only for public performance collective rights is administration needed to solve the transaction-costs problem. Conversely, US law does not seem to take account of the need to protect authors against powerful players in the copyright industry.

In France, the competition agency has so far decided one case on collective rights management. While the agencies of other EU Member States mostly had to deal with issues regarding the licensing practices of CMOs, the decision of the French Competition Council of 2005 related to the question of whether the Society of Dramatic Authors and Composers (SACD) should be allowed to require authors to entrust the theatrical performance rights together with the audiovisual rights to the society.[838] The Competition Council was of the opinion that, by making the transfer of rights mandatory in its statutes, SACD had managed to exclude potential competition for theatrical performance rights in a contestable market. Indeed, authors could either choose to entrust these rights to another CMO are manage these rights individually. The Council closed the case by accepting commitments by SACD with regard to changing its statutes.

11.2.5 Restrictions on the right-holders' freedom to withdraw their rights

The interests of CMOs and the right-holders may conflict in particular when right-holders want to withdraw their rights from a given CMO with the intention to either entrust their rights to another CMO or to grant direct licences to users.

In *GEMA I*, the Commission was extremely critical of restrictions that made it more difficult for right-holders to terminate their relationship with GEMA and join another CMO.[839] It is hardly possible to go into the details of this very thorough and case-specific analysis in the context of this Report. Only a few aspects merit mention here. In particular, the Commission considered the transfer of rights for a fixed period of six years excessive. In this regard, the Commission did not accept GEMA's argument that such a long period was required in order to be able to fulfil its own obligations under its long-term licensing agreements with users, since GEMA could adequately deal with the loss of works under the clauses of the licensing

836 Supreme Court (*Oberster Gerichtshof*), 25 May 2004, Case 4 Ob 107/04w, Schulbuchfreiheit, (2005) *Medien und Recht* 30.

837 Para. IV. A. of the ASCAP Consent Decree, *supra* n. 737.

838 French Competition Council (*Conseil de la Concurrence*), Decision no. 05-D-16 of 26 April 2005, *Société des auteurs et compositeurs dramatiques (SACD), available at:* http://www.autoritedelaconcurrence.fr/pdf/avis/05d16.pdf.

839 *GEMA I*, *supra* n. 804, at II. C. 2. c) (p. 24).

contracts with the users. In particular, the Commission criticised that the termination of membership would have had no influence on the transfer of the rights for a period of six years even with regard to future works, since the users could hardly expect under their licensing agreements with GEMA that they would have access to any future works at the time of the conclusion of the contract.

In Ireland, the Competition Authority considered the limitation of the freedom to terminate membership in a CMO to three-yearly intervals as restrictive of competition by making it more difficult for competing CMOs to enter the market.[840] Despite the fact that the termination period was much shorter than in the GEMA case, the Competition Authority finally required the CMO to shorten the termination period to one year.[841]

The question of whether a CMO should be authorised to license a right to users after the right-holder has withdrawn the right was also a major issue in *BRT v SABAM* decision of the European Court of Justice. In this case, the CMO claimed extended use for five more years after the withdrawal of the right-holder from the CMO. In applying its general proportionality test (see at 11.2.3, above), the Court held that especially a compulsory assignment of rights "for an extended period after the member's withdrawal" can be considered an abuse,[842] but still left it to the referring national court to decide the case.

In 2002, in the *Banghalter & Homem Christo* case,[843] the Commission was confronted with the very interesting question of whether CMOs could prevent right-holders from withdrawing rights without simultaneously entrusting them to another CMO. The case related to such membership terms of the French SACEM. SACEM had already consulted the Commission at the beginning of the 1970s about the conformity of its membership terms with European competition law and got a positive answer. The reasons given at that time were twofold: first, the membership clauses aim to protect right-holders against waiving their rights too easily to powerful users with prevailing bargaining power. Second, right-holders should be prevented from cherry-picking, which would leave CMOs with the economically less interesting rights and which would therefore undermine the principle of solidarity of right-holders as the basis of collective rights management.[844] In 2002, the two members of the techno band "Daft Punk" wanted to join SACEM, but were rejected for not complying with the SACEM's membership rules. The two authors indeed wanted to retain the rights regarding the exploitation of their works through multimedia, Internet, CD-I, DVD, CD-ROM and Karaoke, with the intention to grant direct licences to users. The two authors

840 Competition Authority, Decision No. 326 of 18 May 1994, Notification No. CA/2/91E – *Performing Right Society and individual creators/publishers (Assignment of Copyright)*, paras 87-88.

841 *Id.*, para. 107.

842 *BRT v SABAM*, supra 113, para. 12.

843 *Banghalter & Homem Christo v SACEM*, *supra* n. 583.

844 *Id.*, p. 11.

argued that SACEM required more than what was absolutely necessary in the sense of the *BRT v SABAM* decision of the ECJ.[845] SACEM, in turn, relied on the reasons that had led to the Commission's positive answer in the 1970s. But now, in 2002, the Commission alluded to technological changes that had occurred that drastically reduced transaction costs for right-holders, enabling them to create systems of direct licensing to users, while individual management was not conceivable before.[846] Also, the Commission recognised the moral interests of the authors in not licensing certain types of uses at all.[847] And finally, the Commission did not believe there was a risk that many right-holders would withdraw their rights and fall prey to powerful users since other CMOs had given up such membership clauses and, still, members only made very limited use of their newly acquired freedom to withdraw rights.[848] For the same reason the Commission also rejected the cherry-picking argument.[849] Rather, it considered the enlarged freedom of right-holders to withdraw rights a welcome additional factor of more competitive pressure on dominant CMOs.[850] Although the Commission affirmed an abuse of dominance by SACEM in principle, it rejected the complaint by the authors, since the two had maintained their complaint despite a modification of SACEM's rules in the course of the procedure before the Commission.[851] While SACEM maintained the obligation to transfer the rights to another CMO, it now allowed right-holders to file a reasoned application for an exemption.[852]

As can be seen from this decision, the Commission still continues to rely on the objective of collective rights management and the *BRT v SABAM* decision of the 1970s according to which restrictions on the economic freedom of right-holders do not violate competition law as long as these restrictions are absolutely necessary to protect right-holders against large users. The latter risk has certainly not disappeared, but in *Banghalter & Homem Christo*, the Commission reached a flexible balance by opening the window for right-holders to manage licences for online uses themselves. The problem in the case remains that SACEM could be tempted to abuse its power and reject applications for an exemption in an arbitrary manner. In this regard, the Commission only stated that it cannot be assumed that SACEM will apply the new rules in a generally inappropriate way and thereby abuse its dominant position.[853]

845 *Id.*, p. 3.

846 *Id.*, p. 11.

847 *Id.*

848 *Id.*

849 *Id.*, pp. 10 et seq.

850 *Id.*, p. 10.

851 *Id.*, p. 13.

852 *Id.*, p. 6.

853 *Id.*, pp. 11 et seq.

It is to be noted that the freedom to withdraw parts of the rights from a CMO had already been established by the Irish Competition Authority in its *PRS* decision of 1994.[854] However, the decision did not take into account the possible risk that individual authors would license their rights at excessively low prices to powerful users.

In the US, the consent decrees also address the modalities to withdraw one's rights from a CMO. According to the ASCAP consent decree, ASCAP has to allow right-holders to withdraw their rights with effect at the end of any calendar year upon giving three months' advance written notice.[855]

11.2.6 Transfer of rights to CMOs on the basis of exclusivity?

A most difficult and controversial question is whether CMOs should be prevented from requiring the transfer of rights on the basis of exclusivity. Such exclusivity is deeply enshrined in the practice of many CMOs around the world, including those from the European Union. Yet it may be doubted whether the collective rights management system is indeed in need of such exclusivity. Users are granted non-exclusive licences by CMOs. Hence, for them, it is only important that CMOs can grant licences, while it is not important whether the CMOs themselves are granted an exclusive position or not. In addition, especially the ability of the right-holder to grant licences to users would increase right-holders' own economic freedom to promote their own economic interests and exercise some more competitive pressure on the dominant CMOs. More flexibility may be useful especially with regard to Internet uses, where direct licensing by right-holders could be a realistic option, as the analysis of the *Banghalter & Homem Christo* case (at 11.2.5, above) has also shown.

In the US, the ASCAP consent decree explicitly prevents ASCAP from claiming exclusive rights from right-holders.[856] Within the EU, it was the Irish Competition Authority that banned the transfer of rights from right-holders to CMOs as illegal already in the 1990s. By excluding the possibility of direct licensing between right-holders and users, such assignment was considered restrictive of competition in the sense of Section 4(1) of the former Competition Act (1991).[857] As to the question of whether the exclusivity clause can be exempted from the cartel prohibition, the Competition Authority held, in the light of US experience, that such

[854] Competition Authority, Decision No. 326 of 18 May 1994, Notification No. CA/2/91E – *Performing Right Society and individual creators/publishers (Assignment of Copyright)*, paras 88 and 107.

[855] Para. XI. B. 3. of the ASCAP Consent Decree, *supra* n. 737.

[856] Para. IV. A. of the ASCAP Consent Decree, *supra* n. 737.

[857] Irish Competition Authority, Decision No. 326 of 18 May 1994, Notification No. CA/2/91E – *Performing Right Society and individual creators/publishers (Assignment of Copyright)*, para. 81; Decision No. 445 of 15 December 1995, Notification No. C/2/95 – *Irish Music Rights Organisation/Writers*, Notification No. CA/3/95 – *Irish Music Rights Organisation/Publishers (Non Corporate)*; Notification No. CA/4/95 – *Irish Music Rights Organisation/Publishers (Limited Company)*, para. 37.

exclusivity was not needed in order to establish a workable system of collective rights management.[858]

EU institutions have so far not been requested to decide on the issue. Yet, in 2006, the Polish competition agency banned an exclusivity clause by the Polish author's society ZAiKS. The procedure was launched upon the complaint by the members of the music band "Brathanki" that was directed against the exclusivity requirements of ZAiKS that prevented authors from granting licences for their music directly to users.[859] The decision was confirmed by the Court of Competition and Consumer Protection that held that copyright would best be promoted by competition and that the practices of ZAiKS violated competition law.[860] A similar case can be reported from Columbia, where the competition agency has most recently opened investigations against the Columbian CMO SAYCO for preventing authors from licensing their rights directly to users in circumvention of SAYCO.[861]

Of course the question is whether, in terms of the requirements fixed by the ECJ in *BRT v SACEM*, it is "absolutely necessary" that a position of exclusivity be accorded to CMOs. One possible reason would be that users would risk paying twice for the use of the same right if a right-holder grants non-exclusive licences to several CMOs. The same problem would appear if a user takes a licence from the right-holder directly and, at the same time, is granted a blanket licence from the CMO that also covers this work. This, however, seems to be more a matter of transparency regarding rights-clearing. A user who knows which works are covered by the blanket licence should not be interested anymore in requesting a licence directly from the right-holder.

As also pointed out by the ECJ in *BRT v SACEM* and by the European Commission in *Banghalter & Homem Christo*, exclusivity can only be justified with the need to protect right-holders. Indeed, there is the risk that powerful users may try to circumvent CMOs by directly contracting with individual right-holders at lower royalty rates. In cases of mass uses, users will usually not be able to abstain from taking a blanket licence. Also in countries, such as Italy and Austria, that provide for a legal monopoly, but simultaneously allow the right-holder to license his or her rights individually, individual licensing does not seem to have undermined the system of collective administration or led to exploitation of the right-holders. The issue of exclusivity should therefore be decided more in line with the European Commission's approach in *Banghalter & Homem Christo*. CMOs should be allowed to claim the transfer on the basis of exclusivity by excluding the transfer of the same rights to any other CMO. At the same time the right-holder should be allowed to grant a licence for use to any other person.

858 *Id*., paras 105-106.

859 UOKiK, Decision of 16 July 2004, Case RWA-21/2004, Annual Report 2006, p. 20.

860 CCCP, Decision of 9 January 206, Case XVII Ama 84/04, Annual Report 2006, p. 20.

861 SIC, Decision No. 20964 of 2 April 2012, SAYCO.

The principle that right-holders should always be allowed to contract individually with users has also been recognised by competition law practice in Israel.[862]

11.3 Competition in the licensing market

Competition law has to face many more difficulties in respect of protecting competition in the licensing market. Whereas in the market for collective rights management services, competition law can enhance competition between different national CMOs and protect right-holders' interest in direct licensing to the extent this seems possible, in the licensing market, the monopoly of CMOs seems unavoidable. Hence, the major issue with regard to the licensing market is the protection of users against excessive royalty rates. Application of competition law to the licensing market is mostly about exploitative and not exclusionary abuse.

11.3.1 Control of royalty rates

Controlling the royalty rates and tariffs set by CMOs is a major part of many systems that provide for sector-specific regulation of collective rights management. Thereby, jurisdictions can choose among many different approaches, including collective bargaining models between the CMO and user associations, administrative control by state authorities[863] and systems of mediation and arbitration before specialised bodies in which the different stakeholders are represented or proceedings before specialised or regular law courts.[864]

In jurisdictions where such procedures exist and work sufficiently well, competition law enforcers are less likely to be confronted with excessive pricing allegations. In contrast, competition agencies, given the extremely high number of users affected, will have to be confronted with numerous complaints about the royalty rates if no such specialised procedures exist.

This expectation is also proven correct by the survey. Two interesting examples of emerging economies to be cited here are Singapore and Turkey. In Singapore, Article 163(2) Copyright Act allows users to apply to a specialised Copyright Tribunal in order to have the reasonableness of the royalty rates and the licensing conditions assessed. The Competition

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[862] Israeli Antitrust Tribunal, Case 3574/00, *Federation of Israeli and Mediterranean Music Ltd. v Director of the Competition Authority*; Israeli Antitrust Tribunal and Israeli Supreme Court, Case DAF/COMP(2010)17, *ACUM v Director of the Competition Authority*, as reported by Israeli Antitrust Authority, Annual Report 2010, paras 46-52.

[863] An example would be Switzerland where CMOs are under a duty to negotiate tariffs with user organisations and where, consequently, these tariffs are applied after the Swiss Institute for Intellectual Property has confirmed the reasonableness of the tariffs.

[864] A well-established approach is the use of so-called copyright tribunals in a number of Commonwealth countries such as Australia.

Commission of Singapore has so far not received any complaint about excessive royalty rates imposed by CMOs.

In contrast, in Turkey, where copyright law does not provide for any special mechanism for the control of royalty rates set by CMOs, the competition agency has repeatedly been confronted with complaints alleging excessive pricing or price cartels by CMOs. In a case from 2002, the agency rejected the complaint of several broadcasting companies that were alleging a price cartel among five CMOs. The agency recognised that the CMOs held dominant positions in the relevant markets, but found no evidence of excessive pricing.[865] In 2005, the Turkish agency received two complaints, each from several broadcasting agencies, against four CMOs. In both complaints it was argued that the CMOs had abused their dominant position by charging excessive royalty rates. In the second case the complainants also claimed that the royalty rates should be different for regional and nationwide channels, since the latter benefit from higher income from advertising. The competition agency rejected both complaints by pointing out that copyrighted works for music are very different from other goods and services as regards the production and distribution costs. Accordingly, the agency held itself unable to identify a fair price and accordingly held that there was no evidence of excessive pricing.[866]

The Turkish experience demonstrates the difficulties a competition agency may encounter when it has to decide on the appropriateness of royalty rates for the use of copyrighted works. It seems that the Turkish agency tried to assess the appropriateness of the fees in the light of the cost-price margin and then was unable to make any reliable assessment of the costs involved. This is certainly an approach which is very different from how the fairness of royalty rates is assessed by sector-specific regulation, which relies more on procedures of mediation and arbitration than on economic analysis.

Yet the practice of the European Court of Justice shows that competition law can also contribute something to controlling the royalty rates set by CMOs. On several occasions, the ECJ was asked by national courts to make an assessment of the reasonableness of royalty rates. It is no surprise that these cases were referred to the ECJ by courts from jurisdictions where no specific procedures for the control of royalty rates exist, namely, from France and, more recently, from Sweden.

The so-called French nightclub cases – *Tournier*[867] and *Lucazeau*[868] – were among the first cases ever in which the Court applied today's Article 102(2)(a) TFEU on excessive pricing.[869]

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865 Turkish Competition Authority (*Rekabet Kurumu*), Decision 02-27/290-118 of 7 May 2002, Case 535.

866 Turkish Competition Authority (*Rekabet Kurumu*), Decision 05-36/451-104 of 26 May 2005, Case 1207, *available at:* http://www.ratem.org/eski_02_2009/RK_Meslek_Birlikleri_Karari.pdf; Decision 05-48/683-177 of 21 September 2005, Case 1304.

867 Case 395/87 *Tournier* [1989] ECR 2521.

868 Joined Cases 110/88, 241/88 and 242/88 *Lucazeau* [1989] ECR 2811.

In all of the cases referred to the ECJ, French operators of discothèques claimed that the royalty rates of the French CMO SACEM were in violation of European competition law. In assessing the case, the ECJ relied upon a comparison of the royalty rates in different Member States. Despite the cultural differences that may influence the income of nightclubs in different member states, the Court held that the fees in one Member State are

> appreciably higher than those charged in other Member States and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position. In such a case it is for the undertaking in question to justify the difference by reference to objective dissimilarities between the situation in the Member States concerned and the situation prevailing in all the other Member States.[870]

SACEM was trying to justify its much higher royalty rates by higher standards of copyright protection in France and relied for this, among other things, on the particularity of French law that for playing music in public the user needs not only a licence relating to the public performance but also one for the mechanical reproduction right as stipulated by French law.[871] The Court, however, rejected this argument, relying on economic considerations. It stated that the royalty charged for the mechanical reproduction right only constitutes a part of the price that has to be paid for the public performance of music also in other Member States and therefore should not lead to a difference in the overall price to be paid.[872] In addition, the Court rejected the justification of higher rates in the light of higher administrative costs of SACEM. Quite rightly, the Court attributed such differences to the lack of competition that competition law is indeed supposed to remedy.[873] Hence, the Court considered the comparison with the level of fees in other Member States as a useful indicator of the excessive character of fees charged by dominant CMOs.[874]

Finally, the Court of Justice held that royalty rates could also be controlled by comparing the royalty rates that the same CMO charges for different uses. The Court ultimately refrained from giving a clear answer to this, since these criteria were neither part of the question

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869 In the earlier Case 402/85 *Basset v SACEM* [1987] ECR 1747, the Court was also requested to apply ex-Article 86 EEC Treaty (now Article 102 TFEU) to the royalty rates of SACEM. In this case, the Court only indicated that the royalty rates can be controlled as a matter of this provision, but left the question finally open since the referring court had not considered the royalty rates unfair. *Id*., paras 19 *et seq*. Earlier cases on abusive prices that do not relate to copyright are Case 26/75 *General Motors Continental v Commission* [1975] ECR 1367, para. 12; Case 27/76 *United Brands v Commission* [1978] ECR 207, para. 250

870 *Tournier*, *supra* n. 867, para. 38; *Lucazeau*, *supra* n. 868, para. 25.

871 *Tournier*, *supra* n. 867, para. 39; *Lucazeau*, *supra* n. 868, para. 26.

872 *Tournier*, *supra* n. 867, para. 40; *Lucazeau*, *supra* n. 868, para. 27. Thereby, the Court relied on the earlier *Basset v SACEM* case, *supra* n. 869.

873 *Tournier*, *supra* n. 867, para. 42; *Lucazeau*, *supra* n. 868, para. 29.

874 *Tournier*, *supra* n. 867, para. 43; *Lucazeau*, *supra* n. 868, para. 30.

referred to the ECJ by the national courts, nor were there any clear indications in the facts that would have enabled the ECJ to rely on such a comparison.[875]

In addition, the Court was also asked whether the charging of a flat rate for the blanket licence has to be considered abusive as well. In this regard, the Court was more generous and applied a proportionality test according to which flat rates are accepted if they are necessary to protect copyright effectively while keeping the costs of collective management low. The Court stated that flat rates can only be considered abusive "if other methods might be capable of attaining the same legitimate aim, namely the protection of the interests of authors and composers and publishers of music, without thereby increasing the costs of managing contracts and monitoring the use of protected musical works".[876]

As can be seen from European case-law, the application of a cost-price-margin test is not the only way of assessing the abusive character of royalty rates. Indeed, other competition jurisdictions also rely on the market-comparison test for assessing the excessiveness of prices as part of their rules on abuse of market dominance.[877] The test of the ECJ is still very generous since it relies on the comparison of prices in comparable markets, which are all characterised by market dominance and not competition. Yet the test applied by the Court may lead to indirect cross-border effects of sector-specific regulation available in other countries. If special procedures keep royalty rates low in Germany, French courts can still take German royalty rates as a point of reference for controlling the royalty rates of French CMOs under competition law. Also, comparison of the royalty rates of the same CMO for other uses and on the royalty rates of other – foreign or domestic – CMOs are also more likely to be used as criteria in sector-specific systems for the control of the fairness of royalty rates. By adopting such criteria, competition law enforcers can learn from sector-specific regulation.

In the more recent *STIM* case, the ECJ was requested by a Swedish court to provide guidance on the calculation of the royalty rates that are charged for the use of music by private and public TV stations.[878] STIM, the Swedish CMO for musical works, which is the only provider for broadcasting licences for music in Sweden, used to charge private TV channels fees calculated as a percentage of their revenues, whereby the percentage varied according to the amount of music broadcast. In contrast, public TV stations pay a lump sum on which they agree with STIM in advance. In the case that led to the referral to the ECJ, the public TV stations sued STIM for having violated ex-Article 82 EC (now Article 102 TFEU) before the Swedish Market Court. The questions referred to the ECJ related to the appropriateness of

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875 *Tournier*, *supra* n. 867, para. 44; *Lucazeau*, *supra* n. 868, para. 31.

876 *Tournier*, *supra* n. 867, para. 45.

877 German competition law, for instance, explicitly provides for this test in its list of examples of possible abuses. See Section 19(2) Nos 2 and 3 Act against Restraints of Competition.

878 Case C-52/07 *Kanal 5 et al. v STIM* [2008] ECR I-9275.

the calculations of fees for private TV channels by also taking into account possible discrimination in comparison to the public TV channels. For answering these questions, the ECJ applied a standard of reasonableness according to which the royalties have to be reasonable in relation the economic value of the licences.[879] Based on the earlier decisions, including the holding in *Tournier*, according to which a flat rate can in principle be justified, the Court held that the remuneration system "does not in itself constitute an abuse … and must, in principle, be regarded as a normal exploitation of the copyright".[880] Since reasonableness is to be evaluated in the light of the economic value of the service, the ECJ accepted the revenue of the private TV companies as a basis for the remuneration system.[881] Similarly, the fact that the royalties varied according to the amount of music broadcast was considered an important aspect for the reasonableness of the royalties.[882] The Court only found that the remuneration system can nevertheless be considered abusive in certain circumstances, if another method exists that allows for identifying the use of works and the audience more precisely and, at the same time, is capable of achieving the same legitimate goal of protecting the right-holders.[883] Yet, in answer to the questions of the referring court, the ECJ also assessed whether the royalty rates are discriminatory in the sense of ex-Article 82(2)(c) EC (now Article 102(2)(c) TFEU) and whether STIM thereby required that dissimilar conditions be applied that put the private TV stations at a competitive disadvantage.[884] The ECJ left this decision to the referring court but also pointed out that this court has to take into account that public TV stations do not generate revenue from advertising or subscription contracts and that the royalties paid by public TV do not take account of the volume of musical works actually broadcast.[885] And as a preliminary question, the referring court has to clarify whether the private TV stations and public TV are actually competitors in the same market.[886] Even if the referring court would reach the conclusion that there is a discrimination that puts the private TV stations at a competitive disadvantage, the Court allows for an objective justification, most importantly with a view to the method of the financing of the public TV stations.[887] Of course, it would be interesting to know how the Swedish court would have applied these principles. Yet, there is no such decision, since STIM

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879 *Id.*, para. 29.

880 *Id.*, para. 34.

881 *Id.*, para. 37.

882 *Id.*, para. 39.

883 *Id.*, para. 40. With this *caveat*, the Court responded to the argument of the TV companies that they also have to pay for revenue that is generated by broadcasts that does not contain music, such as the broadcast of news or sports events.

884 *Id.*, para. 43.

885 *Id.*, para. 45.

886 *Id.*, para. 46.

887 *Id.*, para. 47.

in 2010 finally agreed with the private TV stations concerned on the introduction of a new tariff structure.[888]

Among the EU Member States, it is above all the Irish Competition Authority that has produced considerable case-law with regard to controlling licensing agreements of CMOs. This is explained by the particular role of the Competition Authority under the former Competition Act (1991). Under this law, the Competition Authority had to assess notified agreements and had the power to grant clearance certificates or exemptions to such agreements. In this function, the Competition Act was asked several times to decide on the conformity of licensing agreements with the prohibition of restrictive agreements.[889] This notification system ended with the entry into force of the Competition Act of 2002. Accordingly no such decisions can be reported after that time. In all of these earlier decisions the Competition Authority either certified that the agreement did not offend the prohibition of restrictive agreements or granted a "licence" to apply the agreement under the exemption provision for restrictive agreements. Thereby, the Competition Authority assumed that blanket licences are not considered anti-competitive agreements *per se*.[890] With regard to the royalty rates it only asserted limited power of control. On the one hand, the Authority refused to assert power to control the fairness of the remuneration in general. However, it also rejected the argument that the power of the Controller of Patents, Trademarks and Designs excluded its own function to act against restrictive agreements. Hence it declared itself responsible to act against discriminatory royalty rates in particular.[891] To the extent that users tried to argue an abuse of market dominance in the form of excessive pricing, the Competition Authority held that it had no power to make a decision on abuse of market dominance according to Section 5 Competition Act within proceedings concerning Section 4 Competition Act on restrictive agreements.[892] However, the licensing terms negotiated between the CMO of phonogram producers and the associations of users were identified by the Competition Authority as horizontal price fixing agreements between

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[888] STIM Annual Report 2010, *available at:* http://www.stim.se/annualreport/files/assets/seo/page48.html.

[889] Irish Competition Authority, Decision No. 449 of 18 December 1995, Notification No. CA/5/91E – *Irish Music Rights Organisation Ltd/Independent Radio Stations*; Decision No. 456 of 21 December 1995, Notification No. CA/4/91E – *Irish Music Rights Organisation Ltd/Radio Telefis Eireann*; Decision No. 457 of 21 December 1995, Notification No. CA/3/91E – *Irish Music Rights Organisation Ltd/Public Performance Users*; Decision No. 569 of 8 October 1999, Notification Nos. CA/483/92E et. al. – *MCPS/MCPSI/Various Agreements*; Decision No. 580 of 28 January 2000, Notification No. CA 1048-105/92E, CA/26/96 – *Phonographic Performance (Ireland) Ltd./Various Agreements*.

[890] Irish Competition Authority, Decision No. 449 of 18 December 1995, Notification No. CA/5/91E – *Irish Music Rights Organisation Ltd/Independent Radio Stations*, para. 22.

[891] *Id*., paras 24 et seq.

[892] Decision No. 457 of 21 December 1995, Notification No. CA/3/91E – *Irish Music Rights Organisation Ltd/Public Performance Users*, para. 28.

associations of competitors that are prohibited by Section 4(1) Competition Act (1991).[893] Yet the Competition Authority recognised the beneficial role of collective rights management within the exemption provision of Section 4(2) Competition Act (2011) to the benefit of consumers.[894] It therefore accepted the grant of an exemption in this rare case of a horizontal price cartel.[895]

In sum, despite the number of cases, the scope of control through the Irish Competition Authority remained rather limited, mostly due to constitutional constraints of division of power between the Authority and the Controller on the one hand and the limitations of applying the prohibition on restrictive agreements only. As will be seen in the following, competition agencies in other EU Member States went considerably further in exercising control over the royalty rates of CMOs.

Another very active agency in this field is the Spanish Competition Commission. It has had the opportunity to decide on CMO-related cases several times. Here, it suffices to refer to its most recent and important decision.[896] In 2012, it handed down a major decision against the Spanish CMO SGAE (*Sociedad General de los Autores y Editores*).[897] The Commission acted on a complaint that it had received in 2010 by two restaurant operators and one hotel operator against SGAE's licensing conditions for the public performance of music played at the occasion of weddings, baptisms and first communions as events that can only be accessed through invitation. Under Spanish copyright law, SGAE was obliged to set a general tariff scheme. Before 1994, the fees were fixed at a percentage of the revenue of the restaurant or hotel. In 1994, the tariffs were changed and the payment of a lump sum was imposed for each event, regardless of the number of persons attending the event; beyond 75 guests, however, an additional amount was charged for every person. In 2009, SGAE introduced a

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893 Decision No. 569 of 8 October 1999, Notification Nos. CA/483/92E et. al. – *MCPS/MCPSI/Various Agreements*, paras 12.1.1-12.1-3.

894 *Id*., para. 13.3.

895 Id., para. 13.7.

896 As to earlier decisions see: Spanish Competition Tribunal (*Tribunal de Defensa de la Competencia*), Decision of 14 December 1998, Case 430/98, *Onda Ramblas v. AGEDI* (on unfair and discriminatory royalty rates); Spanish Competition Tribunal (*Tribunal de Defensa de la Competencia*), Decision of 27 July 2000, Case 465/99, *Audiovisual Intellectual Property* (CMOs fined for charging unfair fees to hotels); Spanish Competition Tribunal (*Tribunal de Defensa de la Competencia*), Decision of 25 January 2002, Case 511/01, *Vale Music v. SGAE* (CMO fined for discriminatory royalty rates); Spanish Competition Tribunal (*Tribunal de Defensa de la Competencia*), Decision of 13 July 2006, Case 593/05, *Televisions* (CMO fined for discriminatory royalty rates imposed on television stations); Spanish Competition Commission (*Comisión Nacional de la Competencia*), Decision of 9 December 2008, Case 636/07, *Phonograms* (CMOs fined for discriminatory royalty rates); Spanish Competition Commission (*Comisión Nacional de la Competencia*), Decision of 23 July 2009, Case 651/08, *AIE v. T5* (CMO fined for unfair and discriminatory royalty rates; on this case see also the English summary in Comisión Nacional de la Competencia, Annual Report 2007-2009, p. 219); Spanish Competition Commission (*Comisión Nacional de la Competencia*), Decision of 19 December 2011, Case 208/09, *AISGE Cines* (inequitable fees imposed on cinemas).

897 Spanish Competition Commission (*Comisión Nacional de la Competencia*), Decision of 3 July 2012, Case 220/10, *SGAE*, *available at:* www.cncompetencia.es.

contractual obligation of restaurants and hotels to submit a “monthly anticipated declaration” and a penalty tariff for cases in which the restaurants and hotels did not fulfil this reporting obligation. Under this tariff it was assumed that the restaurant or hotel would have organised such an event in its biggest available room every day with an occupation of 75%. In addition, this tariff was 15% higher than the regular one. The complaints accused SGAE of having applied discriminatory licensing systems depending on whether the restaurant or hotel was a member of one of the users associations with which SGAE had entered into a collective agreement. For non-associated undertakings, the tariff scheme applied as described above. However, for incorrect or delayed declaration, the regular tariff was doubled for each additional guest that attended the event. In contrast, associated undertakings benefitted from discount regimes that differed – with rates of 20% and 5% – according to whether the undertaking was a member of one of the 33 regional associations with which SGAE had concluded agreements or of the Spanish Confederation of Hotels and Tourist Accommodations. The non-associated complainants claimed that they should also be entitled to a 20% discount. The Commission held that, in principle, SGAE was allowed to apply differential rates, as long as they are transparent and justified by objective reasons. Hence, the Commission concluded that the discounts were in need of being specifically justified by the lower costs generated by the membership in one of the associations. Since the 20% discount seemed by far too large and since the requirements for qualifying for the discounts could also be fulfilled by non-associated members, the Commission confirmed an abuse of market dominance by placing the non-associated members at a competitive disadvantage. Moreover, the Commission also held that the anticipated-declaration obligation and the penalty rates had a discriminatory character and that this scheme, since it had the objective of reducing the monitoring costs for SGAE, should be made optional to users and combined with a discount. The Commission, finally, considered SGAE’s abuse a very serious violation according to Article 63(1)(c) Spanish Competition Act and imposed a fine of €1.766.744.

The position of the Spanish Competition Commission regarding CMOs is further explained by a report on collective rights management the Commission published in 2009.[898] This report, which recognises the economic advantages of collective rights management, also considers the interests of right-holders, but puts it focus on the control of royalty rates. In this report, the Commission also criticises the lack of clear provisions in the Spanish copyright law on the *de facto* monopoly of CMOs.[899] The purpose of the report is indeed to propose a competition-oriented reform of the provisions on collective rights management in the Spanish Copyright Act (*Ley de propriedad intelectual*). Simultaneously, the Commission

[898] Comisión Nacional de la Competencia, Report on the Collective Management of Intellectual Property Rights, 2009.

[899] *Id.*, p. 78.

announces that it will continue to scrutinise and prosecute violations of competition law by CMOs.[900]

Forms of discriminatory royalty rates were one issue that caused the European Commission to intervene in its early *GEMA I* decision. Among these was the practice of GEMA to charge full royalty rates from traders who imported records from other Members States although a royalty had already been paid to either GEMA itself or to another CMO abroad. This placed parallel imports of records at a competitive disadvantage in comparison to records that were directly sold by the record companies in the German market.[901] The Commission's position seems especially justified in the light of the principle of European exhaustion, which, however, was recognised by the European Court of Justice only a few months after *GEMA I*.[902] GEMA still invoked the independence of national copyrights. Yet the Commission clarified that its decision is independent of the recognition a principle of European exhaustion. According to the Commission, the abuse only relies on the fact that GEMA treats imports of record producers and those by traders economically differently.[903] This argument could also be used by the competition agency of any country of the world that rejects international exhaustion. However, the Commission allowed GEMA to charge importers the difference between its own royalty rates and the rates that had already been paid abroad. This faculty, however, was later considered by the ECJ to conflict with the principle of European exhaustion.[904]

In *GEMA I*, the Commission also banned discriminatory rates that placed the importers of music and video recorders at a competitive disadvantage in comparison to German manufacturers as an abuse of market dominance.[905]

In the Finnish *Gramex* case, the Finnish Competition Authority submitted a proposal to the Market Court in 2001 to decide against Gramex, the Finnish CMO of performing artists and phonogram producers, for abuse of market dominance by imposing higher royalty rates on local radio stations than on nation-wide stations. This recommendation was followed in the decision by the Market Court, which, in turn, was confirmed by the Supreme Administrative Court.[906] In line with the arguments of the Authority, the Courts held that both kinds of radio

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900 *Id.*, p. 83.

901 *GEMA I*, *supra* n. 804, at II. C. 5. (p. 25).

902 Case 78-70 *Deutsche Grammophon* [1971] ECR 487.

903 *GEMA I*, *supra* n. 804, at II. C. 5. (p. 25).

904 Joined Cases 55/80 and 57/80 *Musik-Vertrieb membran GmbH* [1981] ECR 147.

905 *GEMA I*, *supra* n. 804, at II. C. 6. (p. 26).

906 Finnish Competition Authority, proposal of 18 December 2001, Case no. 1061/61/00, *Gramex*; see Finnish Competition Authority, Annual Report 2001-2002, pp. 7 et seq., *available at:* http://www.kilpailuvirasto.fi/cgi-bin/english.cgi?luku=publications&sivu=oecdreport2001. Market Court, decision of 18 August 2003, Case no. 156/03, *Gramex*, English summary *available at:* http://www.oikeus.fi/markkinaoikeus/34833.htm. Supreme Administrative Court, decision of 2 October 2005,

station compete for the same advertising customers and that therefore discriminatory royalty rates would distort competition to the prejudice of local stations. Gramex had to pay a fine of €250,000.

Shortly after its *Gramex* proposal, the Finnish Competition Authority also attacked the royalty rates of Teosto, the Finnish authors' rights CMO for music, on grounds of excessive prices imposed on radio stations.[907] The proposal made to the Market Court was inspired by a sudden increase of the royalty rates, which Teosto failed to justify by objective criteria. The Authority also argued that excessive royalty rates would make it more difficult for new radio stations to enter the market. This proposal was also followed by the Market Court and finally confirmed by the Supreme Administrative Court.[908] Some years later, Teosto became the target of actions of the Finnish competition law enforcers again. In 2006, Teosto merged different tariffs imposed on different groups of users into one, which led to a considerable increase of royalty rates for some users. In June 2011, the Helsinki Court of Appeal finally held that the royalty rights constitute a case of excessive pricing and an abuse of market dominance. While Teosto was in principle allowed to increase royalty rates, the Court held that Teosto had not shown any justification why the value of the use of the copyrights had increased for the users concerned. In August 2011, Teosto submitted an application to the Supreme Court to permit a retrial.[909]

In a very similar case, the Brussels Court of Appeal had to decide on the royalty rates the Belgian CMO SABAM imposed on private and public TV stations.[910] In applying EU competition law (ex-Article 82 EC), the Court held that, while the mere unilateral charging of prices cannot be considered as excessive pricing, imposing different rates on the two kinds of TV stations can only be considered legal if there is an objective justification.[911] For the private TV station, SABAM charged a percentage of the income from advertising while the corresponding French-speaking public TV station was charged a flat rate. The Court held that the two types of charging did not create a competitive disadvantage for the private TV

Case 2715/02/03, *Gramex*. On all three instances see Ioannis Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, paras 5-029 et seq.

907 Finnish Competition Authority, proposal of 2002, Annual Report 2001-2002, p. 8, *available at:* http://www.kilpailuvirasto.fi/cgi-bin/english.cgi?luku=publications&sivu=oecdreport2001

908 See Christian Wik & Ami Käyhkö, "Finland" in: Roschier, Attorneys Ltd., Dominance – The regulation of dominant firm conduct in 36 jurisdictions worldwide, 2008, p. 56 para. 28.

909 Helsinki Court of Appeals (*Helsingin hovioikeus*), decision of 30 June 2006, Case no. S 08/2682, *available at*: http://ec.europa.eu/competition/national_courts/cases/131898/131898_2_3.pdf

(original Finnish version); English information *available at:* http://www.concurrences.com/Bulletin/News-Issues/June-2011/The-Helsinki-Court-of-Appeals?lang=fr.

910 Brussels Court of Appeal (*Cour d'appel de Bruxelles*), 4 March 2009, SABAM, (2009) *Droit intellectuel* 197, para. 12.

911 *Id.*, paras 11 and 20.

stations since the public TV station had to pay more than the private TV stations.[912] The Court held that such calculation of royalties would in principle meet the reasonableness test[913] if (1) this percentage in general corresponded to the proportion of broadcasts that contain musical works in relation to total broadcasts and (2) any other more accurate mode of calculation caused disproportionate costs. The Court remanded the case in order to allow SABAM to provide further information on whether these requirements were met.

In Bulgaria as well, the Competition Commission did not hesitate to control the royalty rates of dominant CMOs. In 2006, the Commission acted against five CMOs that collectively imposed licensing agreements at uniform royalty rates on cable operators.[914] The Commission held that the royalty rates had to be considered exploitative since they did not meet the transparency test because they did not inform the user what proportion of royalties was to be paid for the use of the rights represented by the individual CMOs and since the users had no option to request separate licences from the individual CMOs. Also, the CMOs failed to provide any objective criteria for calculating the royalty rates. Therefore, the Commission also considered it insufficient that the CMOs tried to rely on a price comparison with royalty rates charged in Romania. It will be interesting to see whether the Competition Commission will have to decide on such cases in the future. The copyright law reform of 2011 led to the creation of a new system of control of the royalty rates charged by CMOs. Pursuant to Article 40e Coypright Act, tariffs now need to be agreed upon by the CMOs and users' organisations and approved by the Minister of Culture. If no agreement is reached, the Minister will appoint a Committee of three mediators.[915] Yet, also in 2011, the Competition Commission held that the tariffs of Musicauthor for the performance of works of music in hotels and restaurants fulfilled the requirements of transparency and, therefore, did not constitute an abuse of market dominance.[916] In this decision, the Competition agency relied on the ECJ decision in *Tournier*.[917]

In Croatia, the Competition Agency has so far had to deal twice with the tariffs of HDS-ZAMP, the music composers' CMO of Croatia, which holds an effective and legal monopoly under

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912 Id, para. 20. According to the Court this did not create a disadvantage of the public TV station since this station was under a public utility obligation to promote cultural diversity and therefore had to broadcast more music.

913 *Id*., para. 12.

914 Bulgarian Commission for Protection of Competition (CPC), decision no. 331 of 28 December 2006, Evrotour Sat ED et al. v. Music Author et al. This decision was confirmed by the Supreme Administrative Court, decision no. 8079 of 3 August 2007. These cases are reported by Ioannis Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, paras 5-036 to 5-038.

915 On these changes and its impact on the negotiation for the use of works by broadcasting companies see Ofelia Kirkorian-Tsonkova, 'New Tariffs of the Collective Societies', *available at:* http://merlin.obs.coe.int/iris/2012/8/article 13.en.html.

916 Bulgarian Commission for Protection of Competition (CPC) No. 1780 of 20 December 2011, *Balkan Holidays Services v. Musicauthor*, as reported in the responses the Questionnaire by CPC.

917 *Tournier*, *supra* n. 867.

Croatian competition law. In the first case, the Competition Agency indeed confirmed an abuse of dominance.[918] This case related to the private-copying levy charged on digital reproduction equipment, devices and media and was triggered by a complaint of importers of such equipment. In 2009, the Competition Agency ordered the CMO to charge equal levy rates and apply equal conditions to all undertakings that had to pay such levies. Nevertheless, HDS-ZAMP brought an appeal to the administrative court that was in the end dismissed by the High Administrative Court.[919] In the second case, the Competition Agency showed that cases need to be assessed based on their individual merits. This case was initiated by two complaints, one lodged by a pay-TV operator and the other by eight cable operators. In both complaints, it was argued that HDS-ZAMP was imposing higher royalty rates for the public performance of works of music on the complainants than on their competitors. The Competition Agency rejected both complaints in one decision.[920] In its investigations the Agency found that the HDS-ZAMP had applied the same method of calculating fees to all users. However, the CMO had granted discounts in three individual cases. Yet the Agency held that these discounts did not have any significant effect on competition between the users. Accordingly, the Agency decided that there was no evidence of abuse of dominance by the CMO. Both cases demonstrate that the Competition Act is not only applicable to collective rights management, but will also be enforced despite the legal monopoly of CMOs recognised under Croatian copyright law.

In the *FilmJus* case, the Hungarian Competition Council acted in its role of protecting competition even with regard to the tariffs charged by CMOs, although, in the end, it did not find any abuse. In this case, the Competition Council checked the fairness of the tariffs set by FilmJus, the CMO for cinematographic works, which enjoyed a legal monopoly under Hungarian copyright law.[921] According to the general standard applied by the agency, prices have to be regarded as unfair if they "considerably exceed a return that is proportionate to the justified investment in the given field taking into account the risks thereto." However, the Competition Council did not think that this test would be practical in the case of royalty rates in the copyright field. Therefore, it applied another test and relied on the method for calculating the royalty rates. In this regard, since the rates were proportionate to the income of users, the Competition Council did not find any abuse. Despite its outcome, the decision deserves close attention since it confirms that competition law applies to the tariffs set by CMO despite the legal monopoly granted to CMOs in the past and state supervision over

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[918] Croatian Competition Agency (CCA), Press Release of 20 April 2010, *available at:* http://www.aztn.hr/article/212/39-session-of-the-competition-council.

[919] See report by Alexandr Svetlicinii, 20 April 2012, e-Competitions, N°49029, *available at:* www.concurrences.com.

[920] Croatian Competition Agency (CCA), UP/I 030-02/2008-01/021 of 16 December 2010, *B.net Hrvatska et al. v. HDZ-ZAMP*. English summary of the case *available at:* http://www.aztn.hr/uploads/documents/eng/documents/decision/TN/UPI-030-022008-01021.pdf.

[921] Hungarian Competition Council, decision of 12 May 2005, Case Vj-97/2004, *FilmJus*. See Press Release, *available at:* http://www.gvh.hu/gvh/alpha?do=2&st=2&pg=113&m5_doc=3877.

CMOs. Meanwhile, with effect on 1 January 2012, the provision of copyright law according to which only one CMO can engage in the management of certain categories of rights or right-holders was abolished.

In Italy, the AGCM issued a cease-and-desist order against SIAE. This CMO, which holds a legal monopoly under Italian competition law (see at 11.1.4, above), was considered to have abused its market dominance by charging royalty rights for music played in ballrooms that were considerably higher than in other countries and that discriminated among different ballroom operators. Also, the AGCM found an abuse that placed certain right-holders at a competitive disadvantage since the royalties were not distributed to the right-holder in proportion to the effective performance of their music.[922] In contrast, in 1999, the District Court of Turin, in the context of infringement proceedings, considered the tariffs of SIAE to be in line with competition law and, therefore, decided that SIAE can claim compensation based on its tariffs.[923]

Another jurisdiction within the EU where competition law was effectively and successfully applied for the purpose of controlling the tariffs of CMOs is Latvia. There, the competition agency acted against AKKA/LAA, the country's dominant CMO, concerning the royalty rates for the public performance of works of music.[924] The competition agency found out that the royalty rights of the Latvian CMO were up to 2.75 times higher than those charged by Estonian and Lithuanian CMOs, depending on the geographic area in which the commercial user – shop or restaurant – was located. Since AKKA/LAA could neither produce any objective justification for charging different royalty rates for users situated in Riga and rural areas nor for charging much higher fees than those charged by Estonian and Lithuanian CMOs, AKKA/LAA was found to have abused its dominant position by imposing excessive prices. AKKA/LAA appealed to the administrative regional court, which finally dismissed the appeal.[925] According to this court, CMOs, for the purpose of setting their tariffs, have to take into account the following parameters: (i) recommendations by the International Confederation of Authors and Composers Societies (CISAC), (ii) the economic situation in Latvia, and (iii) the level of royalties within the given region of the EU. Hence, the Court

922 AGCM, Decision No. 3195 of 28 July 1995, Case A48, *S.I.L.B./S.I.A.E.*, Bollettino n. 30/1995, *available at:* http://www.agcm.it/concorrenza/intese-e-abusi/open/41256297003874BD/37342D98F0C061BA4125621F005572B8.html.

923 Tribunale di Torino, Decision of 20 November 1999, *Fondazione Teatro Nuovo per la Danza v. S.I.A.E.*

924 Latvian Competition Council, 1 December 2008, Case no. 154/08/05/9, *AKKA/LAA*, *available at:* http://www.kp.gov.lv/uploaded_files/2008/DE02-120_0112.pdf. See also Competition Council, 'The Competition Council imposes penalty on AKKA/LAA for abuse of dominant position', Press Release of 1 December 2008, *available at:* http://www.kp.gov.lv/?object_id=928&module=news.

925 Administrative Regional Court, 11 December 2009, Case no. A43003309, AKKA/LAA. See Competition Council, 'Court Upholds the Decision on Abuse of Dominant Position by Collective Copyright Management Association', Press Release of 11 December 2009, *available at:* http://www.kp.gov.lv/?object_id=1006&module=news. See also Ioannis Kokkoris, *Competition Cases from the European Union*, 2nd ed., Sweet & Maxwell: London, 2010, paras 17-028 to 17-030.

accepted the possibility to assess the appropriateness of royalty rights based on a market comparison test. Since AKKA/LAA had failed to give due account to these criteria, the appeal had to be dismissed. AKKA/LAA had to pay a fine and, accordingly, changed its tariffs in line with the competition law decisions. In another case, the Latvian competition agency, after having received a complaint concerning the discount policy of the Latvian CMO for the neighbouring rights of performing artists and phonogram producers (LaIPA), closed the case when the CMO offered commitments to bring its policy in line with the opinion of the agency.[926] Indeed, the Latvian experience is highly instructive, since, on the one hand, copyright law provides for a legal monopoly of CMOs, but only includes a very general obligation according to which royalties must be fair, without providing specific procedures for controlling the fairness. The Latvian case proves that competition law can indeed be applied effectively with the purpose of filing gaps in the regulation of CMOs.

Also in Lithuania, the Competition Council was requested to review the royalty rates of LATGA-A, the country's authors' rights CMO, which holds a *de facto* monopoly.[927] Yet the complaint submitted by a cable TV provider was dismissed. The Competition Council was not able to identify any abuse of market dominance. This is explained by the fact that the alleged discriminatory royalty rates imposed on different cable TV providers had ceased by the time the Competition Council assessed the case.

In contrast to other EU Member States, competition law enforcers in the Netherlands have showed more reluctance to control the royalty rates of CMOs. The Dutch Competition Authority NMa received complaints about 10 years ago with regard to the royalty rates set by BUMA, the country's CMO for works in music. Subsequently, NMa conducted a study on the practices of CMOs.[928] Concerning the royalty rates, NMa pointed out that it would be particularly difficult to calculate an adequate price based on costs.[929] Also, when it compared the BUMA rates with those of CMOs in other EU Member States it could not find that these rates were excessive.[930] In a case on the complaint of a regional broadcasting corporation that had brought a complaint before NMa against BUMA in 2003, the Court of Appeals for Trade and Industry has recently confirmed NMa's cautious approach.[931]

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926 Commitment Decision of 2012, *LaIPA*, *available at:* http://www.kp.gov.lv/uploaded_files/2012/D061_0308.pdf

927 Lithuanian Competition Council, decision of 30 July 2012, Case no. 15-102, *LATGA-A*, *available at:* http://kt.gov.lt/index.php?show=nut_view&nut_id=1395.

928 See NMa, De NMa en het toezicht op collectieve beheersorganisaties, February 2005.

929 See also NMa, Annual Report 2007, p. 30.

930 NMa, *Fresh FM v. BUMA*, case summary *available at:* http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=447f2597-dd5a-41f0-b192-fc9383df44c1

931 See most recently Court of Appeal for Trade and Industry (*College van Beroep voor het bedrijfsleven*), 24 May 2012, Case AWB 09/1302, *Stichting Commerciële Omroep Exploitatie Zuid-Holland v. NMa* (2012) *NJB* 1335, also *available at:* http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:CBB:2012:BW6327 (original Dutch version).

Extreme reluctance to apply competition law for the purpose of controlling licences granted by CMOs to users was shown by the Austrian Supreme Court. In the *WUV II* case, this Court certainly held competition law applicable in general but argued that even a monopolistic CMO does not hold a market-dominant position when it negotiates licences with a users' organisation that is at least as dominant as the CMO.[932]

Also the Estonian competition agency tested the appropriateness of royalty rates of CMOs when it received a complaint regarding the fee structure of some domestic CMOs, but finally decided that the differentiated fees did not violate competition law.[933] The complaint was submitted by the Estonian Nightclubs Association, which had realised that many restaurants had started to operate as nightclubs, but still benefitted from lower fees charged by Estonian CMOs than the regular nightclubs. The CMOs defended their differentiated fees by less intensive use of music in restaurants and the fact that the playing of music was not indispensable to the business of running a restaurant. Although the rules on how to distinguish between restaurants and nightclubs were not very clear, the competition agency found that the CMOs applied detailed rules for measuring the intensity of the use of music also for restaurants, such as the possibility to dance, as a basis for charging higher fees. Therefore, the agency did not find any violation of competition law.

It has to be pointed out that even in the US, antitrust law plays a major role in controlling the royalty rates of CMOs. This is highly remarkable since Section 2 of the Sherman Act on monopolization, according to general interpretation, does not provide protection against excessive pricing. This particular aspect of US antitrust law did not prevent the DoJ from entering into a consent decree with ASCAP that sets up a fully-fledged regulatory scheme that guarantees the reasonableness of the of the royalties. This includes the right of the licensee to question the reasonableness of the royalties before the District Court of the Southern District of New York, the court that has rendered the consent decree. In these proceedings, ASCAP carries the burden of proof of reasonableness, and the District Court is granted power to set a reasonable royalty rate if ASCAP fails to do so.[934]

In Brazil, the competition agency CADE was much more reluctant to control the royalty rates of ECAD, the Brazilian association of CMOs. In 2001, after investigations as to whether ECAD had abused its market power by collecting fees, CADE held that the Copyright Act recognises the monopoly of collective rights management and that, therefore, ECAD's conduct cannot

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932 Supreme Court (Oberster Gerichtshof), 16 January 2001, Case 4 Ob 291/00y, *WUV II*, (2001) *Medien und Recht* 35.

933 Decision of 2009, *available at:* http://www.konkurentsiamet.ee/public/MT_Eesti_klubide_Liit_Eesti_Fonogrammitootjate_hing_Eesti_Autorite_hing_Eesti_Esitajate_Liit_otsus_28_10_2009.pdf.

934 Para. IX of the ASCAP Consent Decree, *supra* n. 837. A similar mechanism was implemented in the BMI Consent Decree in 1994. This mechanism has led to a number of court proceedings before the District Court for the Southern District of New York as a royalty-setting court. See, for instance, *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563 (2d Cir.1990); *United States and Music Choice v. BMI*, 316 F.3d 189 (2d Cir. 2002).

be considered anti-competitive.[935] In a second case, the federation of social and leisure clubs brought a complaint to the competition agency CADE against ECAD for charging abusive royalty rates. CADE rejected the complaint since the clubs were not competing for new members and, therefore, the royalties imposed by ECAD had no effect on the market in which the clubs are active.[936]

A most interesting case can be reported from Mexico.[937] There, the competition agency acted against a regulation of the Mexican Copyright Institute (INDA), which had imposed a uniform tariff on all broadcasting corporations for the use of phonograms as a percentage of the turnover generated by advertising, irrespective of how much music the broadcasters use. The Federal Competition Commission was concerned about the negative impact of the regulation on competition between the broadcasters. The Commission therefore issued an opinion on its own motion with a recommendation to INDA to change the calculation of fees. The Commission thereby relied upon Article 24(8) of the Competition Act that grants power to the Commission to direct binding opinions to the institutions of public federal administrations regarding their draft regulations and general acts. The Commission's action is most remarkable since the addressee of the decision was not a CMO as a private entity, but a state agency that, however, fixes royalty rates similar to a CMO.

Finally, another case should be reported from Denmark that did not directly deal with the application of competition law to CMOs but to an agreement of users on their cooperation in negotiating agreements with CMOs. The Danish Competition and Consumer Authority allowed such an agreement between TV and radio stations, holding that such cooperation can counterbalance the dominant position of the CMOs.[938]

11.3.2 Other cases of abuse to the disadvantage of users

In *GEMA I*, the European Commission also identified a form of abuse that is not related to prices, but nevertheless affects the interests of the users of works. This abuse relates to the extension of GEMA licences granted to record producers to works in the public domain. In its decision, the Commission rejected the argument advanced by GEMA that such extension was needed in order to prevent the record companies from only bringing music to the market for which copyright protection has already expired.[939]

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[935] CADE, Decision of 9 May 2001, Case 08000.011187/1995-13.

[936] CADE, Decision of 22 October 2003, Case 08000.002511/1997-19.

[937] Comisión Federal de Competencia, Opinion PRES-10-096-2006-066 of 1 March 2007, *accessible at:* http://www.cfc.gob.mx/index.php/es/publicacionesinformes.

[938] Danish Competition and Consumer Authority (*Konkurrenceomraadet*), 15 December 2004, Press Release, *available at:* http://www.kfst.dk/en/konkurrenceomraadet/decisions/decisions-2008-and-earlier/national-decisions-2004/konkurrenceraadets-moede-den-15-december-2004/notification-of-agreement-between-radio-denmark-tv-2-and-a-number-of-other-radio-and-television-stations/.

[939] *GEMA I*, *supra* n. 557, at II. C. 4. (p. 25).

Standard licensing terms are also reviewed by the British Office of Fair Trading (OFT).[940] Similar to the past situation in Ireland (see at 11.3.1, above), CMOs were able to notify their agreements to the OFT. Accordingly, the Film Distributors' Association (FDA) notified its standard licensing conditions for the exhibition of films to the Director General of Fair Trading in 2000. The OFT identified some clauses that it considered in violation of the prohibition of restrictive agreements of the Competition Act 1998. These clauses included a limitation of the ability of exhibitors to determine their admission prices and their promotional activities and a limitation of the ability of exhibitors to determine the use made of their screens, such as to move a film from one screen to another.[941] The FDA accordingly amended these clauses, which were finally approved by the OFT.

11.3.3 Recognition of a duty to license?

As a matter of principle, the question needs to be answered of whether CMOs should also be considered to be under a duty to license to users as a matter of competition law. Such a duty to license is provided by a number of jurisdictions as part of their sector-specific regulation of collective rights management. An example of such a rule is provided by Section 11 of the German Act on Collective Rights Management and Section 17 of the Austrian Act on Collecting Societies, which oblige CMOs to grant licences at reasonable conditions to anybody who seeks a licence.

As, however, the analysis of the case-law demonstrates, refusal to license is not an important issue in practice. Conflicts predominantly arise with regard to excessive or discriminatory royalty rates. The reasons for this are obvious. CMOs have an interest in licensing. They want to license as much as possible, but at high royalty rates. Therefore, it is legitimate to ask whether jurisdictions are in need of a statutory duty to license as part of their sector-specific regulation of collective rights management in the first place.

Indeed, it makes a difference whether jurisdictions provide for such a rule or not. Although CMOs are interested in licensing, without a duty to license they can retain the licence with the objective of increasing their bargaining power against users. Conversely, the recognition of a duty to license reduces the bargaining power of CMOs as dominant undertakings quite considerably. In practice, this would mean that CMOs cannot prevent right-holders from using rights while CMOs and associations of users are still in the process of negotiating royalty rates. German law allows users to actually use the rights in such a situation if the users pay the CMO at least the rate that the users would accept and deposit the difference to the royalties claimed by the CMO until an agreement is reached (Section 11(2) Act on Collective Rights Management).

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940 Office of Fair Trading, Decision of the Director General of Fair Trading No. CA/98/10/2002 of 1 February 2002, *Film Distributors' Association*, *available at:* http://www.docstoc.com/search/ca98-decision---notification-by-the-film-distributors%C3%A2%E2%82%AC%E2%84%A2-association.

941 *Id.*, para. 10.

It is worth noting that there are other ways to achieve the same result. In Israel, under the temporary exemption that was granted to CMOs, users who dispute the reasonableness of the royalty rates have the right to use the works in exchange for the payment of temporary royalties.[942]

The Commission's Proposal for a directive on collective rights management[943] does not provide for such a duty to deal despite the positive effects such a rule would have on the control of bargaining power of CMOs. But it is still unclear how the European Court of Justice would decide a case in which a user relies on Article 102 TFEU, alleging a duty of a CMO to license at lower royalty rates, as a defence against a claim for injunctive relief.

Although US practice is very hesitant to impose a duty to license as a matter of antitrust law, such a duty has nevertheless been implemented as part of the consent decrees relating to CMOs. Under the ASCAP Consent Decree, ASCAP is "ordered and directed to grant to any music user making a written request therefor a non-exclusive license to perform all of the works in the ASCAP repertory".[944]

An example of another jurisdiction that provides for a duty of CMOs to grant licences is Hong Kong (China). Section 158(1) of the Hong Kong Copyright Ordinance provides that a person who claims a licence in accordance with a licensing scheme and who is refused such licence by the operator of the scheme, such as a CMO, may apply for an order from the Copyright Tribunal.

11.4 Control of reciprocal representation agreements

Reciprocal representation agreements are extremely important as instruments that guarantee most effective international exploitation of copyrights in the interest of right-holders and users, whereby the latter get access to the repertoire of all right-holders that are affiliated with the domestic or any foreign CMO. At the same time such agreements also raise competitive concerns since they may restrain competition among CMOs from different countries for right-holders. They also prevent more competition in the licensing markets by deterring CMOs from granting cross-border licences. Thereby, the existing network of reciprocal representation agreements contributes to the emergence of *de facto* monopoly positions of many of the participating CMOs in the national markets. [945]

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942 See Israeli Antitrust Authority, Annual Report 2008-09, para. 50.

943 *Supra* n. 24.

944 Para. VI of the ASCAP Consent Decree, *supra* n. 737.

945 This effect was more recently highlighted by the Spanish Comisión Nacional de la Competencia, Report on the Collective Management of Intellectual Property Rights, 2009, p. 80.

In the light of these concerns it is quite remarkable that there is only one jurisdiction of the world that has so far acquired substantial competition law practice on reciprocal representation agreements. This is the EU, which, by applying competition law to such agreements, responds to the overarching objective of EU law to establish an internal market for collective rights management services. As will be seen in the following, by also controlling the decisions of the international confederations of the CMOs, EU competition law has the potential of providing a regulatory framework for reciprocal representation agreements on a global level. For these reasons, this sub-chapter of the Report will concentrate on the legal situation in the EU.

As already indicated, reciprocal representation agreements generate efficiencies that by and large coincide with those of collective rights management in general. Users in a given country are not only interested in using rights of right-holders that have entrusted their rights to the domestic repertoires. Users of music in particular need to get access to the constantly changing world repertoire. Without reciprocal representation agreements users would have to contract with a high number of national CMOs, never exactly knowing which CMO represents which right-holder and which CMO can grant licences for which works. The international system of reciprocal representation agreements solves this problem by establishing a one-stop shop. For instance, a discothèque operator in France will get the licence for playing music from the French society SACEM without regard to whether right-holders have directly contracted with SACEM or not. What matters in this example is that SACEM has power to grant licences under French copyright law for use in France for the world repertoire. Yet the situation has become more complex through online exploitation. For online distribution of works, which involves the making-available right and often the "mechanical" reproduction right, namely, in the case of download services, users are not only in need of acquiring licences for the country from which they operate but in principle for all those countries from within which the works can be accessed, or at least where works meet substantial interest of the audience (so-called country-of-destination principle).[946]

In the following, the Report will first deal with the situation of, and practice on, territorial use of copyrights and will address online distribution later. The traditional type of reciprocal representation agreement has developed for territorial use. Reciprocal representation agreements are concluded bilaterally between two national CMOs. However, they regularly

[946] The question of which national rights are used on the Internet is one of localisation of the user's conduct under the different national copyright laws and not one of the rules of conflict of laws. In intellectual property matters, conflict rules – see for instance, Article 8(1) of the EU Rome II Regulation on the law applicable to non-contractual obligations – provide for the application of the law of the country for which protection is sought. If a right-holder claims protection in country A, it is for the copyright law of country A to establish whether there has been use of the copyright in this country. While, in principle, Internet use has the potential of leading to the application of a large number of national laws (so-called "mosaic approach"), in legal proceedings CMOs usually only plead an infringement of their domestic law. This is explained by the fact that, as will be seen further below, in the traditional system CMOs are only authorized to manage rights under their national law in the framework of reciprocal representation agreements.

follow, and sometimes slightly modify, the model agreements that have been developed by the international confederations of CMOs. For the most important authors' rights societies for works in music, this is CISAC, the International Confederation of Societies of Authors and Composers. From the perspective of EU competition law, these model agreements are captured as decisions by associations of undertakings under Article 101(1) TFEU,[947] while the individual bilateral agreements fall under the same provision as potentially restrictive agreements between undertakings.[948]

In the traditional system of reciprocal representation agreements, right-holders will usually grant their copyrights for the whole world to one national collecting society. Although this society would in principle be able to grant licences for its full repertoire including for use abroad, it will usually prefer to mandate the partner organisations abroad with the licensing and with the prosecution of local infringements. Accordingly, in the reciprocal agreements, the CMOs authorise each other to license their individual repertoires for territorial use in the respective other country. Accordingly, the target CMO can only grant territorially limited licences for the world repertoire. For the right-holder, reciprocal representation agreements have the disadvantage that they lead to administrative costs of two instead of one collecting society. However, these agreements are also efficient for right-holders, since they allow worldwide representation by contracting with only one CMO. At the same time, reciprocal representation agreements also save costs for the collecting societies. In particular, CMOs are freed from the need to build up their own monitoring systems for authorised and unauthorised (infringing) use abroad. In the framework of reciprocal representation agreements, the monitoring function is fulfilled by the local CMO, also on behalf of its foreign partner organisations.

On several occasions, the European Commission and the European Courts have had the opportunity to decide on the conformity of reciprocal representation agreements with the European prohibition of restrictive agreements. In the early *Greenwich Film* judgment of 1979, the European Court of Justice (ECJ) decided that European competition law also applies to the extent that bilateral representation agreements empower CMOs to manage rights outside of the European Union.[949] In the two decisions *Tournier* and *Lucazeau* from 1989, the ECJ indicated that reciprocal representation agreements must not contain any territorial restrictions. The Court held:

> [T]he reciprocal representation contracts in question are contracts in services which are not in themselves restrictive of competition …. The position might be different if the contracts

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947 See *CISAC*, *supra* n. 754, paras 90-92 (also holding that the non-binding nature of the model agreements does not argue against application of Article 101 TFEU since members comply with the model).

948 *Id*., para. 89.

949 Case 22/79 *Greenwich Film v SACEM and Société des éditions Labrador* [1979] ECR 2811, para. 12.

> established exclusive rights whereby copyright-management societies undertook not to allow direct access to their repertoires by users of record music established abroad.[950]

The ECJ also pointed out that "any concerted practice by national copyright management societies of the Member States having as its object or effect the refusal to license by each society to grant direct access to its repertoire to users established in another Member State" would be considered anti-competitive.[951]

According to these rules, CMOs in the EU are not allowed to grant exclusive licences to foreign CMOs. However, this does not mean that they are under an obligation to grant a cross-border licence for their repertoire whenever a user from another country seeks such a licence. Rather, CMOs may refuse such licences as long as this is not based on an agreement or a concerted practice among CMOs of different countries but an independent business decision.

In *Tournier* and *Lucazeau*, the ECJ had to deal with the situation of public performance of music in physical premises (discothèques, hotels, etc.). In this regard, the Court held that, based on mere parallel behaviour, "concerted practices … cannot be presumed where the parallel behaviour can be accounted for by reasons other than existence of concerted practice."[952] For the use of music in physical premises, the ECJ accepted the need to organise a monitoring system abroad as a valid business reason for refusing to grant a cross-border licence. Hence, in this system the prohibition of exclusive licensing did not necessarily lead to more competition between national CMOs as far as analogue and territorially limited use of copyrights is concerned.

With regard to online use of music, for which users are in need of multi-territorial licences, the collecting societies quickly understood that the system of territorially limited licences is not the optimal solution. Due to the considerable transaction costs, the system of territorial licensing creates the risk that users will refrain from acquiring licences for all countries. Hence, application of the traditional system also collided with the interests of the CMOs and the right-holders they represent. This explains why, around 2000, CMOs tried to develop new models of reciprocal representation agreements that enable the one-stop shop for multi-territorial licences for online use of the world repertoire.

In particular, the phonogram producers, acting through the International Federation of the Phonographic Industry (IFPI), created such a new model for reciprocal representation agreements between the CMOs representing the related rights of phonogram producers and performing artists. The so-called "IFPI Simulcasting" agreement, which was first developed for simulcasting (simultaneous terrestrial and online broadcasting) and later extended to

950 *Tournier*, *supra* n. 867, para. 26; *Lucazeau*, *supra* n. 868, para. 20.

951 *Tournier*, *supra* n. 867, para. 26; *Lucazeau*, *supra* n. 868, para. 20.

952 *Tournier*, *supra* n. 867, para. 24; *Lucazeau*, *supra* n. 868, para. 18.

webcasting (without simultaneous terrestrial broadcasting), after some amendments, was also accepted by the European Commission, which granted it an individual exemption under ex-Article 81(3) EC (now Article 101(3) TFEU) in 2002.[953] The IFPI Simulcasting Agreement empowers CMOs to grant a multi-territorial licence for such online use of music for all the territories and repertoires of the other CMOs with which a given CMO has concluded agreements according to the model of IFPI Simulcasting. In this respect, the agreement was based on the assumption that online use of music can be monitored from everywhere in the world over the Internet and, therefore, does not require local monitoring systems. The IFPI Simulcasting agreement both allowed and restricted competition to some extent. On the one hand, it restricted price competition in so far as the royalty rates had to be based on the individual tariffs set by the different national CMOs measured by the volume of downloads from the individual country. On the other hand, CMOs were enabled to price-compete to some extent by allowing the user to choose which CMO would grant the licence. Hence, under this new agreement, a French user could request a licence from the German society and a German user could ask for the same licence from the French society. While IFPI Simulcasting left no flexibility with regard to the tariffs set by the other societies, it allowed the CMO that granted the licence to also grant discounts on the tariffs to be paid for the use in its own territory. This latter element of competition was something that the phonogram industry agreed to include on the initiative of the Commission.

Given the restrictive aspects of the IFPI Simulcasting model, however, it does not come as a surprise that the Commission considered the agreement one that restricts competition in the sense of ex-Article 81(1) EC. Yet it held that the agreement fulfilled all four cumulative requirements for an exemption under ex-Article 81(3) EC. First, the Commission held that the agreement would both "promote economic and technological progress" by offering a new kind of multi-territorial and multi-repertoire licence to users[954] and "improve the distribution of goods" by making more online music available to consumers and saving transaction costs for users.[955] The latter arguments also explain why the Commission confirmed the fulfilment of the second requirement, namely, that the efficiencies from the agreement also benefit consumers.[956] The most critical question related to the third requirement of the indispensability of the restraint. The Commission also answered this question in the affirmative by referring to the need to create incentives for all national CMOs to join the new system with a view to enabling multi-territorial licences. The Commission thereby recognised the risk that especially smaller CMOs would not be able to compete

953 Commission Decision of 8 October 2002, Case COMP/C2/38.014 – *IFPI "Simulcasting"* [2002] OJ EC No L 107, p. 58.

954 *Id*., para. 87. The use of the term "new product" reminds both of the judgment in *BMI v. CBS* where US Supreme Court distinguished the blanket license of CMOs from a price cartel (at 11.1.1, above) and the ECJ judgment in *Magill* where it established the new product rule as a basis for a duty to license (at 9.3.1, above).

955 *Id*., paras 89-92.

956 *Id*., paras 93-95.

effectively if the respect of their tariffs was not guaranteed.[957] Finally, with regard to the fourth requirement, the Commission also held that the agreement would not eliminate competition. In particular, the Commission took into account that IFPI Simulcasting would lead to more price competition than was available under the traditional system of territorial licensing.[958] The *IFPI Simulcasting* decision had the advantage of supporting a new global system of licensing by accepting this system that meets the needs for licensing within the EU internal market as well.

At about the same time, the authors' rights CMOs also agreed on two new model agreements that allowed multi-territorial licences for online use of works of music: the Santiago Agreement for the public-performance rights and the Barcelona Agreement for the "mechanical" reproduction right. However, the two agreements differed in an important point from the IFPI Simulcasting Agreement. Both agreements included a user's residence clause according to which the user could only get the multi-territorial licence from the CMO of the country of the user's residence. In the light of its *IFPI Simulcasting* decision, it is not surprising that the European Commission opposed the Santiago and Barcelona Agreements. Instead of deleting the user's residence clause, the authors' rights CMOs decided to simply refrain from extending the applicability of the agreement beyond the end of 2003. This is why still today the traditional reciprocal representation agreements apply to authors' rights regarding online use of works of music.

Subsequently, the European Commission reacted in two ways: first, in 2005, based on preparatory work of the Directorate General for the Internal Market, the Commission adopted its Recommendation on collective cross-border management of copyright and related rights for legitimate online music services (see also at 7.2, above).[959] This Recommendation contrasts considerably with the position of the Commission in the competition law decision in *IFPI Simulcasting* by generally rejecting the system of reciprocal representation agreements and recommending right-holders to withdraw their rights from the existing system and to negotiate new deals with individual CMOs for multi-territorial licensing of their individual repertoires. In contrast to the IFPI Simulcasting model, this also meant that the Commission turned away from the objective of promoting a one-stop shop in the interest of users and advocated a system of multi-territorial licences for individual repertoires in the interest of right-holders. In line with the policy of the Recommendation, the complexity of the system for licensing online rights has increased considerably since some major publishing companies, such as EMI, withdrew rights from the existing system and established new licensing platforms in cooperation with individual CMOs (see also at

957 *Id.*, para. 110. With regard to the indispensability requirement, the Commission put a particular emphasis on the transparency of the charging policy and required that the fees that are charged clearly distinguish the administrative costs of the CMO since this would be the price element that allows price competition between the societies.

958 *Id.*, paras 117-119.

959 *Supra* n. 182.

7.2., above). This now means that users like Internet radio station operators or providers of music download services still have to collect national licences from the individual CMOs. However, those licences no longer represent the world repertoire.

Second, the European Commission tried to attack the existing reciprocal representation agreements, which enabled only territorially limited licences, on competition law grounds. Based on complaints by Music Choice, a digital and interactive audio broadcaster, and RTL, a Luxembourg-based broadcasting group and audiovisual content producer, against CMOs that refused to grant cross-border licences for their repertoires, the Commission initiated an investigation against CISAC and its member organisations. Finally, in 2008, the Commission confirmed a violation of ex-Article 81 EC with regard to three kinds of clauses and conduct, namely, (1) membership restrictions, (2) exclusivity clauses and (3) concerted practice with regard to the refusal to grant cross-border licences for the three kinds of copyright exploitation, via the Internet, satellites and cable.[960] With regard to the third allegation concerning territorial limitations through concerted practice, the Commission, in the light of the ECJ decisions in *Tournier* and *Lucazeau*, was of the opinion that, given the ability to monitor the three abovementioned kinds of uses of works across borders, the CMOs had no justified business reason for refusing the grant of cross-border licences. It therefore concluded that the CMOs engaged in a concerted practice by jointly refusing such licences.

On appeal, the General Court annulled the decision with regard to the territorial limitations based on a concerted practice.[961] CISAC and the CMOs argued that the Commission had not provided sufficient evidence for a concerted practice. As a general standard, the General Court required the Commission to "show precise and consistent evidence in order to establish the existence of an infringement".[962] In the absence of documentary evidence the General Court held that the Commission "did not establish, to the requisite legal standard, the existence of a concerted practice between the collecting societies to fix the national territorial limitations."[963] Therefore, the Court asked whether the Commission had provided sufficient evidence "to render implausible the explanations of the collecting societies' parallel conduct … other than the existence of concertation."[964] The General Court finally held that the Commission had also failed to deliver sufficient evidence in this regard since the Commission had only taken into account the possibility of monitoring authorised use across borders, while the CMOs argued that the need to fight unauthorised use abroad could still justify an independent decision of individual CMOs to abstain from granting cross-border licences.

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960 *CISAC*, *supra* n. 754.

961 Case T-442/08 *CISAC et al v Commission* [2013] ECR II-0000 (not yet officially published).

962 *Id.*, para. 96.

963 Id., para. 132.

964 Id., para. 133.

In sum, neither the Recommendation of 2005 nor the CISAC case contributed to promoting an effective system of multi-territorial licensing. Whereas the Commission relied on competition law for the purpose of regulating multi-territorial licensing of online rights by taking an overall wise decision in *IFPI Simulcasting*, due to the resistance of the authors' rights CMOs, competition law has ultimately proven to be rather ineffective for promoting a functioning system of multi-territorial licensing. But attempts to regulate multi-territorial licensing through sector-specific copyright regulation have so far not produced any better results. Rather, the Recommendation of 2005 has made things deteriorate even more. And here is not the place to judge whether the current proposal of the Commission on multi-territorial licensing in the framework of a Directive on collective rights management[965] will improve the situation.

From a more global perspective, it is worth noting that, in principle, the European Commission as a competition authority has the power of controlling reciprocal representation agreements by asserting jurisdiction over the international associations of CMOs that develop model agreements in this regard. Unfortunately, in the field of online use, due to the resistance of the CMOs and unwise regulatory decisions of the European Commission outside of the ambit of competition law, the world is further away from a workable system of multi-territorial licensing than ever.[966]

11.5 Relationship between sector-specific regulators and competition law enforcers

The analysis demonstrates that sector-specific regulation of CMOs and competition law in many jurisdictions coexist and are often applied simultaneously by different authorities and adjudicative bodies. In the light of the fact that sector-specific regulation is often inspired by competition concerns, it is quite surprising to see that only a very few jurisdictions provide for institutional cooperation between the two systems. Giving a say to competition agencies when decisions are made within sector-specific regulation could better guarantee that general principles of competition policy are recognised in such decisions. Conversely, cooperation with the sector-specific regulators could enhance a better understanding within competition agencies of the specificities of collective rights management.

Yet there are also jurisdictions that take into account the complementarity of the two systems. An interesting example is provided by Australia. There, after a revision, the Copyright Act empowers the Copyright Tribunal to make the Australian competition agency (ACCC) a party in proceedings in which a licensor applies to bring a certain licensing scheme into operation (Section 154(2)(c) Copyright Act), in disputes arising between the licensor and the seeker of the licence (Section 155(2)(d) and Section 157 Copyright Act) and if the ACCC

965 *Supra* n. 24.

966 See the critical comments of the Max Planck Institute, *supra* n. 24.

makes a request and the Tribunal is satisfied that this is appropriate (Section 157B Copyright Act).[967] The ACCC is taking this task very seriously. This agency proactively offers and seeks to become a party to such proceedings.[968] When, for the first time, the ACCC applied to become a party to such proceedings in May 2007, the Copyright Tribunal decided to accept the ACCC as a party with the consent of the other parties. In principle, the ACCC would only apply to become a party in cases of public interest, i.e. where the case has a considerable impact on the market and consumers.[969]

This strong interest of the ACCC in CMOs may find an explanation in earlier cases in which, based on its general powers under competition law, it had to decide on applications of CMOs for an authorisation of collective licensing schemes. The most important case in this regard is probably the application of the Australasian Performing Rights Association (APRA).[970] This application covered all different aspects of collective rights management, ranging from the conditions of the grant of the copyright by right-holders, the licensing schemes applicable to users, the distribution of the royalties to the right-holders and the relationship with CMOs of other countries. The broadness of these issues demonstrates that the role of the competition law enforcers, also in Australia, is to provide protection where sector-specific regulatory bodies fail to provide adequate protection or simply do not have sufficient powers to do so. In the concrete case, the Australian Competition Tribunal recognised that the "Copyright Tribunal does provide an effective constraint on APRA's dealings with its major licensees".[971] Nevertheless, the Tribunal confirmed the position of the ACCC that there was a need to have a quick and simplified dispute-resolution procedure for smaller right-holders that APRA should create.[972] In this regard, the ACCC and the Australian Competition Tribunal asserted jurisdiction in some fields, notably with regard to the control of licensing terms, in which the Copyright Tribunal is vested with adjudicative powers.

The legal and institutional design of the interplay of sector-specific regulation and competition law is different in Canada, although also there the powers of the Copyright

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967 Those powers entered the Copyright Act after the so-called Ergas Report on the impact of collective rights management on competition. See Intellectual Property and Competition Review Committee, Review of intellectual property legislation under Competition Principles Agreement (Ergas Report), September 2000. This Report recommended an extension of the Copyright Act to collectively administered schemes.

968 See Ed Willett (Commissioner of the ACCC), "Copyright collecting societies, the Copyright Tribunal and the ACCC – a new dynamic", 24 May 2007, p. 7 et seq., *available at:* http://www.accc.gov.au/speech/copyright-collecting-societies-the-copyright-tribunal-and-the-accc%E2%80%94a-new-dynamic.

969 *Id*.

970 See *Re Australasian Performing Rights Assn* [1999] ACompT 3 (16 June 1999) (finally granting authorisation).

971 *Id*.

972 *Id*. However, the Tribunal disagreed with ACCC as to the concrete scheme of such a procedure.

Board and of the competition agency are closely linked. Section 70.5 of the Copyright Act provides for a particular scheme of organising the interaction between the two. First, according to Section 70.5(2), if a licensing agreement has been concluded between a CMO and another person, either of them will be able to file the agreement with the Copyright Board within 15 days after its conclusion. This filing has the important effect of exempting this agreement from the application of Section 45 of the Competition Act, the prohibition on restrictive agreements (Section 70.5(3) Copyright Act). Yet such filing also has the effect of empowering the Commissioner for Competition, if he or she considers the agreement to be contrary to the public interest, to request the Copyright Board to examine the agreement. Although this legal design provides standing to the Commissioner on his or her own motion before the Copyright Board, this scheme does not seem to be superior to the Australian one for a number of reasons. First, it takes away power from the competition agency to review the case pursuant to the rules of the Competition Act. Thereby, the fact that the CMO itself is allowed to opt for the exemption from competition law by filing the agreement seems particularly problematic. Second, power of the Copyright Board does not necessarily guarantee a better decision, since, as a specialised entity, it may be more easily captured by the interests involved, i.e. that of the CMOs in collecting high royalty rates. And finally, it is not at all guaranteed that the Commissioner will show significant interest in using powers that arise from copyright law and not competition law.

Unlike the situation in Australia and Canada, the Copyright Act of New Zealand does not grant any standing to the Commerce Commission, the country's competition agency, in proceedings before the Copyright Tribunal. The latter is frequently seised with claims to control the royalty rates of CMOs, while the Commerce Commission has not developed any practice in this regard.

In other jurisdictions such as Barbados, the existence of a Copyright Tribunal may be the major reason why the competition agencies have not yet shown any interest in collective rights management. Although CMOs are not exempted from the Fair Competition Act, the Competition Commission of Barbados seems to consider the Copyright Tribunal a body that can adequately solve problems relating to the grant of licences to users. At least, the competition agency has not yet received any complaints from users.

From other jurisdictions, it is to be noted that the Spanish Competition Commission, in its abovementioned report on collective rights management (at 11.3.1) explicitly recommended establishing the Intellectual Property Office as an independent agency that has strong supervisory and adjudicative powers for solving conflicts, including those on tariffs in particular.[973] Despite the fact that the Spanish Competition Commission has proven to be a very active enforcer of competition law against CMOs, the Commission itself also

[973] Comisión Nacional de la Competencia, Report on the Collective Management of Intellectual Property Rights, 2009, p. 86.

understands the limitations of its own powers and the need for more effective and permanent control.

11.6 Conclusion

Application of competition law to CMOs presents particular challenges to competition law enforcers. CMOs are necessary for licensing markets yet to emerge, especially for mass uses of copyrights and related rights. At the same time, at least due to the economics of collective rights management, CMOs typically hold dominant positions in the respective markets. The role of competition law enforcers in this regard is to protect both right-holders and users against exploitative abuses by CMOs. To a certain degree, CMOs may also harm competition among right-holders and users by discriminatory practices and engage in exclusionary practices, in particular, with regard to the possibility of right-holders to withdraw their rights with the intention to license them directly to users or to entrust them to other, typically foreign, CMOs. In applying competition law, competition law enforcers are confronted with the challenge to consider and respect the needs for collective rights management, which requires a deep understanding of both the economics and the system of collective rights management.

Application of competition law to CMOs interfaces with sector-specific regulation in many jurisdictions. Specialists of copyright law often tend to argue that collective rights management should be exempted from competition law or that CMOs should at least enjoy privileged treatment, for instance under EU competition law, as undertakings that provide services in the general public interest. However, in the light of the analysis in this Report, such a case cannot be made. Rather, sector-specific regulation of CMOs and competition law should be considered as complementary systems serving the same purpose. Sector-specific regulation can address the issue of dominance much more effectively than competition law by establishing a permanent system of control and more effective procedures against excessive royalty rates imposed by CMOs. In systems where sector-specific regulation addresses competition concerns in effective ways, competition law enforcers will not have much work. Conversely, competition agencies and courts will receive complaints by right-holders and users against CMOs if their problems are not adequately addressed by sector-specific regulation. Competition law therefore works like a seismograph for the existence of effective sector-specific regulation. Where such regulation does not work well or contains significant gaps, competition law enforcers will often have to come in and fill these gaps. Because of this function, general exemptions of collective rights management from competition law are not justified. Such exemptions would exclude control even in the case of regulatory failures of sector-specific regulation. However, it is also clear from the analysis that competition law enforcers are not necessarily better regulators of CMOs. This is most apparent when it comes to the control of royalty rates. Competition law enforcers often demonstrate considerable reluctance to act as price regulators. And even in systems that provide for a ban on excessive pricing, the more generally accepted approach of cost-based tests to identifying excessive prices fails in the case of fees imposed by CMOs. Yet experience in many competition law jurisdictions around the world and within the European Union in particular prove that competition agencies can provide protection by turning the focus of their analysis from the amount of the fees to the methods of fixing the fees. This approach equals sector-specific procedures in many jurisdictions for the control of royalty rates. Indeed, such sector-specific procedures may lead to quicker and more appropriate solutions than the application of competition law. Hence, the legislature should not leave control of CMOs to competition law alone, but combine sector-specific regulation with competition law control. The latter is still important in such an integrated system in order to respond to regulatory failures such as institutional capture of the sector-specific regulatory bodies by vested interests.

7 General Conclusion

This Report has produced a large number of important insights. In the framework of this general conclusion, it is not necessary to summarise the results that have been sufficiently identified in the preceding chapters. Rather, in the following, these results will be assessed against the backdrop of the general motivation for conducting the survey and providing this Report.

First, the survey has produced an amazingly large body of experience of many competition law jurisdictions around the world on copyright-related markets from which other jurisdictions can benefit enormously. In particular, it is to be noted that especially in the larger emerging economies, which also represent younger competition law jurisdictions, practice on copyright-related markets has virtually exploded during the last very few years. The reasons for this are to be found mostly in the rapid technological development for media distribution which has reached even these economies, the increase of domestic, culture-specific production of media content, such as in India in particular, and the emergence of large consumer markets for information and entertainment in these countries.

The decision to open up the survey and the Report beyond the issue of refusal to license to also include an analysis of the distribution of copyright-protected content provides three major benefits: first, the Report proves that competition law does not only provide an instrument for restricting the exclusivity of intellectual property rights, but also a means for promoting the interest of both creative authors and consumers in the most effective possible distribution of works by enhancing the access of consumers to works at lower costs and thereby reducing incentives for piracy. In this regard, undertakings belonging to the copyright industry and distributors that often control bottleneck technologies and distribution networks appear as the major addressees of competition law enforcement. Accordingly, effective competition law enforcement can even contribute to and enrich more intelligent strategies against piracy. Second, the Report also highlights the importance of media and entertainment markets for technological development in many countries. By applying competition law effectively to copyright-related media and entertainment markets, competition law also promotes the implementation of new communication technologies around the world. Effective competition law application to the distribution of copyright-protected works also enhances transfer of technologies in the related communication sectors to emerging and developing economies. Third, the Report also highlights the importance of competition law for the free flow of information and thereby can contribute significantly to the development of democracy in individual countries. This is not only demonstrated by the fact that merger control can be applied specifically for the purpose of protecting plurality of opinion and diversity, but also by many other competition law cases relating to the newspaper and TV industry.

The Report adopted a structure that is based on the classical types of violation of competition law. Another approach could have consisted in an industry-oriented analysis. With regard to the major copyright industries it is important to note that competition law not only plays an important role in cases where holders of the rights in individual works tend to hold dominant positions, such as in the software industry, where markets are often characterised by network effects. Cases can be found in practically all creative sectors and especially in those where undertakings of the copyright industry assemble large repertoires of rights and control key distribution technologies and networks.

Finally, it is hoped that the Report can provide incentives for the future work agenda of WIPO. In particular, the survey has produced a major need and interest of the agencies of especially younger and smaller competition law jurisdictions in building up competence and understanding of the challenges of copyright-related markets. In this regard, the Report teaches two lessons for future WIPO projects: first, the Report makes a case for WIPO as an intellectual property organisation to provide such assistance to national competition agencies. This Report may be considered a first step in this direction. Second, to be able to provide such assistance, WIPO will have to broaden its own expertise in the field of competition law. Yet, in both regards, WIPO can cooperate with other existing international organisations with experience in both fields of copyright and competition, such as UNCTAD.

Finally, the competition-related analysis of the distribution of copyright-protected works could be further developed and taken into account by WIPO in general, by complementing WIPO’s traditional work on IP legislation and treaty-making, which is focused on how to protect IP most appropriately, with a more market-oriented approach that includes the regulation of such markets. In this regard, the most appropriate regulation of collective rights management may appear as a most appropriate candidate for the future work agenda of WIPO. National regulation and approaches to sector-specific regulation differ considerably among jurisdictions, and more work on integrated approaches to regulating collective rights management, taking into account both copyright law and competition law, seems to be urgently needed.

Questionnaire

(as used in the survey by the Max Planck Institute)

Introductory Notes:

In the framework of its biannual work plan 2012/2013, WIPO has mandated the Max Planck Institute for Intellectual Property and Competition Law in Munich to conduct a survey on the practice of competition law jurisdictions on "Copyright, Competition and Development". The survey is on the application of the law against restraints of competition regarding copyright-related markets in a broad sense. Aspects of the law against unfair competition will not be included. Nor is the survey intended to deal with copyright law as such and copyright infringement. The results of the survey are expected to be analysed and presented to the public by a report that provides insights from a comparative perspective in the first half of 2013.

Regarding the interface of intellectual property and development, for many decades, the debate has mostly focused on the issue of transfer of technology and patent law. However, there is no doubt that, given the vast human resources in developing nations, local creativity as a "resource" of the entertainment industry constitutes a most important asset for growth and development. Creativity also has the advantage that it can be easily developed in even the poorest countries where the capacity for receiving and further developing technology is rather limited. Also, cultural content has a large potential of appealing to a world public from wherever such content may originate. The Indian movie industry (Bollywood) has become an Asian success story. Latin American music is the second most popular "world" music next to the Anglo-American mainstream. African music catches up quickly. Many world-renowned writers nowadays come from developing countries.

For promoting economic development, it will not suffice to only concentrate on the production level. Cultural content will only lead to income, and thereby promote additional creativity, if such content finds its market. Markets, however, may be affected by restraints of competition. Incumbent dominant firms in the entertainment industry may foreclose markets with the effect of creating market entry barriers to cultural content originating from developing countries in particular. From this perspective, this survey focuses on the copyright and competition law interface. It seeks to gather the practice relating to restraints of competition in copyright-related markets; it is not about copyright infringement or other issues of copyright law.

This study coincides with a most fascinating development in competition law. In recent years, competition law has become a success story also in developing nations. Practically all Latin American countries nowadays have competition law systems in place. In Asia, only a few countries still have to draft and implement competition laws. And also in Africa, more and more countries adopt and apply competition law. Hence, the study will in particular include the law and practice of the younger competition law jurisdictions of developing and emerging economies.

Yet WIPO and the Max Planck Institute are aware that younger developing jurisdictions in particular will not have much practice regarding copyright-related markets. Still, the survey will also include such jurisdictions. So, even if you find that your jurisdiction cannot provide any or much practice, do not feel frustrated. Also such information is very important for our survey. On the other hand, with the objective of gathering more material, the survey also includes experienced competition law jurisdictions of industrialized countries. Developing jurisdictions may find it useful to learn about experience in such other countries.

In answering the following questions, feel free to leave out and indicate those questions which you do not deem relevant from the perspective of your jurisdiction.

The survey will be conducted in two steps:

(1) We expect you to familiarize yourself with the questionnaire and try to find out how the questions should be answered.

(2) We will contact you by phone to help you to better understand the questionnaire and to answer the questions.

The responses will require you to invest some time and maybe even to engage in some research. But do not feel frustrated by the number of questions. Many of them may not be relevant for your jurisdiction and, therefore, may not require any answer. Questions of understanding you may have can be clarified in the course of the conference call. Feel free to fill in your answers directly in this Word document.

1. Legislation

1.1 Does your law on restraints of competition (in the following: competition law) contain special provisions on intellectual property rights (yes or no)?

1.2 Does your competition law contain special provisions on copyright as one form of intellectual property rights (yes or no)?

If the answer to one of these questions is yes, please provide the text of these provisions

1.3 According to general practice (of the agencies and courts) and/or general legal opinion, does your competition law apply to IPRs?

1.4 Would the answer to question 1.3 be different for copyright?

1.5 Are there competition law regulations and/or guidelines such as on

(1) horizontal cooperation agreements (including R&D agreements);

(2) vertical agreement (distribution agreements);

(3) licensing agreements;

(4) unilateral conduct (including refusal to deal/refusal to license); and

(5) mergers (role of IPR portfolios on merger analysis)

that are relevant for intellectual property in general and/or for copyright in particular? If the answer is yes, please specify the impact of such regulations/guidelines on IP and/or on copyright. Please provide the text of these regulations and guidelines.

1.6 In case that IPRs, including copyright, are exempted from the application of competition law, is the scope of the exemption, as stipulated in the legislation, further specified in the practice of the agencies and courts (e.g. in the sense of a broader/narrower interpretation of the exemption)?

1.7 Have there been any recent changes to the relevant law or are there any plans to reform, amend or adopt provisions, regulations or guidelines that may affect intellectual property rights or – more specifically – copyright? Please specify these plans.

2. Practice in general

2.1 When did your competition law enter into force?

2.2 Since when are agencies enforcing this law? In case that there is more than one agency, please describe the division of competences/power to the extent that this matters for intellectual property or copyright.

2.3 Since when do courts apply the law?

2.4 Are there specialised courts or specialised chambers of general courts for IP and/or competition law enforcement? Can the same courts decide on both fields of law in individual cases?[1]

2.5 Are there any agencies that do not only grant or register rights but also apply and/or enforce IP ("IP offices")? Are there legal provisions on the relationship between the

[1] Such a need for applying both IP law and competition law may especially arise in infringement proceedings where firm A as the holder of an IP right sues B for infringement. B may well admit that it has used the IP right but claim, as a defence, that A was under a duty to license the right to B as a matter of competition law and that therefore the use of the right was legal. In some jurisdictions, that do not have special jurisdictions, the infringement court will also decide the competition law question, while in other jurisdictions that infringement court may have to stay proceedings and wait for a decision to be made by the agency or court exclusively competent for the competition law question. Note that the question only relates to the issue of jurisdiction and not on the procedural and substantive requirements whether such a competition law defence can be brought.

IP agencies and the competition agencies? Is there cooperation between the two kinds of agencies in practice?

2.6 Are there cases in which your agencies or courts have applied competition law to IP-related cases in general and/or on copyright-related cases in particular? Please characterize the facts and legal issues of such cases. Please provide the source of decisions or the decisions themselves (translation not required).

2.7 Please indicate how such decisions are enforced in practice.

2.8 Please indicate what impact such decisions had on the market.

2.9 Have you encountered any institutional challenges or issues that make it harder for you to deal with copyright cases, such as deadlines, capacity constraints, limited human resources with limited knowledge in IP, including in copyright.

2.10 If there is very little or no competition law practice regarding IP in general and copyright in particular, how would you explain this?

3. Practice in selected copyright industries

Competition law is assessed with regard to specific relevant product markets. Such products may be protected by IPRs. Hence, it is appropriate to analyse the role of copyright for competition policy according to different copyright industries. There is obviously a large variety of copyright industries. In the following, we would like you to refer to the following industries when you answer the questions further down:

Industries:

(a) Music industry (including sale of CDs, online distribution, distribution via broadcasting)

(b) Film industry (including movie theatre distribution, DVD sales and rentals, online, broadcasting)

(c) Fiction literature and publishing (novels, theatre plays, publishing, etc.)

(d) Academic writing and publishing

(e) Newspaper industry and publishing (including distribution of newspaper, online newspapers, free advertising papers, “news aggregators”)

(f) Broadcasting industries (tv and radio)

(g) Visual art (paintings, sculptures, photographs – trade in works of visual art, including auctions; museums)

(h) Software industries

(i) Other industries

Questions:

Note that we **do not expect you to answer any of the following questions** for all of the abovementioned industries. But, whenever you give an answer, **be specific as to which industries you refer**.

3.1 Try to assess the importance of these industries for your economy (very important, important, medium, less important, not important)?

3.2 What is the level of concentration in the relevant product markets? It is sufficient to provide examples of markets in which you have particular high concentration.

3.3 Is there any specific form of regulation for such markets (e.g. broadcasting)?

3.4 Are there any competition law cases or decisions, including, for instance, those relating to collective rights management organisation (CMOs) (yes or no)?

If the answer to Question 3.4 is yes, answer the following questions:

3.5 Which relevant markets were affected?

3.6 Who were the alleged infringers of competition law? You may describe in general terms: Authors, publishers, distributors, firms as users, collective rights management organisations (CMOs), others? Domestic or foreign firms?

3.7 Who were the complainants or did your agency initiate proceedings? Whom did the competition agencies and courts try to protect in applying the law?

3.8 Which were the legal provisions applied to the cases?

3.9 What were the major competition law problems and challenges that arose (e.g. market definition)?

3.10 What was the theory of harm considered/applied by the agencies/courts?

3.11 What remedies were applied? What other remedies would, in principle, be available for similar forms of competition law violations, but were not applied in the specific case? Were the decisions and remedies enforced in reality? If not, due to what reasons?

3.12 How highly does your agency put protection of these markets put on the list of your enforcement priorities?

3.13 How do you explain the correlation of the number of cases in the respective industry to the economic importance of that industry for the economy?

3.14 What are the major lessons to be learned and the major insights you would like to share?

4. Markets for Collective Rights Management (Collective Rights Management Organisations, CMOs)

Collective rights management organisations (CMOs) often hold a monopoly position in the national territory. A CMO may be the only undertaking that will provide the service of administering the rights to individual right holders (market for collective rights management services) and may be the only undertaking that grants specific licences to users, such as a license for broadcasting music (licencing market). This is why several jurisdictions have gathered quite some competition law practice regarding CMOs. Some countries may also have special legislation on CMOs or provisions in their copyright act relating to collective management of rights. Such provisions may provide for special agencies and/or courts (e.g., copyright tribunals) that regulate and control the activities of CMOs. Such rules and schemes may or may not have a competition-policy orientation. In any instance, in such cases, there is an overlap of competition policy and special regulation of CMOs. We are not only interested in knowing about competition law practice relating to CMOs but also in knowing more about special regulation, since such regulation may be the better and more effective form of addressing competition law issues. We are aware that competition agencies may not be well placed in answering all of the following questions. **Therefore, if you are a competition agency, feel free to indicate that you are unable to provide any reliable answer to questions 4.1 through 4.5 below and, perhaps, please try to refer us to any other resource person or institution in your country that may help us for getting these questions answered.** However, we would very much appreciate an answer to question 4.5.

4.1 Are there collective rights management organizations (CMOs, collecting societies) in your jurisdiction?

4.2 Are there legal provisions regulating the establishment, constitution and activity of your domestic CMOs?

(a) Is there a specific law regulating CMOs?

(b) What kind of form do CMOs take? State entities, private associations, business companies, etc.

4.3 Do your domestic CMOs hold a monopoly position regarding (a) the collective management service to right holders and (b) the grant of specific licenses to users in your country? Note that some countries have several CMOs that are nevertheless monopolies since they specialize in the management of rights for specific categories of works (e.g., music) or specific rights/right holders (e.g., performing artists).

(a) In case of a monopoly position of your CMOs in your country, is the monopoly prescribed by the law (which provision?) or do CMOs hold a de facto monopoly?

(b) In case of a de facto monopoly: How would you describe the reasons for the emergence of this monopoly?

(c) Is there a realistic option for right-holders to become a member of, or contract with, a foreign CMO?

(d) Do your CMOs administer rights and grant licences to users in other country?

4.4 Special regulation of CMOs

(a) Is there special regulation of the activity of CMOs in your country?

If the answer is yes:

(b) To which extent does this regulation take into account the goal of protecting competition?

(c) Does the law take precedence over general competition law?

(d) Is there cooperation between the competition agencies and the agencies and courts that are specifically empowered to control the activities of CMOs?

4.5 Competition law and CMOs

(a) Does your general competition law apply to CMOs?

(b) Has your agency developed a specific policy concerning CMOs? Are there competition law regulations and/or guidelines applicable to CMOs?

(c) Do you have any competition law practice regarding CMOs? Please specify cases.

(d) What are the major problems and challenges in applying competition law to CMOs?

5. Traditional cultural expressions/expression of folklore, especially of indigenous people

In recent years, awareness has grown as to the need to protect the specific intangible assets that exist in developing countries. This includes subject matter that is linked to indigenous people and their living environment such as genetic resources, indigenous knowledge, traditional cultural expressions and folklore. Some states have introduced specific legislation. The subject-matter of protection of traditional cultural expressions (such as traditional patterns for textiles, tattoos, etc.) or folklore is very similar to copyrighted works. Indigenous people do not only exist in developing countries but also in developed countries (e.g., the Aborigines in Australia). Or some developed countries may have an important production of traditional folklore (e.g., Irish folk music). Therefore, we do not want to limit the following questions to developing countries. At the same time, we are aware that the following questions do not have any relevance for most jurisdictions and that we may not even expect that these questions will produce any significant result. **Hence, we leave it to you whether you want to answer the following questions.**

5.1 How important is the production and consumption of traditional forms of cultural expression and expression of folklore for your economy (very important, important, medium, less important, not important)?

5.2 Is there special legislation on traditional or indigenous creative expression such as folklore under your legislation? Please specify this legislation.

5.3 Are there special agencies and institutions that play a role in the protection of such subject matter? Please, name these agencies and institutions so that we will be able to contact them.

5.4 Is there any competition law practice in this field? Please specify.

5.5 In case that there is no practice: Do you think that there could be potential competition concerns in the field? Please specify.

6. Concluding questions

6.1 Do you have the feeling that the questionnaire was capable of helping you to provide a full picture of the situation in your country?

6.2 If you have any additional information that may be relevant for the study, please inform us accordingly.

6.3 Would you be interested in getting guidance or assistance from international organizations for applying competition law to copyright-related cases? What kind of guidance or assistance would be most important for you?