

ARTICLE

The Supervision of Collective Management Organisations

www.cisac.org



SERVING AUTHORS WORLDWIDE
AU SERVICE DES AUTEURS DANS LE MONDE
AL SERVICIO DE LOS AUTORES EN EL MUNDO

A degree of supervision and public control of the operations of collective management organisations (or CMOs for short) exists in different forms in various countries around the world.

Most CMOs are - by their very definition and purpose - in a dominant position within a given market, representing as they do in any given territory the rights of a large number rights owners, both national and foreign. In some countries (for example, Italy) the local CMO is in a *de jure* monopolistic position, established under the law. Accordingly, while the utility of collective administration of rights through CMOs is universally accepted, CMOs remain constantly alert to provisions in general competition law aimed at preventing abuse of dominant positions.

Collective administration of rights as operated by CMOs is considered in the public good as they provide the most effective means of, on the one hand, administering and protecting rights owners' interests, whilst, on the other, facilitating easy access to copyright works by rights users and consumers. Notwithstanding this public interest in collective management, some commentators perceive there to be a conflict between the CMOs' public service role and the potential for abuse of a dominant position which a CMO's structure inherently and unavoidably embodies. From time to time CMOs are called upon to respond to legal challenges from rights users claiming some abuse of a dominant position contrary to the rules of competition law. For this reason, a consensus has developed at the international level, that to defuse the perception of the potential for abuse of their dominant position, some measure of public oversight of the activities of CMOs is desirable.

While many countries maintain some form of oversight of CMOs, the degree of supervision and regulation by the state varies widely. Some European Union countries make the establishment of a CMO conditional on the approval of a public authority, examples of which include the Ministry of Culture (in France and Spain), the Ministry of Justice or the Patent Office (in Germany). In deciding whether to grant such approval these authorities apply certain criteria. These include, for example, the degree to which the proposed society is representative of the category of rights owner it seeks to represent, the volume of potential users, the suitability of its statutes and the means by which it proposes to achieve its aims both nationally and internationally. This oversight continues after the initial approval is given, involving on-going monitoring and surveillance of the CMO's activities.

Other approaches are used in certain jurisdictions. The UK does not subject the establishment of CMOs to approval and oversight by a public authority. Instead, in 2012, the UK Government published minimum standards for UK CMOs as a guide to support a self-regulatory framework for such organisations including the implementation of individual codes of practice by each CMO.

Other provisions can apply as to how CMOs conduct their business. Some countries give jurisdiction to the civil courts over all disputes so that all challenges to tariff rates or licence conditions, for example, are dealt through the normal judicial process. Italy, Netherlands, Portugal and Spain follow this approach. Other countries provide for the review of licensing conditions by an administrative authority (for example, in Germany). Elsewhere, for example in Australia and the United Kingdom, specialist copyright tribunals have been established with jurisdiction to review the activities of CMOs. The tribunals also have power to determine or vary the rates of royalty charged for various uses and to order the grant of licences where these have been unreasonably refused. This system thus provides for public review of the financial and other terms offered by a CMO before specialised arbitrators.

Another - less common - practice is to provide that a government department must approve the terms and conditions on which CMOs may license certain uses of their works in advance. This is the case in, for example, Canada and Denmark.

Beyond these particular measures, CMOs are, for the most, also subject to the general law of competition and the powers of the competition authorities in their respective countries as well as, where appropriate, those of the European Union.

In Germany, however, the CMOs and their operations are expressly exempt from competition law, in recognition of the fact that, by its very definition, a CMO is intended to be a monopoly. In order to guard against any possible abuse of this monopoly position by the CMO, a special arbitration board (*Schiedsstelle*) exists within the Patent Office to regulate the activities of the CMOs and to settle any conflicts that might arise. Furthermore, as a general rule, claims against a CMO may not be made in regular civil court proceedings unless they have been preceded by proceedings before this specialised arbitration body.

In 2012, the European Commission put forward a proposal for a European Directive on collective administration of rights as well as multi-territorial licensing. The proposal aimed first, to support the high standards of governance and transparency of CMOs by enhancing the role of rights owners in their oversight and management and second, to facilitate the multi-territorial licensing of author's rights in musical works for the provision of online services through CMOs. The Commission argued that the Directive would help promote modernisation collective administration of rights in Europe. The Directive was adopted by the European Parliament on February 4, 2014.