Collective Management Organisations (CMOs) at the Intersection Between EU Competition Law and the Freedom to Provide Services

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This paper aims at examining some of the key questions that are essential to the daily work of Collective Management Organisations (CMOs), who perform an important role by administering rights on a large scale and administering the remuneration to authors, performers, publishers, producers and other rightholders:

The question has been raised that some of the practices of CMOs may conflict with the freedom to provide services within the EU or competition law. Such restrictions may, however, be justified by demonstrating that these are necessary to protect the essential subject-matter of copyright protection.

The EU has recently adopted the new EU Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (“CRM Directive”). However, the following issues are still disputed:

- Do CMOs provide ‘services’, and do they fall under the EU Directive 2006/123 on services in the internal market?
- Can an EU Member State reserve the exercise of collective rights management to a single CMO, given that this creates a territorial monopoly, and does this infringe the freedom to provide services within the EU, or does this violate Article 102 TFEU (abuse of a dominant position)?

I. THE CRM DIRECTIVE

The EU CRM Directive has recently been adopted by the Council of the European Union on 20 February 2014, following a vote in the European Parliament on 4 February 2014. As will be shown below, the Directive gives some (limited) guidance as to the applicability of EU competition rules and the EU Services Directive.

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1 CMOs are sometimes – not quite comprehensively – also referred to as “collecting societies”. The recently adopted ‘Collective Rights Management’ Directive 2014/26/EU provides an up-to-date definition of CMOs (see: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2014:084:0072:0098:EN:PDF) in Article 3(a): “‘collective management organisation’ means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which fulfils one or both of the following criteria: (i) it is owned or controlled by its members; (ii) it is organised on a not-for-profit basis”.

2 For the purposes of this paper, ‘author’ encompasses authors of literary, dramatic, musical or artistic works, including visual creators, photographers, journalists, composers, etc.


4 EU Member States have to incorporate the new provisions into domestic law within 24 months after the entry into force of the Directive, i.e. on the twentieth day following its publication in the EU Official Journal (on 20 March 2014), by 10 April 2016 at the latest.
1. **The CRM Directive and Competition Law**

Firstly, there are some explicit references in the CRM Directive with respect to competition law and its applicability to CMOs:

Recital 11 states that nothing in the CRM Directive should preclude CMOs from concluding representation agreements with other collective management organisations “in compliance with the competition rules laid down by Articles 101 and 102 TFEU”. Also, Recital 32, which refers to the digital environment and to related requests to CMOs to license their repertoire for new forms of exploitation and business models, states that the provisions are to be understood as being “without prejudice to the application of competition law rules”. Hence, according to the CRM Directive, the applicability of competition rules to CMOs remains valid.

The second objective of the CRM Directive, to facilitate the granting of cross-border licensing of authors’ rights in their online music vertically, is addressed through the establishment of a passport model, by which CMOs that satisfy certain minimum requirements are enabled to license online rights in musical works on a multi-territorial basis (title III of the Directive). Even though the Directive covers multi-territory licensing only in the music sector (with the exception of online music rights required for radio and television programmes, *cf.* Article 32 of the Directive), it will have relevance for other sectors, such as, for instance, cross-border licensing of music in print, too. The general principle in Recital 56 covers all sectors and clarifies that the provisions of the CRM Directive “are without prejudice to the application of rules on competition, and any other relevant law in other areas including confidentiality, trade secrets, privacy, access to documents, the law of contract and private international law relating to the conflict of laws and the jurisdiction of courts, and workers' and employers' freedom of association and their right to organise”.

In title III of the Directive, the European Commission implemented the principles of the Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC). In a nutshell, the idea of title III is that CMOs in the music sector should be able to grant multi-territory licences, either alone (if they meet the quality standards contained in Article 24 paragraph 2) or by aggregating their repertoires with other CMOs in the EU (cf. Articles 30 and 31). Also, agreements between CMOs on multi-territory licensing should be conducted on a non-exclusive basis to ensure greater competition (cf. Article 29). The CRM Directive sets many conditions which must be fulfilled by CMOs wishing to engage in multi-territory licensing: on data management and transparency of repertoire information (cf. Article 25), accuracy of repertoire information (cf. Article 26), accurate and timely reporting and invoicing (cf. Article 27), as well as accurate and timely payment to rightholders (cf. Article 28). Against this background, it might be that probably only a few larger music CMOs will be able to fulfill these conditions.

Apart from the provisions outlined above, there is no reference in the CRM Directive to any concrete provisions with respect to competition law and CMOs.

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5 Recital 48: “(...) That derogation should not operate so as to distort competition with other services which give consumers access to individual musical or audiovisual works online, nor lead to restrictive practices, such as market or customer sharing, which would be in breach of Articles 101 or 102 TFEU”. Article 32 adds to this: “The requirements under this Title shall not apply to collective management organisations when they grant, on the basis of the voluntary aggregation of the required rights, in compliance with the competition rules under Articles 101 and 102 TFEU, a multi-territorial licence for the online rights in musical works required by a broadcaster to communicate or make available to the public its radio or television programmes simultaneously with or after their initial broadcast as well as any online material, including previews, produced by or for the broadcaster which is ancillary to the initial broadcast of its radio or television programme.”


7 See: *supra*, note 1. The rules on multi-territorial licenses for online use of musical works are included in Title III of the CRM Directive.
2. **THE CRM DIRECTIVE AND ITS APPLICABILITY TO ‘SERVICES’**

Secondly, is the CRM Directive also applicable to ‘services’ as contained in the EU Directive 2006/123/EC of 12 December 2006 on services in the internal market (“Services Directive”)?

The Services Directive develops the freedom to provide services, as stated in Article 56 Treaty on the Functioning of the EU (TFEU), further. It is repeated that “Member States [should] respect the right of providers to provide services in a Member State other than that in which they are established. The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory” (…) (cf. Art. 16(1) Services Directive). It should, however, be borne in mind that the Services Directive pursues an internal market objective and, in principle, regulates economic activities only.

The only reference to ‘services’ in the final version of the CRM Directive, as adopted, is included in Recital 8, which highlights that the CRM Directive “is concerned with a sector offering services across the Union”, which is why it “should have as a legal base Article 62 TFEU”. Article 62 TFEU provides the legal basis for initialising an ordinary EU legislative process for all matters related to services. However, there is no explicit reference as to whether CMOs should be covered (or not) by the Services Directive as “service providers”.

The original proposal, in the draft presented by the European Commission on 11 July 2012, went much further. At the outset, it suggested the same wording as contained in the (above-mentioned) final Recital 8 in its initial Recital 7. However, most importantly, the initial Recital 3, as suggested by the Commission, stated clearly that CMOs are to be considered as being “service providers”: “When established in the Union, collecting societies – as service providers – must comply with the national requirements pursuant to Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market which seeks to create a legal framework for ensuring the freedom of establishment and the free movement of services between the Member States. This implies that collecting societies should be free to provide their services across borders, to represent rightholders resident or established in other Member States or grant licences to users resident or established in other Member States.”

Also, Annex 2 to the originally proposed Commission version of the Directive highlighted that CMOs need to respect the rules contained in the Services Directive: “Collecting societies must comply with the national requirements pursuant to the Services Directive (2006/123/EC). They should be free to provide their services across borders to represent rightholders resident or established in other Member States or grant licences to users resident or established in other Member States. They must also respect the competition rules of the Treaty. Therefore, in order to ensure that national rules transposing the proposed directive are consistent with the Services Directive and the competition rules, it is particularly important that the Commission can keep an overview and undertake an appropriate review of the national transposition, on the basis of the necessary explanatory documents.”

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10 Recital 7: “This Directive should aim at coordinating national rules concerning the access to the activity of managing copyright and related rights by collecting societies, the modalities for their governance, and their supervisory framework and is also based on Article 53(1) of the Treaty. In addition, since this is a sector offering services across the Union, this Directive is also based on Article 62 of the Treaty.”
This view is based on the European Commission’s interpretation of the Services Directive, in particular the Copyright Unit’s opinion (DG Internal Market and Services), stating clearly on its FAQ website that CMOs do fall under the scope of the Services Directive: “The Services Directive applies to all activities and sectors that are not expressly excluded from its scope of application. Relevant examples of activities and sectors covered by the Services Directive include: (...) 16. INTELLECTUAL PROPERTY-RELATED SERVICES, e.g. administration of IP rights by collecting societies”\(^{11}\) (i.e., CMOs).

Nonetheless, based mainly on diverging opinions within the members of the Council of the European Union, these explicit references to CMOs as service providers and related obligations to comply with national requirements pursuant to the Services Directive were finally deleted in its entirety from the CRM Directive. On the basis of its wording as adopted – i.e., the mere, vague reference to a sector offering cross-border services – the CRM Directive remains silent on whether the Services Directive applies to CMOs. Also, the CRM Directive does not clarify whether a single CMO per EU Member State infringes the freedom to provide services, and whether it constitutes an abuse of a dominant position.

II. **Applicability of the Services Directive to CMOs**

Is the Services Directive applicable to CMOs? Do the activities of CMOs fall under related EU rules? Are their activities (i) ‘services’, or (ii) do they represent the collective exercise by rightholders of their rights, or are they (iii) non-economic services of general interest, and, thus, excluded from the scope of the Services Directive by virtue of its Article 2(2)(a)?

The free movements of goods, services and establishments do not at first sight seem compatible with the prohibitive provisions of copyright law, with their territorial limitations. And yet, the activities of CMOs have consistently been held to be covered by the TFEU rules on freedom to provide services.\(^{12}\) CMOs provide a service to rightholders who would otherwise find it difficult to administer related uses themselves.

However, the CMOs’ services do not fit into one of the categories listed (non-exhaustively) in Article 57 TFEU. Also, CMOs are, in principle, not-for-profit organisations, but they do require some remuneration to cover their administrative costs, and it could be questioned whether the activities of CMOs constitute non-economic services of general interest as referred to in Article 2(a) (the Services Directive does not deal with related services, reserved to public or private entities, cf. Article 1(2) of the Services Directive). Moreover, it is a fact that CMOs provide services not only to rightholders, but also to users.\(^{13}\)

It is also disputed (i) whether Article 16 of the Services Directive is applicable to CMOs, and whether the activities of CMOs constitute ‘services’ within the meaning of Article 4(1) of the Services Directive; (ii) whether CMOs provide non-economic services of general interest, excluded under Article 2(2)(a); (iii) whether the services of CMOs are to be considered ‘services of general economic interest’, excluded from the application of Article 16 on the basis of Article 17(1); and (iv) whether they are excluded from the application of Article 16 by virtue of Article 17(11), which excludes copyright and neighbouring rights.

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\(^{11}\) See: Frequently Asked Questions, question 7 (“What is the ambit of application of the Services Directive?”): [http://ec.europa.eu/internal_market/services/services-dir/faq/index_en.htm#maincontentSec7](http://ec.europa.eu/internal_market/services/services-dir/faq/index_en.htm#maincontentSec7)


\(^{13}\) See: CJEU, Case C-52/07 Kanal 5 and TV4 [2008] ECR I-9275, paragraph 29; and points 40 to 42 of AG Trstenjak’s Opinion.
The Services Directive principally safeguards the internal market for services for the benefit of not only rightholders but also users and consumers. Some fear that applying the Services Directive to CMOs could lead to an unhealthy competition on the tariffs for the same licences in the same territory, leading to a “race to the bottom” in rightholder remuneration. On the other hand, it has been argued that there is no need for a national ‘one-stop-shop’ since in EU Member States in which there is no territorial monopoly, no fragmentation of repertoires is apparent, nor do users experience any difficulty in identifying and obtaining the licences they want.

Recital 34 of the Services Directive specifically excludes social, cultural, educational and judicial fields, and schemes which do not engage in economic activity and are financed by public funds, while Recital 70 clarifies that services may be considered services of general economic interest "if they are provided in application of a special task in the public interest entrusted to the provider by the Member State concerned". If these tasks relate to "social and cultural cohesion", requirements which are "necessary for the fulfilment of such tasks should not be affected" (cf. Recital 72 of the Services Directive). Also, it can be argued that the intellectual property exception of Article 17(11) of the Service Directive applies to CMOs, given that that CMOs manage copyrights and related rights arising from national law.¹⁴

The EU Court of Justice’s (CJEU’s) Advocate General (AG) Eleanor Sharpston, in her Opinion in Case C-351/12 Ochranný svaz autorský pro práva k dílům hudebním, o.s. (OSA) v Léčebné lázně Mariánské Lázně a. s.,¹⁵ considered all these options, and concluded that the activities in question should be regarded as ‘services of general economic interest’ (cf. Article 17(1) of the Services Directive), for the Member States to define (cf. Article 1(3) of the Services Directive), and which are thereby specifically excluded from the application of Article 16, as well as from the scope of the Services Directive by Article 1(2). In the words of AG Sharpston:

“In any event, they must in my view be excluded from the application of Article 16 of Directive 2006/123 (the provision on which the referring court seeks guidance) inasmuch as they fall within the field of copyright and neighbouring rights, listed in Article 17(11) of the same directive. Although, on a literal reading, the latter provision concerns only rights, it is clear that it must refer in fact to services relating to those rights, since only services can be excluded from the application of Article 16. Furthermore, Article 1(3) specifies that the directive does not deal with the abolition of monopolies providing services.”¹⁶ And: “The fact that the services provided by collecting societies are not covered by (Article 16 of) Directive 2006/123 does not exclude them from the more general provisions of Article 56 et seq. TFEU. That being so, it seems undeniable that territorial monopolies limiting the area within which collecting societies may operate restrict their freedom to provide services, a restriction prohibited in principle by those provisions. They also restrict the freedom of both rightholders and users to choose between service providers.”¹⁷

¹⁶ Point 64 of AG Sharpston’s Opinion, supra, note 16.
¹⁷ Point 65 of AG Sharpston’s Opinion, supra, note 16.
On 27 February 2014, the CJEU delivered its judgment in this case, in which it confirmed AG Sharpston’s view. The CJEU also held that – as EU law stands at present – the territorial monopoly granted to CMOs is compatible with the freedom to provide services.

It needs to be underlined in this context that the nature and mission of CMOs is that they are not pure service providers: They act on a not-for-profit basis, often also for related cultural and/or social purposes, as trustees for their members and provide licence solutions on a repertoire scale for users. These features are valuable for rightholders, users of rights and the public alike and must be taken into account when interpreting the EU Services Directive. Activities of CMOs therefore, in my opinion, need to be considered excluded from the scope of the Services Directive by Article 1(2), as these provide ‘services of general economic interest’ (cf. Article 17(1) of the Services Directive), precluding the applicability of Article 16 of the Services Directive to CMOs. However, in case it is assumed that CMOs are covered by the scope of the Services Directive and that they are subject to its Article 16, CMOs and their services should, as outlined by AG Sharpston in her Opinion in Case C-351/12, be considered to fall, in any case, within the field of copyright and neighbouring rights, listed as additional derogations from the freedom to provide services, cf. Article 17(11) of the Services Directive.

III. CMOs and the Freedom to Provide Services / Abuse of a Dominant Position

It is established CJEU case-law that CMOs are not entrusted with the operation of services of general economic interest in the sense of Article 106 TFEU, regardless of the cultural functions they fulfil. Consequently, CMOs are not exempt from the competition rules provided by the TFEU and must comply with antitrust rules (Article 101 TFEU) and not abuse the dominant position that is implied by a de iure or de facto monopoly (Article 102 TFEU). In GVL v Commission (1983), the Court decided that Article 102 TFEU prevents a CMO enjoying a de facto monopoly from excluding nationals of another EU Member State from membership.

In many cases, the individual author, performer, publisher, producer and other rightholders are considered to be in a weaker position, compared with financially more powerful users, and therefore often depend on the collective protection by CMOs. At the same time, CMOs serve the purpose of making it easier for users to access works. Therefore, any argument that CMOs would impede free competition by their de facto dominant position does not provide the full picture.

Collective management constitutes a specific sector of competition law. Generally, as highlighted for instance in the EP Echerer report, de jure and de facto monopolies of

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19 See: CJEU, Case C-7/82, GVL v Commission, ECR-483, at paragraph 32; Case C-127/73, BRT v SABAM (BRT II), ECR-313, at paragraph 23.

20 GVL v Commission, supra, note 20.

21 See: CJEU, Case 127/73, SABAM, ECR (1974) 313, paragraphs 9 and 10: “an undertaking of the type envisaged is an association whose object is to protect the rights and interests of its individual members against, in particular, major exploiters and distributors of musical material(…). For an association effectively to protect its rights and interests it 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.

22 See: CJEU, Joined Cases C-241/91 P and C-242/91, RTE v ITP (“Magill”): “(…) so that refusal to grant a licence (…) cannot in itself constitute abuse of a dominant position.”
CMOs do not pose a problem for competition, provided that they do not impose unreasonable restrictions on their members or on access to rights by prospective users.\(^\text{23}\) However, the question remains whether certain EU rules on abuse of a dominant position preclude an EU Member State from reserving the exercise of collective management in its territory to a single CMO, creating a territorial monopoly, and thereby depriving users of the freedom to choose a CMO in another Member State.

Since CMOs are intermediaries in two-sided markets, competition law needs to be applied both with regard to the service they provide to rightholders and to their licensing activities vis-à-vis users. With regard to both markets, collective management causes high fixed costs, but relatively low marginal costs for the management of an additional work. In a market in which several CMOs compete for rightholders, rightholders will be more likely to join the larger CMO, since this CMO will be able to offer its services at a lower fixed price. Conversely, in a market where one CMO is already established as a monopolist, high entry barriers will make it (whether \textit{de jure} or \textit{de facto}) impossible for potential competitors to enter the market. Generally, collective management tends towards a natural monopoly.

EU law and case-law promotes the right of rightholders to choose between different national CMOs, while competition law protects the freedom of rightholders to assign their rights to different CMOs or to license rights directly to users. Also, many competition law jurisdictions prohibit CMOs from requiring rightholders to assign rights on an exclusive basis\(^\text{24}\), rightholders are not forced to entrust their rights to their national CMO. However, at least in the field of text-based works, language barriers may lead to a rightholder preference for their national CMO, but this depends on the respective markets of exploitation for the rightholders’ works and rights.

The majority of EU Member States does not restrict the establishment of CMOs. Whereas CMOs hold \textit{de facto} monopoly positions in some countries, there are also some jurisdictions that provide for a \textit{de jure} monopoly: some EU Member States entrust collective management to a state agency, some recognise an individual private entity as the only CMO in the country, while others base their system on a concession system that allows regulatory bodies to choose among different applying CMOs. Some examples will be highlighted below.

The Italian Copyright Act recognises the legal monopoly of the national CMO, SIAE (\textit{Società Italiana degli Autori ed Editori}).\(^\text{25}\) Italian rightholders can, nonetheless, join a foreign CMO, or grant individual licences directly to users. The situation is similar in Austria, where the rightholder can grant a direct individual licence to users (in case the law does not make collective management mandatory).\(^\text{26}\) Also, the system of prior authorisation, in principle, prevents foreign CMOs from granting cross-border licences.\(^\text{27}\)


\(^\text{25}\) Article 180 of the Italian Law No. 22 of 1941 on copyrights and related rights.


\(^\text{27}\) Section 1 of the Copyright Act defines the term of CMOs broadly; however, only non-profit organisations can be authorised, which excludes competition by profit-oriented CMOs.
The Czech Republic also provides for a *de jure* monopoly. In Bulgaria, the Ministry only registers a new CMO that intends to manage a category of rights or works for which a CMO has already been active for at least five years – provided that the new CMO can present an agreement with the established CMO that authorises one of the two CMOs to also collect royalties for the members of the other CMO.

In Germany, the legislature decided against the introduction of a legal monopoly in 1965, fearing that it would violate the right of professional freedom. While it was argued that the introduction of a legal monopoly for CMOs would guarantee fair remuneration to rightsholders, the legislature contented itself with the assumption that the relevant markets will anyhow lead to a *de facto* monopoly.

The CJEU has, for many years, considered that a certain market concentration – i.e., a monopoly position – on the rightholders’ side is necessary in order to obtain reasonable results in relation to negotiating with large user groups. Similarly, in AG Sharpston’s and the CJEU’s recent view, this is all fine: an EU Member State can reserve the exercise of collective rights management to a single CMO. Although this creates a territorial monopoly, which deprives recipients of services of the freedom to choose a CMO in another Member State, this is neither a violation of the freedom to provide services nor does it violate Article 102 TFEU (abuse of a dominant position). More specifically, the CJEU stated that the territorial monopoly granted to a CMO constitutes a restriction on the freedom to provide services as it does not allow users of protected works to choose the services of a CMO established in another EU Member State. However, the CJEU found that the restriction can be justified, provided that this system is “necessary in order to attain the objective of protecting intellectual property rights”. As EU law stands at present, there is no other method allowing the same level of copyright protection. Hence, the monopoly granted by the national legislation to the CMO is compatible with the freedom to provide services.

AG Sharpston also concluded that there is nothing in the counter-arguments to cast serious doubt on the suitability of statutory monopolies to secure fair and efficient collection and management of royalty fees, and that it can be considered that national statutory monopolies for CMOs “pursue a legitimate objective compatible with the Treaties, are justified by overriding reasons of public interest, are suitable for securing the attainment of that objective and do not go beyond what is necessary in order to attain it”. AG Sharpston was “not dissuaded from that view by the fact that in a small number of Member States such monopolies do not exist”. A CMO holding a dominant position in the market, however, should not abuse its position by making unreasonable demands, for instance by asking for an unreasonable fee for its services, that is, as in the Czech

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28 See: Article 98(6)(c) of the Copyright Act.
29 According to Article 40b(4) Copyright Act.
31 Ibidem, paragraph 7.
33 Points 55 and 56 of the Opinion
34 CJEU, Case C-351/12 *Ochranný svaz autorský pro práva k dílům hudebním o.s. (OSA) v Léčebné lázně Mariánské Lázně a.s.* available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=148388&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=242685
35 Ibidem, paragraph 78.
36 Point 77 of AG Sharpston’s Opinion, *supra*, note 16.
37 Point 82 of AG Sharpston’s Opinion, *supra*, note 16.
38 Ibidem.
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OSA CJEU judgment, “appreciably higher than those charged in other Member States (a comparison of the fee levels having been made on a consistent basis)”\(^{39}\), not reflecting “the economic value of the services provided”\(^{40}\), or by applying a certain remuneration model (e.g., if another calculation method exists, which enables a better identification and quantification of the use of copyright-protected material)\(^{41}\). Nonetheless, the CJEU has also shown its sympathy for authors, performers, publishers, producers and other rightholders, from a practical and administrative perspective, in their aim to receive appropriate remuneration in mass markets.\(^{42}\)

Typically in the European Union, CMOs operate (whether by virtue of a statutory or a de facto monopoly) within the territory of a single Member State and may be required to accept as members any “rightholders and entities representing rightholders (…) if they fulfil the membership requirements, which shall be based on objective, transparent and non-discriminative criteria”, as outlined in Article 6(2) of the CRM Directive. Where a user wishes to obtain a licence for a repertoire managed by a CMO established in another Member State, this is usually enabled on the basis of reciprocal arrangements between CMOs. It has been underlined by the CJEU previously that a system of statutory territorial monopolies with reciprocal representation arrangements provides users with a (national) ‘one-stop-shop’ within any Member State (reciprocal agreements have been explicitly recognised as admissible by case-law\(^{43}\)).

Even though there is a tendency of collective rights management to a natural monopoly, 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. Yet also jurisdictions that refrain from introducing a legal monopoly can still require CMOs, including foreign ones,\(^{44}\) to apply for an authorisation before they begin to manage rights within the domestic territory.

In my opinion, it can therefore be concluded that CMOs do not, a priori, conflict with the freedom to provide services (cf. Article 16 of Directive 2006/123/EC and Article 56 TFEU), or violate EU competition law and its provision on abuse of a dominant position (cf. 102 TFEU) by holding a territorial monopoly position in their respective markets.

IV. CONCLUSIONS

This paper has aimed at giving a legal perspective on how CMO activities stand up to key legal doctrines in the EU such as free movement of services and competition rules. CMOs perform an important role for authors, performers, publishers, producers and other rightholders. However, it remains disputed whether their activities fall under the EU Directive 2006/123 on services in the internal market, and whether an EU Member State can reserve the exercise of collective rights management to a single CMO, thereby risking an infringement of the freedom to provide services within the EU, or an abuse of a dominant position.

As has been argued above, it can be concluded as follows:

\(^{39}\) CJEU, Case C-351/12 OSA v Léčebné lázně Mariánské Lázně a.s., supra, note 35, paragraph 92.

\(^{40}\) Ibidem.

\(^{41}\) See e.g.: CJEU, Case C-52/07, Kanal S Ltd v STIM, [2008], ECR I-9275, paragraphs 28-40.


\(^{44}\) German law does not exclude foreign CMOs from receiving the authorisation.
• CMOs provide services, but are not mere service providers, given that they act as trustees for their members and provide licence solutions to users – both, however, on a not-for-profit basis and often with a cultural and/or social aim, which needs to be considered when interpreting the Services Directive. It remains disputed whether activities of CMOs provide ‘services of general economic interest’. In my opinion, they do not necessarily fall within the scope of the Services Directive; and do no conflict with its Article 16, the freedom to provide services. However, in case it is argued that CMOs do fall under the scope of the Services Directive, CMOs should, in my view, be considered to act within the field of copyright and neighbouring rights, thereby fulfilling the derogation requirements in Article 17(11) of the Services Directive.

• CMOs are necessary for licensing markets yet to emerge, especially for mass uses. At the same time, due to the economics of collective rights management, CMOs typically hold dominant positions in the respective markets. However, this does not mean that they, a priori, abuse their dominant positions, or impact on the freedom to provide services within the EU. An EU Member State can reserve the exercise of collective management to a single CMO, as also confirmed by the CJEU recently in the above-mentioned Czech OSA case, Case C-351/12, and even though this creates a territorial monopoly, this does not, in my view, violate Article 102 TFEU: generally, national (whether de jure or de facto) monopolies for CMOs pursue a legitimate objective, compatible with the Treaties, their activities are and have been accepted as being justified by overriding reasons of public interest, are suitable for securing the attainment of that objective and do not go beyond what is necessary in order to attain it.

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IFRRO is the main international network of collective management organisations and creators’ and publishers’ associations in the text and image spheres. More information on IFRRO is available here: http://www.ifrro.org/content/what-ifrro