

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

12 April 2013 (*)

(Competition – Agreements, decisions and concerted practices – Copyright relating to public performance of musical works via the internet, satellite and cable retransmission – Decision finding an infringement of Article 81 EC – Sharing of the geographic market – Bilateral agreements between national collecting societies – Concerted practices precluding the possibility of granting multi-territory and multi-repertoire licences – Proof – Presumption of innocence)

In Case T-442/08,

International Confederation of Societies of Authors and Composers (CISAC), established in Neuilly-sur-Seine (France), represented by J.-F. Bellis and K. Van Hove, lawyers,

applicant,

supported by

European Broadcasting Union (EBU), established in Grand-Saconnex (Switzerland), represented by D. Slater and D. Waelbroeck, lawyers,

intervener,

v

European Commission, represented by F. Castillo de la Torre and A. Biolan, acting as Agents,

defendant,

APPLICATION for annulment in part of Commission Decision C(2008) 3435 final of 16 July 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/C2/38.698 – CISAC),

THE GENERAL COURT (Sixth Chamber),

composed of H. Kanninen (Rapporteur), President, S. Soldevila Frago and M. van der Woude, Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearings on 19 October 2011 and 4 June 2012,

gives the following

Judgment

Background to the dispute and the contested decision

- 1 Commission Decision C(2008) 3435 final of 16 July 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/C2/38.698 – CISAC) ('the contested decision') concerns the conditions of management and licensing of copyright relating to public

performance rights of musical works solely with respect to exploitation via the internet, satellite and cable retransmission. It is addressed to 24 collecting societies established in the European Economic Area (EEA) ('the collecting societies').

- 2 The collecting societies manage authors' (lyricists' and composers') rights in the musical works which they have created. Those rights generally include the exclusive right to authorise or prohibit the exploitation of the protected works. That is the case, in particular, for public performance rights. A collecting society acquires those rights either by direct transfer from the original holders or by transmission from another collecting society managing the same categories of rights in another country and, on behalf of its members, grants exploitation licences to commercial users, such as broadcasting undertakings or organisers of live shows ('the users').
- 3 The management of copyright implies that each collecting society must ensure that each right holder receives the remuneration due to him for the exploitation of his works, irrespective of the territory in which they are exploited, and ensure that there is no unauthorised exploitation of protected works.
- 4 The applicant, the International Confederation of Societies of Authors and Composers (CISAC), is a non-profit non-governmental organisation, governed by French law and with legal personality, whose principal tasks include promoting reciprocal representation between collecting societies around the world.
- 5 In that context, CISAC has drawn up a non-binding model contract, the initial version of which dates back to 1936 and has been amended on a number of occasions, which must be completed by the contracting collecting societies, in particular with respect to the definition of the territory in which they operate ('the model contract'). On the basis of the model contract, the collecting societies have prepared reciprocal representation agreements ('RRAs') whereby they mutually confer on each other the right to grant licences. The RRAs cover not only the exercise of the rights for traditional 'offline' applications (concerts, radio, discotheques, etc.), but also exploitation via the internet, satellite or cable broadcast.

A – Administrative procedure

- 6 In 2000 RTL Group SA, a radio and television broadcasting group, lodged a complaint with the Commission of the European Communities against a member of CISAC concerning its refusal to grant it a Community-wide licence for its music broadcasting activities. In 2003 Music Choice Europe Ltd, which provides radio and television broadcasting services on the internet, lodged a second complaint against CISAC concerning the model contract. As a result of those complaints the Commission initiated a procedure pursuant to the competition rules.
- 7 On 31 January 2006 the Commission addressed a statement of objections to CISAC and the collecting societies ('the statement of objections') and set a time-limit of two months for a response; the applicant complied with that time-limit.
- 8 The applicant and most of the collecting societies were heard by the Commission at the hearing on 14, 15 and 16 June 2006.
- 9 In March 2007 the applicant and 18 of the collecting societies proposed a number of commitments to the Commission pursuant to Article 9 of Council Regulation (EC) No 1/2003 of 16 December 2002 implementing the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1), which were published in the *Official Journal of the European Union*, pursuant to Article 27(4) of that regulation (OJ 2007 C 128, p. 12).
- 10 At recital 72 to the contested decision the Commission asserted that, in the light of the observations received, the commitments referred to in paragraph 9 above would not give an appropriate answer to the competition concerns raised in the statement of objections.

B – Relevant clauses of the model contract

- 11 The contested decision is aimed in particular at the clauses provided for, at least during a certain period, by the model contract with regard, first, to the membership of the right holders in the collecting societies ('the membership clause') and, second, to the exclusive nature of the mandates which the collecting societies grant themselves mutually in the RRAs and to their territorial scope.
- 12 As regards the membership clause, Article 11(2) of the model contract provided until 3 June 2004 that the collecting societies could not accept as a member an author already affiliated to another collecting society or having the nationality of one of the countries in which another collecting society was active, except under certain conditions (recitals 18 to 21 and 27 to the contested decision). It cannot be excluded that a number of RRAs still contain such a clause (recitals 35, 125 and 260 to the contested decision).
- 13 As regards the exclusive nature of the mandates and their territorial scope, first, Article 1(1) and (2) of the model contract provided, until May 1996, that one of the collecting societies would grant another, reciprocally, the exclusive right on the territories on which the latter operated to grant the necessary authorisations for all public performances ('the exclusivity clause'). Second, Article 6(1) of the model contract invites the collecting societies to define the territories in which they operate, without giving further detail in that regard. Article 6(2) states that each collecting society is to refrain, in the territory of the other society, from any intervention in the latter's exercise of the mandate conferred on it ('the non-intervention clause') (recitals 22 to 25 to the contested decision).
- 14 According to the Commission, the collecting societies apply Article 6(1) of the model contract in such a way as to introduce territorial limitations such that the geographic cover of the licences granted by a given society is, apart from a few slight exceptions, limited to the territory of the EEA country in which the society in question is established ('the national territorial limitations') (recital 38 to the contested decision).
- 15 The evidence supplied by the collecting societies during the administrative procedure did not permit the Commission to conclude with certainty, first, that 17 of those societies had actually and completely removed the exclusivity clause from their RRAs and, second, that all the collecting societies had actually and completely removed the non-intervention clause from the agreements (recitals 37 and 40 to the contested decision).

C – Relevant markets

- 16 The collective management of copyright by means of the model contract covered the following three product markets: first, the provision of copyright administration services to right holders; second, the provision of copyright administration services to other collecting societies; and, third, the grant of licences covering public performance rights to users for exploitation via the internet, satellite and cable retransmission (recital 49 to the contested decision).
- 17 From a geographic point of view, the first market is national, but, in the absence of membership restrictions, it could be broader (recitals 58 and 59 to the contested decision).
- 18 The second market has a national aspect, but includes cross-border elements. Since internet transmission activities are not confined to a single EEA country, undertakings in those sectors require multi-territorial licences, which the collecting societies would be able to grant in the absence of the restrictions in the RRAs. Likewise, for satellite transmission and cable retransmission, any collecting society established within the satellite footprint would be able to grant licences covering the whole of that footprint (recitals 60 to 62 to the contested decision).
- 19 Finally, although, historically, the third market has been defined as having a national scope owing to the need for local monitoring, the same does not necessarily apply for internet, satellite and cable retransmission, as remote monitoring is possible in those fields (recitals 63 and 64 to the contested

decision).

D – Application of Article 81(1) EC and Article 53(1) of the EEA Agreement

1. Membership clauses, exclusivity clauses and non-intervention clauses

20 For the purposes of the present case, according to the Commission, first, the membership clause constitutes an infringement of Article 81(1) EC and Article 53(1) of the EEA Agreement (recitals 123 to 137 to the contested decision).

21 Second, following examination of the exclusivity clause and the non-intervention clause, it became apparent that the exclusivity clause had a foreclosure effect in the domestic market of collecting societies which enjoy exclusivity, since no collecting society could grant a licence in the national territory of another collecting society. According to the Commission, even the possibility that a collecting society would grant directly to a user a licence covering only its own repertoire for performances in the national territory of another collecting society ('a direct licence') is excluded.

22 As regards the non-intervention clause, the Commission observes that in the statement of objections it had considered, in substance, that that clause reinforced the exclusivity clause. Following the observations of certain collecting societies, which maintained that the non-intervention clause does not prevent the grant of direct licences, and in view of the fact that some RRAs had been amended so as to remove that clause, the Commission decided to refrain from taking action in relation to that provision of the model contract (recitals 138 to 152 to the contested decision).

2. Concerted practice relating to the national territorial limitations

23 According to the Commission, the national territorial limitations are the result of a concerted practice that restricts competition (recitals 154 and 155 to the contested decision).

24 It claims that the national territorial limitations cannot be explained simply by autonomous conduct prompted by market forces. Thus, the collecting societies substituted cooperation for the risks of competition in order to ensure, to a certain extent, that those limitations would be not only accepted reciprocally by the other collecting societies but also implemented in all the RRAs (recitals 156 and 157 to the contested decision).

25 The reason for its certainty is said to lie in the mutual dependency existing between collecting societies, especially in the field of offline applications, which require local monitoring networks. For the licensing of rights and the collection of royalties, each collecting society is therefore dependent on the other collecting societies and thus at risk of being disciplined if, in the field of online rights, it is unwilling to perpetuate the historical market segmentation (recital 157 to the contested decision).

26 According to the Commission, the existence of a concerted practice emerges from a number of elements.

27 First, the Commission emphasises that the collecting societies discussed the standardisation of their model contracts in the context of CISAC's activities (recital 158 to the contested decision).

28 Second, the Santiago Agreement, which was notified to the Commission by a number of collecting societies with a view to obtaining an exemption under Article 81(3) EC, shows that the question of the territorial scope of the mandates referred to in the RRAs, in particular those covering new forms of exploitation, was the subject-matter of multilateral discussions among the collecting societies. That agreement, whereby the collecting societies undertook to grant global licences but only to users established in their national territory, was not renewed when it expired at the end of 2004, following the statement of objections which the Commission sent to the collecting societies in the context of the procedure for obtaining the exemption referred to above ('the Santiago statement of objections'), which resulted in a return to national territorial limitations. In the contested decision,

the Commission considers that the abandoning of the Santiago Agreement shows that the collecting societies did coordinate their behaviour as regards the scope of licences for internet use (recitals 158 and 169 to the contested decision).

- 29 Third, the parallel behaviour relating to the national territorial limitations should be assessed in the light of the preceding situation, in which the RRAs contained the exclusivity clause. The fact that no change in behaviour occurred with respect to those limitations after the exclusivity clause was removed is an indication of a concerted practice. In that regard, however, the contested decision acknowledges that this is not so where there are other reasons which may show that the market segmentation is the result of individual behaviour (recital 170 to the contested decision).
- 30 As regards the existence of such reasons in the present case, in the first place, the Commission observes that, while it accepts that copyright and the scope of its protection are defined by national legislation, that does not mean that licences relating to a specific country must be granted by the national collecting society. In that respect, its argument is based on the Santiago Agreement (recitals 159 and 160 to the contested decision).
- 31 In the second place, the Commission denies that the relevant legislative framework, in particular Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15), justifies the collecting societies' behaviour with respect to satellite broadcasting. That directive merely determines the applicable law for the satellite broadcasting of copyright works, which is the law of the EEA country in which the signals carrying the programme are introduced in an uninterrupted chain of communication leading to the satellite and back to earth.
- 32 However, Directive 93/83 does not establish that only the collecting society established in that EEA country can grant the licences necessary for that form of copyright exploitation. Furthermore, as that directive provides that the act of communication must be regarded as taking place solely in that EEA country, users need a licence only for that country. Directive 93/83 therefore rendered obsolete the Sydney Agreement, whereby, in 1987, the collecting societies had inserted into the model contract a provision establishing that the collecting society established in the country from which the signals carrying the programmes went to the satellite was authorised to grant licences covering the entire footprint of the satellite, where necessary after having consulted or obtained the consent of the other collecting societies concerned (recitals 163 to 165 to the contested decision).
- 33 In the third place, the Commission points out that the collecting societies differ considerably in terms of efficiency, administrative costs and their repertoires. They could therefore have an interest in mandating one collecting society, with a particularly good record, to grant licences covering a wider territory than that in which it is established, or to mandate more than one collecting society in some regions, in order to increase the distribution of their repertoire and thereby the remuneration of their authors (recitals 167 and 168 to the contested decision).
- 34 In the fourth place, the Commission observes that, as the contested decision deals only with the legal exploitation of copyrighted material (recital 11 to the contested decision), the need for local monitoring does not explain the national territorial limitations. For exploitation via the internet, satellite and cable retransmission, there are technical solutions that make it possible to monitor the licensee even where the licence is used outside the national territory of the collecting society or where the licensee is established outside that territory. The collecting societies have already put in place licensing practices, as evidenced in particular by the grant of direct licences, which demonstrate their capability to monitor uses and users outside their domestic territory. Furthermore, the current system is not based on the principle of proximity with the licensee, since the territorial limitation of the mandate means that each collecting society grants licences for the use of rights in its territory of activity, irrespective of the residence of the licensee (recitals 171 to 174 to the contested decision).

- 35 At recitals 186 to 199, the Commission provides further information about each of the forms of exploitation covered by the contested decision. In particular, as regards the internet, it refers to the Simulcasting agreement, which was granted an exemption in Commission Decision 2003/300/EC of 8 October 2002 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case No COMP/C2/38.014 – IFPI ‘Simulcasting’) (OJ 2003 L 107, p. 58). That agreement allows broadcasters whose signals originate in the EEA to approach any collecting society which is a party to that agreement in order to obtain a multi-territorial and multi-repertoire licence authorising Simulcasting broadcasting (the simultaneous transmission by radio stations and television channels, via the internet, of sound recordings included in their broadcasts of radio or television signals). The same applies to another agreement, the Webcasting agreement (recital 191 to the contested decision).
- 36 The Commission refers, moreover, to the ‘Nordic and Baltic’ cooperation model (‘the NBC model’), which allows a user to obtain a single multi-territorial licence for online exploitations, covering mechanical reproduction rights and public performance rights and valid for Denmark, Estonia, Latvia, Lithuania, Finland, Sweden, Iceland and Norway (recital 179 to the contested decision).
- 37 In addition, the Commission mentions that in January 2006 the German collecting society, the Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA), and the British collecting society, Performing Right Society Ltd, established the joint venture CELAS, which acts as a pan-European one-stop-shop for the licensing of online and mobile rights of a particular publisher’s Anglo-American repertoire (recital 193 to the contested decision).
- 38 The existence of those agreements shows that a presence on the spot is not necessary (recital 190 to the contested decision). In that regard, the Commission observes that, if the monitoring carried out without a presence on the spot detected breaches which required legal proceedings or if it were necessary to audit the records on the spot, it would be possible for the collecting society that issued a licence covering a territory different from that of its Member State of establishment to entrust those tasks to another person, such as the local collecting society, which has a presence on the spot and the necessary knowledge of the legal system of the country concerned (recitals 177 and 178 to the contested decision).
- 39 After having provided that information in order to demonstrate that the national territorial limitations in the RRAs can be explained only by the presence of a concerted practice, the Commission acknowledges that, in particular circumstances, the decision not to grant authority to license outside the territory in which a collecting society is established may be prompted by the fact that the other collecting society does not have the technical capability that would enable it to provide proper monitoring and enforcement or by the fact that the legal system of an EEA country has features such that the national society will be preferred when the licensor makes its choice, owing, for example, to the particular status which it may enjoy in proceedings before the domestic courts. A territorial limitation which is the result of the assessment of those factors would not normally constitute a concerted practice restrictive of competition. However, the systematic practice of national territorial limitations in all the RRAs could not be explained by those factors (recitals 182 and 183 to the contested decision).
- 40 Having thus concluded that the collecting societies’ conduct constituted a concerted practice, the Commission considered whether that practice restricted competition. It considered that that was so, since that practice ensures that each collecting society is the only one that can grant users multi-repertoire licences for the EEA country in which it is established (recitals 207 to 209 to the contested decision).
- 41 The result is that each collecting society may charge administrative costs for the management of rights and the grant of licences without facing competitive pressure on those costs from other collecting societies. That lack of competition might have negative repercussions even at the level of

authors, whose revenues may vary depending on the collecting society that administers their rights (recitals 134 and 210 to the contested decision).

42 In answer to the argument, raised by a number of collecting societies in their replies to the statement of objections, that competition between collecting societies would result in a ‘race to the bottom’ for the royalties of right holders, the Commission asserted, referring to Decision 2003/300, that Article 81(3) EC permits the development of a tariff mechanism capable of limiting competition on the prices of licences to the administrative costs, without having an impact on the income of the right holders. In any event, the mandating collecting society could merely define a level of revenue for its repertoire vis-à-vis the other collecting societies that grant licences abroad. It would thus receive a guaranteed ‘wholesale’ price for its repertoire while the collecting societies granting licences for that repertoire would be able to compete on the margin which they add to that wholesale price (recitals 217 to 219 to the contested decision).

43 In that regard, the Commission observes that certain adaptations of the pricing system would provide the collecting societies with an incentive to compete. A recent market trend confirms that it may be an efficient strategy for right holders, and therefore also for the collecting societies, to grant their rights to several competing collecting societies. Accordingly, a publishing group has announced that it intends to designate several collecting societies which will have the power to grant users pan-European licences to exploit the Anglo-American mechanical rights of its repertoire for online use (recital 220 to the contested decision).

44 The contested decision also mentions Commission Decision C(2006) 4350 of 4 October 2006 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/C2/38.681 – The Cannes Extension Agreement) (OJ 2007 L 296, p. 27), concerning licences for mechanical rights, which imposed binding commitments providing for a mechanism for the grant of multi-territorial licences with a guarantee that right holders’ revenues will not be jeopardised, owing to the fixing of a uniform rate agreed by all collecting societies, while permitting a certain degree of competition by the introduction of the possibility for collecting societies to offer a maximum rebate to record companies, limited to administrative costs (recital 82 to the contested decision).

E – Operative part

45 On the basis, inter alia, of those considerations, and after finding that trade between Member States was affected by the bilateral agreements at issue and that the conditions for the application of Article 81(3) EC and Article 53(3) of the EEA Agreement were not met, the Commission, without imposing a fine, decided as follows:

‘Article 1

The following [24] undertakings have infringed Article 81 [EC] and Article 53 of the EEA Agreement by using, in their reciprocal representation agreements, the membership restrictions which were contained in Article 11 [paragraph 2] of the model contract ... or by de facto applying those membership restrictions:

...

Article 2

The following [17] undertakings have infringed Article 81 [EC] and Article 53 of the EEA Agreement by conferring, in their reciprocal representation agreements, exclusive rights as provided for in Article 1 [paragraphs 1 and 2] of the CISAC model contract:

...

Article 3

The following [24] undertakings have infringed Article 81 [EC] and Article 53 of the EEA Agreement by coordinating the territorial delineations in a way which limits a licence to the domestic territory of each collecting society:

...

Article 4

1. The undertakings listed in Articles 1 and 2 shall immediately bring to an end the infringements referred to in those Articles, in so far as they have not already done so, and shall communicate to the Commission all the measures they have taken for that purpose.
2. The undertakings listed in Article 3 shall, within 120 days of the date of notification of this Decision, bring to an end the infringement referred to in that Article and shall, within that period of time, communicate to the Commission all the measures they have taken for that purpose.

In particular, the undertakings listed in Article 3 shall review bilaterally with each other undertaking listed in Article 3 the territorial delineation of their mandates for satellite, cable retransmission and internet use in each of their reciprocal representation agreements and shall provide the Commission with copies of the reviewed agreements.

3. The addressees of this Decision shall refrain from repeating any act or conduct described in Articles 1, 2 and 3, and from any act or conduct having the same, or similar, object or effect.

...'

Procedure and forms of order sought

- 46 By application lodged at the Registry of the General Court on 3 October 2008, the applicant brought an action for the partial annulment of the contested decision.
- 47 By document lodged at the Court Registry on 27 January 2009, the European Broadcasting Union (EBU), an association of broadcasters which are among the largest users, applied to intervene in support of the form of order sought by the applicant. The application to intervene was served on the parties in accordance with Article 116(1) of the General Court's Rules of Procedure. The parties did not raise any objections.
- 48 By separate document lodged at the Registry of the General Court on 30 January 2009, the Commission raised an objection as to the admissibility of this application under Article 114 of the Rules of Procedure. On 25 February 2009, it requested permission to add to the file a letter from the applicant dated 16 February 2009 ('the reply to the request for information'), by which the applicant had replied to a request for information which the Commission had sent to it on 30 January 2009 on the basis of Article 18(2) of Regulation No 1/2003 ('the request for information of 30 January 2009'). By decision of 12 March 2009, the President of the Seventh Chamber of the General Court granted permission.
- 49 The applicant submitted written observations both on the objection of inadmissibility and on the letter of 16 February 2009 within the prescribed time-limits.
- 50 By order of 2 June 2009, the President of the Seventh Chamber of the General Court granted EBU leave to intervene in the present proceedings.
- 51 On 13 August 2009, EBU lodged its statement in intervention limited to the issue of admissibility,

on which the main parties submitted written observations within the prescribed time-limits.

52 By order of the Court (Seventh Chamber) of 22 October 2009, the decision on the plea of inadmissibility was reserved for final judgment.

53 The written procedure, which, as well as the defence, included the statement in intervention, the reply, the rejoinder and the observations of the main parties on that statement in intervention, ended on 29 April 2010.

54 Following a change in the composition of the chambers of the General Court, the Judge-Rapporteur was assigned, as President, to the Sixth Chamber, to which the present case has thus also been assigned.

55 Upon hearing the report of the Judge-Rapporteur, the Court (Sixth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure as provided for in Article 64 of the Rules of Procedure, invited the parties to answer a number of questions. Only the main parties did so.

56 At the hearing on 19 October 2011, the parties presented oral argument and answered the questions put to them by the Court.

57 As the Judge-Rapporteur was unable to sit in the present case, the President of the General Court reallocated the case to another Judge-Rapporteur and, pursuant to Article 32(3) of the Rules of Procedure, designated another Judge to complete the Sixth Chamber.

58 By order of 11 January 2012, the General Court (Sixth Chamber), in its new composition, reopened the oral procedure and the parties were informed that they could present oral argument at a further hearing.

59 The parties again presented oral argument and replied to the questions put by the Court at the hearing on 4 June 2012.

60 Consequently, the President of the Sixth Chamber decided to close the oral procedure.

61 The applicant and EBU claim that the Court should:

- annul Article 3 of the contested decision;
- order the Commission to pay the costs.

62 The Commission contends that the Court should:

- dismiss the action;
- order the applicant to pay the costs.

Law

A – The objection of inadmissibility raised by the Commission

63 Since the applicant was not an addressee of the contested decision, it is necessary to examine whether that decision and, more specifically, Article 3 of that decision, to which the applicant's request for annulment relates, is of direct and individual concern to the applicant within the meaning of the fourth paragraph of Article 230 EC.

64 The Commission points out that the applicant is not an addressee of the contested decision because,

as regards the concerted practice referred to in Article 3, it did not have sufficient evidence to conclude that the applicant had played a distinct role in the infringement and that its conduct was separate from that of its members, the collecting societies. Since the applicant was not considered to be liable for the concerted practice found in the contested decision, it is not, in the Commission's view, directly and individually concerned by it.

- 65 As regards, in particular, the issue of whether the applicant is directly concerned by the contested decision, the Commission claims that this cannot arise from the fact that the decision interferes with its role as facilitator of its members' activities. According to the Commission, the contested decision has no effect on the content of the model contract, and does not call into question the very existence of RRAs or the applicant's ability to organise meetings in which the collecting societies discuss various issues; moreover, any modification of the RRAs would not be the immediate result of that decision, as the collecting societies have a margin of discretion as to the means by which they bring an end to the concerted practice found by the Commission. Accordingly, in the latter's view, the circumstances of the present case are not similar to those in Case C-386/96 P *Dreyfus v Commission* [1998] ECR I-2309, in which the applicant was found to be directly concerned by the contested measure, on the ground, inter alia, that the addressees of that measure did not have such a margin of discretion as regards its implementation.
- 66 It is settled case-law that, so far as concerns the admissibility of an action, the condition of direct concern requires that, first, the contested measure must directly affect the legal situation of the applicant and, secondly, it must leave no discretion to its addressees, which are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules without the application of other intermediate rules (Case C-486/01 P *Front national v Parliament* [2004] ECR I-6289, paragraph 34, and Joined Cases C-445/07 P and C-455/07 P *Commission v Ente per le Ville vesuviane and Ente per le Ville vesuviane v Commission* [2009] ECR I-7993, paragraph 45).
- 67 In that respect, the direct consequence of the second subparagraph of Article 4(2) of the contested decision is that the collecting societies must review the territorial scope of the mandates contained in their RRAs, and do so bilaterally, that is to say, outside the context of the activities organised by the applicant. It follows that, as regards the bilateral nature of the negotiations, the collecting societies have no margin of discretion.
- 68 Furthermore, in the contested decision, the Commission claimed that the issue of the territorial limitations of the reciprocal mandates had been the subject of multilateral discussions between the collecting societies in the context of the applicant's activities. Accordingly, the Commission cannot claim, at the stage of the examination of the admissibility of the action, that the contested decision does not directly affect the applicant.
- 69 That conclusion is not called into question by the Commission's argument that the applicant's reply to the request for information of 30 January 2009 confirms that the applicant is not directly concerned by the contested decision, on the ground that, in that reply, the applicant itself admitted that it did not consider itself to be under any obligation to take any measures in relation to Article 3 of that decision.
- 70 It is indeed clear from the minutes of the meeting of the applicant's board – held shortly after the adoption of the contested decision (16 July 2008), namely on 26 August 2008 – annexed to the applicant's observations on the objection of inadmissibility that, on that occasion, it was not considered necessary to modify the provisions of the model contract relating to territories ('The Board unanimously agreed that the territorial provisions of the CISAC Model contract should be left intact').
- 71 The Commission, when informed of the content of the draft minutes of that meeting, sent the applicant the request for information of 30 January 2009 whereby it asked the applicant, inter alia,

to:

- provide the final version of the minutes of that meeting;
- explain the meaning of the sentence referred to in the preceding paragraph;
- provide the provisional and final minutes of all the meetings of the applicant's board that took place between August 2008 and January 2009, along with any correspondence exchanged between the collecting societies concerning those meetings;
- provide any correspondence, any minutes of discussions, and any other documents that the applicant exchanged with the collecting societies in relation to the territorial limitations of the mandates contained in the RRAs.

72 Evidently, those elements show that, in the Commission's view, the activities in which the applicant participates, and which it even coordinates, are relevant to assessing whether the collecting societies are implementing the contested decision by bringing to an end the infringement found in Article 3 of that decision and by avoiding similar conduct in the future.

73 As regards the condition that the applicant be individually affected, it must be observed that, as the applicant claims, the contested decision affects its role as a facilitator of cooperation between the collecting societies, in particular its role as a mediator in negotiations between the various collecting societies on issues relating to the grant of multi-territorial licences.

74 According to the case-law, one of the ways in which an association of undertakings which is not the addressee of the contested measure may be individually concerned by that measure arises where the association has a specific legal interest in bringing proceedings, in particular because its position as a negotiator has been affected by the measure whose annulment is sought (see order of 18 September 2006 in Case T-350/03 *Wirtschaftskammer Kärnten and best connect Ampere Strompool v Commission*, not published in the ECR, paragraph 25 and the case-law cited).

75 The role of facilitator assumed by the applicant is confirmed by its participation in the administrative procedure, as an important interlocutor of the Commission, involved in the negotiation of commitments which could have led the Commission to refrain from adopting a decision finding an infringement relating to the national territorial limitations.

76 Moreover, although the fact that the applicant was an addressee of the statement of objections is not a factor which, in itself, leads to the conclusion that the contested decision was of individual concern to the applicant, it does corroborate the observation that the applicant was closely involved in the administrative procedure, specifically because of its role as a facilitator of cooperation between the collecting societies.

77 Contrary to what is claimed by the Commission, the applicant, in the administrative procedure, found itself in the particular situation of occupying a clearly defined position as negotiator which was intimately linked to the actual subject-matter of the decision, thus placing it in a factual situation which distinguished it from all other persons. In accordance with the case-law, that situation confirms that the contested decision is of individual concern to the applicant (see, to that effect and by analogy, Case C-313/90 *CIRFS and Others v Commission* [1993] ECR I-1125, paragraphs 29 and 30, and Case C-319/07 P *3F v Commission* [2009] ECR I-5963, paragraph 87).

78 It follows that, contrary to what is claimed by the Commission, the operative part of the contested decision, read in the light of the grounds of that decision, affects the applicant's activities directly and individually.

79 It follows from the foregoing that the objection of inadmissibility raised by the Commission must therefore be rejected.

B – Substance

80 In support of its action, the applicant relies, in essence, on the following two pleas in law:

- primarily, infringement of Article 81 EC and of Article 253 EC, in that the Commission has not proved the existence of a concerted practice with regard to the national territorial limitations, and
- in the alternative, infringement of Article 81 EC, in that the concerted practice, even if it were to exist, would not be restrictive of competition.

1. Preliminary observations

81 As a preliminary, certain aspects of the context of the present case must be recalled. First of all, the contested decision solely concerns the exploitation of copyright by internet, by satellite, and by cable broadcast, and not traditional ‘offline’ exploitation, whereas the model contract and the RRAs cover all forms of exploitation.

82 In respect of the forms of copyright exploitation which the contested decision concerns, the collecting societies and the applicant did not establish, *ex nihilo*, a new management system, distinct from that applied in relation to traditional forms of exploitation. However, it is acknowledged that, as technology evolved, modifications were made to the model contract – created in 1936 for traditional exploitations – on the basis, inter alia, of the Sydney and Santiago Agreements.

83 The Commission does not criticise the very existence of the model contract, nor does it question the necessity of cooperation between the collecting societies, provided that such cooperation does not infringe the competition rules.

84 As regards the national territorial limitations contained in the RRAs, they were not challenged by the Commission before the new technologies developed and were therefore part of the context of the collective management in which the collecting societies operated as the new technologies were progressively developed. The contested decision does not specify the date at which the limitations allegedly became contrary to the competition rules.

85 Moreover, even in respect of the exploitations using the new technologies, the Commission does not challenge the national territorial limitations themselves, but only the fact that they appear in all of the RRAs, which, in the Commission’s view, is inevitably the result of concertation.

86 The present action must be examined in the light of those elements in particular.

2. The first plea in law, alleging infringement of Article 81 EC and of Article 253 EC, in that the Commission has not proved the existence of a concerted practice with regard to national territorial limitations

87 The applicant, supported by EBU, claims that the Commission has not proved the existence of a concerted practice with regard to the national territorial limitations, referred to in Article 3 of the contested decision. In particular, according to the applicant, the Commission merely observed that, in respect of the forms of copyright exploitation taken into consideration by that decision, the parallel conduct of the collecting societies – consisting in the fact that all the RRAs contain national territorial limitations – is not the result of normal competitive conditions. However, the applicant and EBU submit that the parallel conduct can be explained by reasons other than the existence of concertation.

88 The Commission contends that, in establishing the existence of the concerted practice at issue, it relied not only on the parallel conduct of the collecting societies, but also on other factors, namely:

- the discussions between the collecting societies, held in the context of the activities managed by the applicant, on the scope of the mandates contained in the RRAs;
- the Santiago Agreement;
- the Sydney Agreement;
- the historical link between the exclusivity clause and national territorial limitations.

89 The factors referred to in the first, second, and fourth indents of the previous paragraph are expressly mentioned in recital 158 to the contested decision as considerations supporting the finding of a concerted practice. Before the Court, the Commission also referred to the Sydney Agreement to show that there had been multilateral discussions between the collecting societies as regards the territorial scope of the mandates.

90 According to the Commission, the factors referred to in paragraph 88 above constitute ‘documents’ within the meaning of Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others v Commission* [1999] ECR II-931, paragraph 727 (*PVC II*) and it did not therefore have to examine the question of whether the collecting societies’ conduct can be explained by reasons other than the existence of concertation.

91 It follows from Article 2 of Regulation No 1/2003 and from settled case-law that, in the field of competition law, where there is a dispute as to the existence of an infringement, it is incumbent on the Commission to prove the infringement found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement (Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417, paragraph 58; Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 86; and Case T-348/08 *Aragonesas Industrias y Energía v Commission* [2011] ECR II-0000, paragraph 90).

92 In that context, any doubt of the Court must benefit the undertaking to which the decision finding an infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point, in particular in proceedings for annulment of a decision imposing a fine (Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP *Dresdner Bank v Commission* [2006] ECR II-3567, paragraph 60, and Case T-11/06 *Romana Tabacchi v Commission* [2011] ECR II-0000, paragraph 129).

93 It is necessary to take into account the principle of the presumption of innocence resulting in particular from Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, which is one of the fundamental rights which, according to the case-law of the Court of Justice, constitute general principles of the Union’s legal order. Given the nature of the infringements in question and the nature and degree of severity of the penalties which may ensue, the principle of the presumption of innocence applies, *inter alia*, to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see, to that effect, Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, paragraphs 149 and 150, and Case C-235/52 P *Montecatini v Commission* [1999] ECR I-4539, paragraphs 175 and 176; see also *Romana Tabacchi v Commission*, paragraph 129).

94 That case-law, developed in cases where the Commission had imposed a fine, is also applicable where, as in the present case, the decision finding an infringement is ultimately not accompanied by the imposition of a fine. Moreover, in the present case the statement of objections did in fact envisage accompanying the finding of an infringement with a fine.

- 95 In addition, account must be taken of the non-negligible stigma attached to a finding of involvement in an infringement of the competition rules for a natural or legal person (see, to that effect, judgment of the EFTA Court of 18 April 2012 in Case E-15/10 *Posten Norge v ESA*, not yet published in the EFTA Court Report, paragraph 90).
- 96 Thus, the Commission must show precise and consistent evidence in order to establish the existence of the infringement (*Dresdner Bank and Others v Commission*, paragraph 62) and to support the firm conviction that the alleged infringement constitutes a restriction of competition within the meaning of Article 81(1) EC (Joined Cases T-185/96, T-189/96 and T-190/96 *Riviera Auto Service and Others v Commission* [1999] ECR II-93, paragraph 47, and *Romana Tabacchi v Commission*, paragraph 129).
- 97 However, it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the set of indicia relied on by the Commission, viewed as a whole, meets that requirement (see *Dresdner Bank and Others v Commission*, paragraph 63, and *Romana Tabacchi v Commission*, paragraph 130).
- 98 Since the prohibition on participating in anti-competitive practices and agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place clandestinely, for meetings to be held in secret, and for the associated documentation to be reduced to a minimum. Even if the Commission discovers evidence explicitly showing unlawful contact between operators, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (see Case C-407/08 P *Knauf Gips v Commission* [2010] ECR I-6375, paragraphs 48 and 49 and the case-law cited).
- 99 In *PVC II*, on which the Commission relies, the Court arrived at a solution which balances those principles. In that case, the Court confirmed that, in accordance with the case-law, where the Commission's reasoning is based on the supposition that the facts established in its decision cannot be explained other than by concertation between the undertakings, it is sufficient for the applicants to prove circumstances which cast the facts established by the Commission in a different light and thus allow another explanation of the facts to be substituted for the one adopted by the Commission. However, the Court specified that that case-law was not applicable where the proof of concertation between the undertakings is based not on a mere finding of parallel market conduct but on documents which show that the practices were the result of concertation. In those circumstances, the burden is on the applicants not merely to submit another explanation for the facts found by the Commission but to challenge the existence of those facts established on the basis of the documents produced by the Commission (*PVC II*, paragraphs 725 to 728; see also, to that effect, Joined Cases 29/83 and 30/83 *Compagnie royale asturienne des mines and Rheinzink v Commission* [1984] ECR 1679, paragraph 16, and Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others v Commission* [1993] ECR I-1307, paragraphs 71 and 126).
- 100 In the present case, the applicant claims, primarily, that the parallel conduct is not the result of a concerted practice, in respect of which the contested decision fails to provide any evidence, but rather it is explained by a number of other factors. The EBU, for its part, submits inter alia that the Santiago Agreement and the model contract cannot be considered as evidence of the existence of a concerted practice.
- 101 Before considering the existence of explanations for the parallel conduct other than concertation, it is necessary to examine the question of whether the Commission, as it claims, established the existence of an infringement in relation to the national territorial limitations by evidence other than

the mere finding of parallel conduct, a claim which the applicant contests. It is necessary to examine that issue before examining whether or not the explanations other than concertation are well founded, since, if the Court concludes that such evidence was provided in the contested decision, those explanations, even if they were plausible, would not invalidate the finding of the infringement. Moreover, it must be pointed out that the contested decision does not have the same structure, in two stages, as that put forward by the Commission before the Court, namely that, first, the concerted practice had been proved by documents, within the meaning of *PVC II*, and, secondly, in the light of those documents and their supposed evidential value, the other explanations of the parallel conduct were not decisive for the purposes of proving that practice.

102 It is therefore necessary, first of all, to establish whether the Commission has proven the existence of a concerted practice by factors other than the parallel conduct of the collecting societies that are comparable to ‘documents’, within the meaning of *PVC II*, on which the Commission relies. In that respect, it must be borne in mind that, in establishing the origin of the cartel at issue in that judgment, the Commission relied on the wording of planning documents, the information given by one of the applicants concerning those documents in response to a request for information, and the close correlation between the practices envisaged in those documents and the practices witnessed on the market (*PVC II*, paragraph 582).

103 In response to a question from the Court at the hearing of 4 June 2012, the Commission admitted that it did not have proof such as emails, letters, or minutes of meetings concerning the national territorial limitations. Therefore, the factors capable of proving concertation between the collecting societies are those referred to in paragraph 88 above, namely the discussions on the scope of the mandates contained in the RRAs held between the collecting societies in the context of CISAC’s activities, the Santiago Agreement, the Sydney Agreement, and the historical link between the exclusivity clause and the national territorial limitations.

104 In that respect, it must be observed that the absence of documentary evidence relating specifically to the national territorial limitations is all the more striking in the light of the fact that the Commission admits that some collecting societies wished to abandon the national territorial limitations. It would have been in the interest of those collecting societies to cooperate with the Commission, by providing it with documentary evidence of the existence of concertation. Given that the Commission, in the statement of objections, had demonstrated its intention to impose a fine on all the addressees, the collecting societies concerned could have cooperated with it in order to reduce the risk that they would be fined, or, at the very least, to limit the amount of that fine. Moreover, those collecting societies could have submitted evidence to the Commission establishing that the other collecting societies had put pressure on them to maintain the national territorial limitations decided in concert, but they did not do so.

105 In those circumstances, it is necessary to examine the evidential value of the elements put forward by the Commission.

a) The evidential value of the elements put forward by the Commission to prove the existence of the concerted practice without relying exclusively on parallel conduct of the collecting societies

The discussions on the scope of the mandates contained in the RRAs held between the collecting societies in the context of the activities managed by the applicant

106 As regards the discussions held between the collecting societies in the context of the activities managed by the applicant (paragraph 88 above, first indent), it must be recalled that the Commission itself stated that the contested decision does not prohibit the system of reciprocal representation between the collecting societies nor any form of territorial delineation of the mandates they grant to each other (recitals 95 and 259 to the contested decision). Likewise, the Commission does not criticise the collecting societies for a degree of cooperation in the context of the activities managed by the applicant. Rather, the Commission criticises the coordinated nature of the approach adopted

by all of the collecting societies with regard to territorial limitations.

- 107 Therefore, the mere fact that collecting societies met in the context of the activities managed by the applicant and that there is a certain amount of cooperation between them does not constitute, as such, evidence of prohibited concertation. Where the context in which meetings between undertakings accused of infringing competition law take place shows that those meetings were necessary to collectively deal with issues in no way related to such infringements, the Commission cannot presume that the object of those meetings was to focus on anti-competitive practices (see, to that effect, *Dresdner Bank and Others v Commission*, paragraphs 105 and 145). In that respect, it must be observed that the Commission has not provided any evidence that the meetings organised by the applicant concerned the restriction of competition relating to the national territorial limitations.
- 108 Lastly, as regards, more specifically, the discussions on the model contract, it must be pointed out that it does not expressly provide for national territorial limitations, but merely invites the collecting societies to define the territorial scope of the mandates they grant each other in the RRAs.

The Santiago Agreement

- 109 The Santiago Agreement (paragraph 88 above, second indent) provided, with regard to the exploitation of copyright via the internet, that each collecting society which was party to that agreement could grant licences covering all the territories and for all the repertoires (first aspect), but only to users with their economic residence in the EEA country where the collecting society granting the licence was established (second aspect). Under the system laid down by Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles [81 EC] and [82 EC] of the Treaty (OJ, English Special Edition 1959-1962(I), p. 87), that agreement was notified to the Commission by some of the collecting societies, with a view to obtaining an exemption on the basis of Article 81(3) EC. The Commission challenged the clause which prevented each collecting society from granting licences to users which were not established in the same country as that collecting society, and issued the Santiago statement of objections. In those circumstances, none of the collecting societies renewed the Santiago Agreement for the period subsequent to its date of expiry, agreed from the outset as being the end of 2004. Accordingly, once that agreement expired, the national territorial limitations contained in the RRAs – which had remained in force for users other than internet users even during the period covered by that agreement – became applicable again between all the collecting societies, including as regards the exploitation of copyright via the internet, since the derogation clause concerning exploitation via internet, added to the RRAs as a consequence of the Santiago Agreement, had expired.
- 110 The Commission's argument that the return to national territorial limitations by all of the collecting societies is proof of concertation cannot be accepted. In the absence of evidence that the collecting societies acted in concert for that purpose, the return to national territorial limitations does not demonstrate the existence of concertation relating to the national territorial limitations, but may be regarded as being merely the natural result of the non-renewal of the Santiago Agreement, which was no longer of interest since its second aspect had not been accepted by the Commission. The fact that the collecting societies returned to the *status quo ante* does not prove, in itself, that they acted in concert for that purpose.
- 111 It must be pointed out that the return to the *status quo ante* may simply be the result of the fact that the collecting societies could not suspend all forms of cooperation between them concerning forms of copyright exploitation relating to new technologies, while they waited to find – bilaterally, or even multilaterally, but in accordance with competition law – different solutions to that contained in the Santiago Agreement.
- 112 Moreover, it must be observed that the Commission, in the contested decision, did not claim that the infringement referred to in Article 3 of that decision had begun after the expiration of the

Santiago Agreement, but, without specifying the start date, seemed to consider that it preceded that agreement.

113 In that respect, either the Santiago Agreement is subsequent to the date, unspecified in the contested decision, at which the infringement supposedly began, in which case it cannot be used as evidence of initial concertation, in respect of which it is more in the nature of an interruption, or the agreement precedes the start of the infringement relating to the national territorial limitations, in which case it cannot prove that infringement, since it does not concern the same restriction of competition. The residence clause contained in the Santiago Agreement led to a different situation to that arising from the national territorial limitations. In the first case, a collecting society may grant multi-repertoire licences without territorial limitations, but only to users established in the same territory as itself, whereas, in the second case, that collecting society may grant licences to any user, provided that the exploitation of the copyright concerned takes place in the same territory as that in which the collecting society is established.

114 It follows from the above that neither the existence of the Santiago Agreement nor the circumstances in which that agreement came to an end can provide evidence of concertation relating to the national territorial limitations.

The Sydney Agreement

115 By the Sydney Agreement (paragraph 88 above, third indent), the collecting societies, in 1987, inserted into the model contract a provision providing that the collecting society established in the country from which the signals carrying the programmes went to the satellite was authorised to grant licences covering the entire footprint of the satellite, where necessary after having consulted or obtained the consent of the other collecting societies concerned.

116 In that respect, it must be pointed out, first of all, that, in the contested decision, the Commission referred to the Sydney Agreement in order to show that that agreement did not constitute an appropriate response to the Commission's objections regarding the concerted practice relating to the national territorial limitations (recital 165 to and part (b) of section 7.6.1.2 of the contested decision). In recital 158 to the contested decision, which specifically concerns the elements which are said to support the concerted practice, the Commission did not expressly refer to the Sydney Agreement. Secondly, the Commission noted that, since it follows from the application of Article 1(2)(a) of Directive 93/83 that the act of communication of musical works by satellite only takes place in the country in which the first signal is introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth, the users of those works need only one licence, for that country, to exploit the works throughout the entire satellite footprint. Consequently, as the Commission itself admitted, the Sydney Agreement became obsolete as regards the multi-territorial scope of licences relating to exploitation via satellite (recitals 162, 163 and 165 to the contested decision). Lastly, the Commission indicated that the Sydney Agreement was not a factor assessed in the contested decision and that the Commission reserved the right to examine it in the context of competition rules (footnote No 131 of the contested decision).

117 It must be observed that, since the Sydney Agreement allowed the grant of multi-repertoire licences covering all of the territories served by the same satellite, that agreement did not produce effects similar to national territorial limitations, under which each collecting society may grant multi-repertoire licences only in one territory.

118 Moreover, the fact that the Sydney Agreement became obsolete from the planned deadline for the transposition of Directive 93/83, namely 1 January 1995 (see the first subparagraph of Article 14(1) of that directive), means that the potential infringement of the competition rules that it contained had already ceased to be applicable at the beginning of the administrative procedure which led to the adoption of the contested decision. Accordingly, the link between the infringement referred to in Article 3 of that decision and the infringement potentially resulting from the Sydney Agreement is

not evident, even just on chronological grounds.

- 119 It follows from the above that, even if the Sydney Agreement were the result of prohibited concertation, it does not constitute a document, within the meaning of *PVC II*, capable of proving concertation with regard to the national territorial limitations.

The alleged historical link between the exclusivity clause and the national territorial limitations

- 120 As regards the alleged historical link between the exclusivity clause and the national territorial limitations (paragraph 88 above, fourth indent), the Commission, in its written reply to one of the questions put by the Court by way of measures of organisation of procedure, stated that, since the scope of the mandate will determine whether just one collecting society will be mandated for a territory, the exclusivity clause and the national territorial limitations are inextricably linked. According to the Commission, since the model contract recommended exclusive mandates, the territory for which a collecting society was mandated could not cover a territory for which another collecting society was mandated. Therefore, the systematic insertion of territorial limitations in all of the RRAs was the necessary counterpart of the exclusivity encouraged in the multilateral recommendation. According to the Commission, the territorial limitation of all of the mandates thus originated and began in the discussions on exclusivity within the applicant.

- 121 In that respect, it must be pointed out that the Commission did not find, in the contested decision, that the national territorial limitations were part of the same infringement as that relating to the insertion of the exclusivity clause in the RRAs. In the Commission's view, the exclusivity results from the grant, in the RRAs, of exclusive rights, such as those provided for in Article 1(1) and (2), of the model contract, whereas the national territorial limitations were coordinated by a concerted practice. In recital 158 to the contested decision, the Commission observes that the deletion of express exclusivity has not led to any material change in the behaviour of the collecting societies. As the Commission itself indicates in that recital, the question which arises is whether, after the deletion of the express exclusivity, there were reasons other than concertation to explain the national territorial limitations.

- 122 Consequently, even if there is a link between the exclusivity clause and the national territorial limitations, it is necessary, in the present case, to examine the behaviour of the collecting societies after the deletion of that clause, which means that the Court will have to assess the plausible explanations for the maintenance of the national territorial limitations, other than concertation (see paragraphs 134 to 181 below).

- 123 Lastly, inasmuch as the Commission claims, before the Court, that the national territorial limitations are merely a continuation of the exclusivity after that exclusivity was deleted from the RRAs, it must be pointed out that, in accordance with the case-law, Article 81 EC is applicable if parallel conduct continues after the termination of the former agreement and in the absence of its replacement by a new agreement, since, with regard to agreements which are no longer in force, it is sufficient, for Article 81 EC to be applicable, that they continue to produce their effects after they have formally ceased to be in force (Case 243/83 *Binon* [1985] ECR 2015, paragraph 17; see also, to that effect, Case T-59/99 *Ventouris v Commission* [2003] ECR II-5257, paragraph 182).

- 124 However, in the present case, it must be recalled that Article 2 of the contested decision censures the mere presence, in itself, of the exclusivity clause in the RRAs, and not the fact that several collecting societies coordinated so that that clause would appear in all of their RRAs. By contrast, as regards the national territorial limitations, the Commission, in the contested decision, acknowledged that they do not, in themselves, restrict competition, but considered that there was nevertheless an infringement, on the ground that the collecting societies acted in concert so that the same limitations would appear in all of the RRAs. The respective natures of those two infringements, as they are set out in the contested decision, are therefore different.

- 125 Moreover, the abandonment of the exclusivity clause made possible certain developments in the

market, namely the grant of the first direct licences, which are necessary if an eventual move beyond the national territorial limitations is to be envisaged.

- 126 A collecting society which is interested in the possibility that, in a territory other than that in which it is established, licences covering its repertoire may be granted by collecting societies other than the local collecting society will first of all consider whether it itself is in a position to grant direct licences in that territory. Likewise, a collecting society which wishes to receive from other collecting societies mandates which extend beyond the territory in which it is established must have a structure enabling it to grant direct licences in other countries. As long as the exclusivity clause was in force, such licences would have breached the exclusive mandate granted to the local collecting society. That is no longer the case once the exclusivity clause disappears, even if the national territorial limitations remain. Accordingly, it cannot be found that those limitations pursue, by alternative means, the same restriction.
- 127 Indeed, as the Commission acknowledged in its written reply to one of the Court's questions, the direct licences market was still at an embryonic stage at the time of the adoption of the contested decision. The spread of direct licensing required, in particular, that a demand for such licences develop on the part of major users which – instead of turning to the collecting societies of all the countries in which they operate – would prefer to acquire direct licences, valid worldwide, over the repertoires which interest them.
- 128 Accordingly, the fact that those developments did not occur right away, and that they did not immediately affect the national territorial limitations, does not mean that it can be concluded that those limitations constitute the preservation, by means of a concerted practice, of the anti-competitive conduct relating to the exclusivity clause.
- 129 Moreover, it is necessary to take account of the fact that the structures for collective copyright management in respect of the forms of exploitation covered by the contested decision originated in the structures used for traditional forms of exploitation, with regard to which the national territorial limitations are not considered by the Commission to constitute an infringement of competition rules.
- 130 The arrival of new information technologies allowing the exploitation of works online does not mean that those structures are suddenly obsolete or that the economic operators concerned should immediately demonstrate their intent to compete. Thus, the mere fact that, after the deletion of the exclusivity clause, the collecting societies did not quickly modify the national territorial limitations could show that those limitations are explained by reasons other than the continuation, in another form, of the exclusivity.
- 131 It follows that the fact that the Commission has proven the existence of anti-competitive conduct as regards the exclusivity clause does not mean that it has also proven the existence of anti-competitive conduct as regards the national territorial limitations.

Conclusions on the evidence put forward by the Commission

- 132 It follows from the above analysis that the evidence put forward by the Commission does not establish, to the requisite legal standard, the existence of a concerted practice between the collecting societies to fix the national territorial limitations.
- 133 Consequently, it is necessary to examine whether the Commission provided sufficient evidence to render implausible the explanations of the collecting societies' parallel conduct, put forward by the applicant, other than the existence of concertation.
- b) The plausibility of the explanations for the parallel conduct of collecting societies other than the existence of concertation

Preliminary observations

- 134 The applicant, supported by EBU, claims that the national territorial limitations are the result of individual, carefully considered and rational decisions on a practical and economic level, given the specific conditions of the market, and not the result of a concerted practice.
- 135 The applicant's arguments relating to the existence of explanations – other than the existence of concertation – for the parallel behaviour of collecting societies are centred on the need for a local presence to monitor effectively the exploitations of copyright and the need to ensure that the amount of royalties received by the authors does not diminish. The applicant also refers to the importance of national territorial limitations for maintaining the existence of national 'one-stop shops' from which users may obtain licences in respect of the worldwide repertoire. That last argument is developed by EBU.
- 136 It must be recalled, first of all, that in Case 395/87 *Tournier* [1989] ECR 2521 and Joined Cases 110/88, 241/88 and 242/88 *Lucazeau and Others* [1989] ECR 2811 the Court ruled on references for a preliminary ruling from French courts concerning the compatibility with the rules of competition of the situation in which, with regard to traditional (offline) forms of copyright exploitation, collecting society B refused to grant a licence to repertoire B in territory A, forcing users established in country A to turn to collecting society A, whose rates were higher.
- 137 The Court held that the RRAs could be considered to be agreements restrictive of competition if they established an exclusivity whereby collecting societies undertook not to grant direct licences to users established abroad. However, it observed that clauses of that kind which previously appeared in RRAs had been removed at the request of the Commission. The Court then considered whether the fact that the removal of those clauses from the contracts had not resulted in any change in the conduct of the collecting societies allowed the conclusion that the management societies had in fact retained their exclusivity by means of a concerted practice. In that respect, the Court pointed out that mere parallel conduct may, in certain circumstances, amount to strong evidence of a concerted practice if it leads to conditions of competition which do not correspond to the normal conditions of competition. Nevertheless, it stressed that concertation of that kind cannot be presumed where the parallel conduct can be accounted for by reasons other than the existence of concertation, and that such might be the case if collecting societies would be obliged, in order to grant direct licences, to organise their own management and monitoring system in another territory. The issue of whether concertation prohibited by the competition rules had actually taken place was left to the national courts which had made the references for a preliminary ruling (*Tournier*, paragraphs 20 to 25, and *Lucazeau and Others*, paragraphs 14 to 19).
- 138 It is necessary, in the present case, to examine whether the Commission was right to find that the presence in all the RRAs of national territorial limitations did not correspond to the normal conditions of the market. In that respect, according to the case-law, it is for the party or the authority alleging an infringement of the competition rules to prove its existence and it is for the undertaking or association of undertakings invoking the benefit of a defence against a finding of an infringement to demonstrate that the conditions for applying such defence are satisfied, so that the authority will then have to resort to other evidence. Thus, although according to those principles the legal burden of proof is borne either by the Commission or by the undertaking or association concerned, the factual evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged (see *Knauf Gips v Commission*, paragraph 80 and the case-law cited).
- 139 Next, it must be recalled that the Commission does not claim that the limiting, in the RRAs, of the geographic scope of the reciprocal mandates to national territories cannot arise from normal market conditions. It is only the fact that all of the RRAs contain such a limitation that, according to the Commission, can be explained only by a concerted practice. Moreover, in that respect, the contested decision does not contain any data or economic analysis regarding the financial incentives which could have led the collecting societies to abandon the national territorial limitations in respect of the

forms of copyright exploitation with which that decision is concerned, when it is not contested that those limitations were rational for the traditional forms of exploitation.

The need for a local presence to ensure the effectiveness of the fight against the unauthorised use of musical works

- 140 The applicant and EBU submit that the collecting societies considered it was in the interest of their members, and therefore rational, to provide for territorial limitations in their RRAs, since those limitations were a means of ensuring the effectiveness of the fight against the unauthorised use of musical works.
- 141 It must be examined whether the evidence which the Commission relied on in the contested decision is such as to render this explanation implausible.
- 142 In that respect, it must be stated that, in recital 11 to the contested decision, the Commission noted that its examination concerned only the legal exploitation of copyrighted material. Likewise, in recital 47 to the contested decision, the Commission stated that the decision only deals with lawful uses of works and that acts of piracy or uses in the absence of an exploitation licence are therefore outside of its scope of application. According to the latter recital, considerations and assessments in the contested decision are valid only within the limits of the usual and normal relationship between collecting societies and users.
- 143 However, in recital 46 to the contested decision, the Commission acknowledged that the collecting societies monitor the use of copyright, audit users' accounts, and enforce copyright in the case of infringement of those rights. Moreover, in recital 11 to that decision, the Commission claimed that, as explained *inter alia* in section 7.6.1.4, that decision did not prevent collecting societies from monitoring the market in order to spot unauthorised uses of copyright works, or from taking enforcement measures against such behaviour.
- 144 In light of those ambiguous statements by the Commission, it must be held that, if, by those statements, the Commission confined itself to taking into consideration only authorised uses, the decision should be annulled for that reason, since it does not explain why it is possible to separate the monitoring of authorised uses and the uncovering and taking action against unauthorised uses. Admittedly, during the proceedings before the Court, in particular at the hearing of 4 June 2012, the Commission claimed that the fight against piracy is a task carried out, for the most part, by the International Federation of the Phonographic Industry (IFPI), the international organisation representing music publishers, which acts from its office in London (United Kingdom). However, if, by that – unsupported – statement the Commission seeks to claim that the collecting societies are in no way involved in the monitoring enabling the detection of unauthorised uses, it must be pointed out that such an argument does not emerge from the contested decision. The Court cannot take into consideration an element put forward for the first time by the Commission during these proceedings, as the failure to state reasons in the contested decision in respect of such a point cannot be remedied during the proceedings before the judicature of the European Union (see, to that effect and by analogy, Case C-521/09 P *Elf Aquitaine v Commission* [2011] ECR I-0000, paragraph 149 and the case-law cited).
- 145 However, despite the statements of the Commission referred to above, it is clear from the contested decision that it broached, in any event, the issue of whether the parallel conduct of the collecting societies as regards the national territorial limitations was the result of their wish to fight effectively against unauthorised use. Accordingly, the Commission itself seems to acknowledge that this explanation cannot be dismissed by the mere statement that the contested decision concerns only lawful copyright exploitation. Therefore, it is necessary to examine whether the passages of the contested decision concerning that issue are sufficient to render implausible the applicant's argument, summarised in paragraph 140 above.
- 146 First, the Commission states that the system which it censures in the contested decision is not based

on the principle of proximity between the collecting society which grants the licence and the licensee user, but rather on the principle that the licence is granted by the collecting society established in the country where the exploitation takes place, regardless of the country of residence of the licensee (recitals 171 to 173 to the contested decision).

- 147 In that respect, it is true that, under the system censured by the Commission, it is possible that collecting society B, which has granted a licence to a user established in country A for exploitations taking place in country B, must take administrative or legal action against that user in country A, that is to say, remotely.
- 148 Nevertheless, in that system, if collecting society B grants a licence to a user established in country A but which is active in country B, it can – in the event that an infringement of that licence is detected – call, if necessary, upon collecting society A. Collecting society A would not see collecting society B as a competitor, given that collecting society A cannot itself grant licences in relation to exploitations which take place in country B. Moreover, since collecting society A – for exploitations taking place in country B – has entrusted its repertoire to collecting society B, it has an interest in seeing that the infringements of the licences granted by collecting society B are effectively prosecuted.
- 149 In the contested decision, the Commission claimed that, for the monitoring and enforcement of copyright for which a local presence is necessary, a collecting society which granted a licence to a user established in another country may have recourse to local providers, in particular to the local collecting society. However, the Commission did not explain how such cooperation could work once competition between the collecting societies has been experienced. In particular, in the contested decision, it did not analyse what financial and commercial interests would induce the local collecting society to cooperate with another collecting society competing with it in its territory.
- 150 Furthermore, it must be pointed out that the Commission did not answer the question of who would manage the general monitoring of the market in order to require users to request licences – not merely the monitoring of licences which have already been granted – if the collecting societies were not involved in the execution of that task. Without being contradicted by the Commission, the applicant claims that one of the tasks of collecting societies is to require unauthorised users of musical works to request the necessary licence. According to the applicant, the collecting society best able to carry out that task is, for each territory, the local collecting society, which has the most thorough knowledge of the market of the country in which it is established. Yet if that collecting society had no guarantee of recovering – by the revenue it receives from granting licences – the expenses related to the monitoring which it carries out, that activity would simply not be viable. That guarantee would be threatened if several collecting societies could grant, for the same territory, licences covering the same repertoires. It must be stated that the Commission has not provided any information capable of undermining the credibility of the applicant's argument in that respect.
- 151 In addition, the Commission has not been able to explain how there could be cooperation between collecting societies which would be competing to grant licences in respect of repertoires which overlap and cover the same territories. Although it is inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the internal market, the Commission, in the contested decision, also acknowledges that cooperation between the collecting societies is necessary in order for each collecting society to be in a position to offer multi-repertoire licences (see, for example, recital 166 to the contested decision). In particular, in order to be able to grant a licence covering the worldwide repertoire, a collecting society must cooperate with all the other collecting societies. Yet the contested decision fails to provide any element to explain how – between collecting societies which have become competitors, as called for by the Commission – the cooperation which the Commission considers to be necessary, *inter alia*, for certain monitoring activities and for the prosecution of infringements, would take place (recitals 177 and 178 to the contested decision).

- 152 Before the Court, the Commission claimed that local collecting societies could not abandon their monitoring role, even if they were in competition with other collecting societies, since they have a fiduciary obligation to the right holders. In that respect, it must be pointed out that the fiduciary obligation at issue only applies to the relationship between a collecting society and the right holders affiliated to it. Therefore, it is not certain that a local collecting society is under a fiduciary obligation to carry out its activities for the benefit of right holders affiliated to other collecting societies once it is no longer the sole collecting society which may grant licences in the territory in which it is established. Moreover, it is not contested that collecting society A would have no obligation towards collecting society B, if collecting society B had conferred the management of repertoire B in territory A to collecting society C, which is not established in territory A.
- 153 The argument, also put forward by the Commission before the Court, that local collecting societies would need to maintain their reputation for efficiency in the detection of unauthorised users so that their members do not turn to other collecting societies, cannot succeed. If the users, whose unauthorised use of musical works have been detected by the local collecting society, could obtain the licences necessary to lawfully exploit those works from other collecting societies, the local collecting society could not pass on to the users, through the price of those licences, the management expenses arising from its monitoring of the market. That would compromise the reputation of that collecting society among its affiliates, since the latter would see their royalties diminish due to the management fees linked to the monitoring of the market, which would not be recovered through the grant of licences by the same collecting society. A collecting society has no interest in carrying out monitoring activities which generate management expenses reducing the royalties it can distribute to its affiliates, if it is not guaranteed that it will recover those expenses through the grant of licences, once it has detected unauthorised uses, and that is all the more so where the right holders are free to affiliate to their preferred collecting society.
- 154 Moreover, the Commission's argument that the cost of the monitoring that the local collecting society must carry out to protect its affiliates would not increase because that collecting society also monitors the exploitation of copyright of other authors is in no way substantiated.
- 155 Finally, it must be taken into account that even if cooperation between the local collecting society and the collecting society which grants the licence to a user were possible, that cooperation would involve three collecting societies, namely the local collecting society C, the mandating collecting society A, holder of repertoire A, and the mandated collecting society B, which, by virtue of the mandate that collecting society A confers on it, may grant licences covering repertoire A in territory C. While the intervention of collecting society C is capable of giving rise to expenses, the Commission has not explained what benefit collecting society A would obtain from conferring the management of repertoire A in territory C, not to collecting society C, but to collecting society B, though it would involve additional expense.
- 156 Secondly, the Commission claims that, for the forms of exploitation of copyright with which the contested decision is concerned, there are technical solutions which allow the remote monitoring of the licensee. In that respect, it states that the collecting societies have already put in place licensing practices which demonstrate their capability to monitor uses and users outside the territory in which they are established (recital 174 to the contested decision).
- 157 However, the Commission cannot refute the explanation of the parallel conduct of the collecting societies advanced by the applicant, concerning the need to combat unlawful uses, by merely stating that there are technological solutions which allow remote monitoring as regards the forms of exploitation which the contested decision concerns.
- 158 Admittedly, in recital 189 to that decision, the Commission added that, at the hearing, it had been demonstrated, especially by the European Digital Media Association (EDIMA), an association representing firms involved in the provision of audio and audio-visual content online, that remote monitoring of online delivery of music can be accomplished in practice. Each musical work has an

electronic identity and each personal computer has an internet protocol address. On the basis of that information, the collecting society can ensure, when it delivers the licence, that the user is in a position to know precisely which musical work is used, by which computer, and for which kind of use. The user which has received the licence can then send that data to collecting societies which will use it to accurately distribute royalties between the right holders.

159 However, that explanation is limited to the monitoring of licences, and does not resolve the issue of how, and by whom, unauthorised uses are to be detected and prosecuted. That explanation is even less illuminating as regards the economic incentives which would motivate collecting societies to remotely monitor a given market, when users active in that market which do not have the necessary licence might request one from a collecting society other than the monitoring collecting society.

160 In the absence of specifics with regard to whether the technical solutions, referred to in recital 189 to the contested decision, allow unauthorised uses to be combated effectively, it is necessary to examine whether the examples invoked by the Commission in the contested decision to respond to the applicant's arguments render implausible the applicant's explanation that the national territorial limitations serve to guarantee the effectiveness of the fight against the unauthorised use of musical works.

161 In that respect, account must be taken of the fact that, where the Commission uses certain examples to render implausible the applicant's argument, the Commission has the burden of showing why those examples are relevant. Moreover, the Commission cannot criticise the applicant for failing to provide further specifics regarding its other explanation, inasmuch as it is the Commission which must prove an infringement. Therefore, if the Commission, at the administrative stage, considers that the applicant had not sufficiently substantiated its explanation, it must continue the examination of the case or find that the concerned parties have not been capable of providing the necessary information. However, in the present case, it is not apparent from the contested decision that the Commission's insufficient analysis is the result of the fact that it could not obtain from the applicant and the collecting societies the evidence which it needed to examine whether there were plausible explanations for the parallel conduct of the collecting societies.

– The NBC model

162 The Commission first cited the NBC model (see paragraph 36 above), with regard to which it stated, in recital 179 to the contested decision, that it provides for one single licence covering both the mechanical and the performing rights, in respect of all the countries in which collecting societies participating in that model are established. The Commission also mentioned that 'Nordic and Baltic' collecting societies claimed that the NBC model had showed, inter alia, that in any multi-territorial licensing model, the existence of a network of national societies cooperating in preserving the rights and interest of the right holders is essential, since the local presence is necessary in order to detect abuse and monitor usage of rights.

163 Before the Court, the Commission claimed, by contrast, in its written reply to a question put to it by way of measures of procedural organisation, that the NBC model – at least at the time of adoption of the contested decision – did not concern performing rights, but only mechanical rights. It added that this did not affect the relevance of the NBC model to its argument that the grant of licences for performing rights in respect of several territories did not pose difficulties, since the challenges relating to monitoring the use of mechanical rights on the internet are the same as those relating to performing rights. During the proceedings before the Court, the Commission claimed that the NBC model had not led to modification of the RRAs between the collecting societies involved and that the grant of multi-territorial licences, in the context of that model, was, as regards the performing rights, a sort of 'bundle' of mono-territorial licences, actually granted by each collecting society for its respective territory of establishment and 'assembled' by the collecting society which a user contacts.

- 164 In that respect, it must be pointed out that the Commission's hesitations, and even contradictions, with regard to the definition of the NBC model shows that it was not subject to a thorough analysis in the contested decision.
- 165 In any event, if, on the one hand, the NBC model concerns only mechanical rights, the Commission has not explained why it should be considered that the difficulties presented by the monitoring of performing rights are in essence the same as those presented by the monitoring of mechanical rights. On the other hand, if the NBC model also covers performing rights, but merely allows the grant of a bundle of mono-territorial licences, the Commission has not explained how the monitoring difficulties particular to such means of granting licences are comparable to those of multi-territorial licences.
- 166 As a result of the Commission's insufficient analysis of that model in the contested decision, the Court cannot draw any consequences from it with regard to the justification of the Commission's claim that the need to combat the unlawful use of works protected by copyright did not justify the collecting societies' choice to retain the national territorial limitations in their RRAs.
- The Simulcasting and Webcasting agreements
- 167 In recital 191 to the contested decision, the Commission referred to the Simulcasting and Webcasting agreements (see paragraph 35 above), which, according to the Commission, demonstrate that it is not technically necessary for collecting societies to be physically present in a given territory in order to offer multi-territory and multi-repertoire licences for internet use and to properly monitor such use.
- 168 It is not disputed that the Simulcasting and Webcasting agreements do not cover performing rights, but rather other types of intellectual property rights such as 'neighbouring' rights. The contested decision does not contain any explanations as to why the solutions devised for those neighbouring rights are applicable to the rights with which the contested decision is concerned. No comparison of the characteristics or the economic value of the various forms of intellectual property rights at issue can be found in the contested decision, nor any information concerning the practical application of the Simulcast and Webcasting agreements.
- 169 In those circumstances, it cannot be held that the Commission's reference to those agreements refutes the explanation that the retention of the national territorial limitations in the RRAs is a result of the need to ensure the effectiveness of the fight against unauthorised use.
- The Santiago Agreement
- 170 In recital 192 to the contested decision, the Commission refers to the Santiago Agreement (see paragraphs 28, 30 and 109 to 114 above), which, in the Commission's view, demonstrates the possibility of granting multi-territorial licences.
- 171 However, that reference to the Santiago Agreement is not relevant, inasmuch as the Commission takes into consideration only the first aspect of that agreement, namely the possibility of granting licences which are not territorially limited, without taking account of the second aspect, namely the limitation of the possibility of granting such licences to users established in the same territory as the collecting society which grants the licence. The Commission, in the contested decision, does not explain why the system provided for in the Santiago Agreement ensures the effectiveness of the fight against unlawful use, even in the absence of its second aspect.
- 172 Although the Court is not required, in the present action, to rule on the validity of the reason for which the Commission, in the Santiago statement of objections, found that the agreement in question was contrary to Article 81 EC, specifically because it guaranteed to one sole collecting society the possibility of granting licences to users established in a given territory, it cannot be ignored that the system provided for in the Santiago Agreement, by introducing a system different to that arising

from national territorial limitations, but based on a form of exclusivity guaranteed to the local collecting society, does not allow any conclusions to be drawn as regards the effectiveness of the fight against unauthorised use in a context where the collecting societies would be in competition.

- 173 For those same reasons, the Commission is also unjustified in relying on the response of the Czech collecting society, Ochranný svaz autorský pro práva k dílům hudebním (OSA), to the statement of objections, referred to in recitals 180 and 181 to the contested decision. OSA merely explained that it had granted licences based, in essence, on the Santiago Agreement, that is to say, licences, admittedly multi-territorial, but for the benefit of users established in the Czech Republic only.
- The CELAS joint venture, the grant of direct licences and the initiative of a publisher
- 174 In recital 193 to the contested decision (see paragraph 37 above), the Commission referred to the fact that, in January 2006, the collecting societies of Germany and the United Kingdom created a joint venture, CELAS, which was to act as a pan-European one-stop-shop for the licensing of online and mobile rights of the Anglo-American repertoire of a publisher. According to the contested decision, CELAS will deliver pan-European licences to commercial users located in any EEA country. Consequently, in the Commission's view, that new model effectively demonstrates the technical possibility for collecting societies to offer a multi-territory licence and that the arguments related to the auditing, monitoring and enforcement tasks of collecting societies and the required geographic proximity between the licensor and the licensee do not validate the current parallel behaviour as regards territorial limitations.
- 175 It must be pointed out that, as the Commission itself acknowledged, CELAS grants licences in respect of mechanical rights and not performing rights. As the Commission has not explained how monitoring the use of mechanical rights poses difficulties comparable to those linked to monitoring the use of performing rights, the example of CELAS does not refute the applicant's arguments. It is true, as is clear from the Commission's written reply to one of the questions put to it by the Court, that CELAS licences are supplemented by licences in respect of the corresponding performing rights, issued by Performing Right Society and GEMA. However, those performing licences are only a form of direct licenses, since those collecting societies merely grant licences which are, indeed, valid for several territories, but are limited to the repertoire which has been directly conferred to them by the right holders, and not on the basis of RRAs.
- 176 In those circumstances, it must be considered whether conclusions with regard to the evidence of the concerted practice referred to in Article 3 of the contested decision may be drawn from the phenomenon of direct licences. It must be pointed out that the existence of those licences does not call into question the parallel conduct of the collecting societies, since the national territorial limitations set out in the RRAs are not affected by the fact that the mandating collecting society itself grants licences over its repertoire which are also valid in the territory of the mandated collecting society. However, the grant of direct licences does not place two collecting societies in competition to grant licences to the same users. As is clear from the Commission's written reply to one of the questions put to it by the General Court, the collecting societies – at the very least those which have the necessary structure – grant direct licences only to major users, since it is only in respect of those major users that the expenses arising from monitoring the use of licences are compensated by the large number of exploitations carried out by those users. Therefore, if collecting society A grants direct licences to major users active in country B, collecting society B nevertheless remains the sole collecting society which can grant licences over, inter alia, repertoire A, to other users active in country B.
- 177 It follows that the phenomenon of direct licences, including the activities of CELAS and those collecting societies which have created and which grant supplementary licences to those granted by CELAS, does not pose monitoring difficulties comparable to those highlighted by the applicant. Therefore, those elements raised by the Commission, in the absence of further explanations, cannot undermine the applicant's argument.

178 The same applies to the initiative of a publisher (see paragraph 43 above), to which the Commission referred in recital 220 to the contested decision. Although it is not evident from that decision, the Commission acknowledged in its written pleadings before the Court that this initiative concerns only mechanical rights. Moreover, as the applicant points out, the Commission has never explained, still less in the contested decision, how the conditions in which a large publisher operates – with a repertoire which is commercially attractive internationally – are comparable to the conditions in which collecting societies operate.

– The document entitled ‘Cross border collective management of online rights in Europe’

179 In recital 194 to the contested decision, the Commission observed that the absence of technical and economic difficulties resulting from the abandonment of the national territorial delineation was demonstrated by the fact that certain collecting societies had signed a document entitled ‘Cross border collective management of online rights in Europe’, advocating a system based on the grant of multi-repertoire, multi-territory licences.

180 In that respect, it must be pointed out that the collecting societies which signed that document have brought actions against the contested decision, which could weaken the document’s ability to prove that there are no technical difficulties with the grant of multi-repertoire and multi-territory licences. In any event, the evidential value of that document is very limited, since it does not emerge from the documents before the Court that the collecting societies concerned had taken any steps towards applying the proposition set out in that document.

181 It follows from the foregoing that the evidence relied on by the Commission is not sufficient to render implausible the explanation – other than the existence of concertation – for the collecting societies’ parallel conduct put forward by the applicant, based on the need to ensure the effectiveness of the fight against the unauthorised use of musical works.

3. Conclusion on the outcome of the action

182 On the basis of the foregoing, it must be found that the Commission has not proved to a sufficient legal standard the existence of a concerted practice relating to the national territorial limitations, since it has neither demonstrated that the collecting societies acted in concert in that respect, nor provided evidence rendering implausible one of the applicant’s explanations for the collecting societies’ parallel conduct.

183 Article 3 of the contested decision should therefore be annulled, in so far as it concerns the applicant (see paragraph 78 above), and it is not necessary to examine the other arguments put forward by the applicant and EBU in the context of the first plea in law, relating inter alia to the importance of the national territorial limitations in order to avoid a race to the bottom with regard to royalties and to maintaining the existence of national one-stop-shops, or to examine the second plea in law.

Costs

184 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicant and EBU.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

- 1. Annuls Article 3 of Commission Decision C(2008) 3435 final of 16 July 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/C2/38.698 – CISAC), in so far as it concerns the International Confederation of Societies of Authors and Composers (CISAC);**
- 2. Orders the European Commission to pay the costs.**

Kanninen

Soldevila Fragoso

Van der Woude

Delivered in open court in Luxembourg on 12 April 2013.

[Signatures]

Table of contents

Background to the dispute and the contested decision

A – Administrative procedure

B – Relevant clauses of the model contract

C – Relevant markets

D – Application of Article 81(1) EC and Article 53(1) of the EEA Agreement

1. Membership clauses, exclusivity clauses and non-intervention clauses

2. Concerted practice relating to the national territorial limitations

E – Operative part

Procedure and forms of order sought

Law

A – The objection of inadmissibility raised by the Commission

B – Substance

1. Preliminary observations

2. The first plea in law, alleging infringement of Article 81 EC and of Article 253 EC, in that the Commission has not proved the existence of a concerted practice with regard to national territorial limitations

a) The evidential value of the elements put forward by the Commission to prove the existence of the concerted practice without relying exclusively on parallel conduct of the collecting societies

The discussions on the scope of the mandates contained in the RRAs held between the collecting societies

in the context of the activities managed by the applicant

The Santiago Agreement

The Sydney Agreement

The alleged historical link between the exclusivity clause and the national territorial limitations

Conclusions on the evidence put forward by the Commission

b) The plausibility of the explanations for the parallel conduct of collecting societies other than the existence of concertation

Preliminary observations

The need for a local presence to ensure the effectiveness of the fight against the unauthorised use of musical works

– The NBC model

– The Simulcasting and Webcasting agreements

– The Santiago Agreement

– The CELAS joint venture, the grant of direct licences and the initiative of a publisher

– The document entitled ‘Cross border collective management of online rights in Europe’

3. Conclusion on the outcome of the action

Costs

* Language of the case: English.