UDK 347.78:331.231]:339.13
Review article

CRITERIA FOR SETTING TARIFFS IN COLLECTIVE MANAGEMENT OF COPYRIGHT - COMPETITION LAW PERSPECTIVE

Romana Matanovac Vučković, Ph.D., Full Professor
University of Zagreb, Faculty of Law, Department of Civil Law
Trg Republike Hrvatske 3, 10000 Zagreb
romana.matanovac.vuckovic@pravo.unizg.hr

Siniša Petrović, Ph.D., Tenured Full Professor
University of Zagreb, Faculty of Law,
Department of Commercial Law and Company Law
Trg Republike Hrvatske 3, 10000 Zagreb
sinisa.petrovic@pravo.unizg.hr

Abstract

The purpose of this research is to explore the criteria for setting tariffs in the collective management of copyright from a competition law perspective. The study aims to identify how competition law interacts with copyright-specific characteristics, including protecting authors' rights and the operational particularities of collective management organisations (CMOs). By analysing European Union directives and case law from the Court of Justice of the European Union (CJEU), this paper investigates whether the tariffs imposed by CMOs, particularly those in dominant market positions, comply with competition rules.

The research employs a legal analytical approach, reviewing key legal texts and case law to provide a comprehensive understanding of criteria used in tariff-setting and their regulation under both copyright and competition law. It evaluates whether tariffs reflect the economic value of the rights used, considering the nature and scope of use and the economic value of the services provided by CMOs.

The major findings of this research highlight that CMOs, as de facto or de jure monopolies, must set tariffs based on fair and objective criteria to avoid abuses of dominant positions. The implications of these findings suggest that appropriate regulation of tariffs, aligned with competition law, ensures a balanced relationship between protecting authors' rights and promoting fair competition in the marketplace. The discussion here contributes to the ongoing debate on the regulation of collective management and the role of competition law in safeguarding both authors' interests and market fairness.

Key words: *copyright, collective management organisations, criteria for tariffs in collective management of copyright, abuse of dominant position of collective management organisations*

1. INTRODUCTION

Setting tariffs in the collective management of copyright and related rights[1] is a challenging and complex issue. Many principles and rules that have been developed in practice, in jurisprudence, but also in the European Union and national copyright laws need to be followed to establish comprehensive, justified, and fair tariffs. These fees need to reflect fairness, not only towards the authors and other right holders (authors' publishers, employers, heirs, and others who acquired copyright by contractual arrangements or by law),[2] who are entitled to receive remunerations for the use of their works through collective management organisations but also in relation to the users of copyright works.

Copyright is an exclusive and monopoly right. Authors may decide whether they will give a licence or authorisation for the use of their copyrighted work[3] and under which conditions. In principle, they may act as they wish: prohibit the use of their work, offer it for free, or demand a fee that potential users are unwilling to pay, resulting in the work remaining unused. No national laws on copyright or any other laws may generally impose to an author the obligation to grant a licence or authorisation for use, to charge a particular price, or to grant the licence or authorisation for use under uniform terms to all users or for similar types of uses. Although being an exclusive and monopoly right, individual copyright shall, in principle, not fall under the scrutiny of competition rules. Like other property rights, the exclusive nature of copyright shall not, in principle, raise the question of abuse of monopoly. Nevertheless, there are circumstances where the situation changes, in exceptional cases that lead to the need to apply competition rules for copyright matters. One of those cases is where copyright is exercised (or administered) through collective management systems by collective management organisations.[4] Those situations shall be examined here from a competition law perspective concerning criteria for setting the tariffs.

---

1 Hereinafter, when said „copyright", this embraces copyright and related rights, such as performers' rights, phonogram producers' rights and all other related (neighbouring) rights that could be exercised collectively through collective management organisations.

2 Hereinafter, when said „authors", this embraces authors and all other owners of copyright, whether acquired whole copyright, such in the case is with heirs, or acquired parts of it referred to as „rights or use" or economic rights, such in the case of employers, publishers and others who may acquire copyright by virtue of a legal transaction, such as contract, or by law, such as employers in cases where it is regulated in the relevant copyright laws or film producers in the same position. This also embraces the owners of related rights, either acquired under law or by a legal transaction.

3 Hereinafter, when said "copyrighted work", this embraces all types of copyrighted works but also all types of objects of related rights in relation to which related rights may be exercised collectively through collective management organisations, such as performances of phonograms.

4 Hereinafter, a collective management organisation shall be referred to as CMO.

When a CMO tariff sets remuneration for the use of work, the dynamic changes due to their *de facto* or *de jure* monopoly. Some principles must be followed to avoid infringing competition rules when setting tariffs by CMOs. Several European Union directives, national laws, European and national case law, and jurisprudence regulate criteria for setting tariffs that align with the competition rules. Nevertheless, we remain far from having a complete and comprehensive legal framework that addresses all questions regarding the criteria for setting tariffs. New questions continue to arise in this evolving field due to financial interests that lay in the background. The relationship of tensions between authors represented by CMOs, who are striving for higher remunerations, on the one side, and users whose intentions are basically to avoid payments, if possible, or to lesser them to the lowest possible amount, on the other, are cause for action on both sides. This inevitably leads to the activities of legislators, competition authorities, and the courts, which try to assess different situations objectively. Sometimes, they succeed, but sometimes, the challenges remain and lead to new disputes.[5] This text will concentrate on competition issues related to traditional circumstances, such as general public performance rights, broadcasting rights, or cable and other retransmission rights. We shall focus on EU perspective. Online collective management of copyright remains for some other occasion because, with this respect, many aspects of collective management change, particularly from the competition law perspective.[6]

2. COLLECTIVE MANAGEMENT ORGANISATIONS AS MONOPOLY UNDERTAKINGS

Collective management is a speciality of copyright, mainly developed during the 20th century.[7] It consists of a series of activities directed towards exercising copy-

---

5 For example, a new case is pending in the CJEU: Request for a preliminary ruling from the Krajský soud v Brně (Czech Republic) lodged on 29 February 2024 – OSA - Ochranný svaz autorský pro práva k dílům hudebním, z.s. v Úřad pro ochranu hospodářské soutěže (Case C-161/24, OSA). *Krajský soud v Brně* refers to the Court the question whether the allegedly excessive prices charged by a collective management organisation OSA to accommodation facility operators for the provision of a licence to make copyrighted works available by means of television and radio receivers located in rooms intended for the accommodation of private guests, which do not take into account the actual occupancy of the individual rooms of the accommodation facilities concerned, amount to an abuse of a dominant position.

6 For more about tariffs in online collective management of copyright see, for example, Matanovac Vučković, Romana, Implementation of Directive 2014/26/EU on Collective Management and Multi-Territorial Licensing of Musical Rights in Regulating the Tariff-Setting Systems in Central and Eastern Europe, IIC (2016) 47:28-59, DOI 10.1007/s40319-015-0438-5. For the critical approach see also Hviid M., Schroff S., Street J., Regulating Collective Management Organisations by Competition: An Incomplete Answer to the Licensing Problem?, 7 (2016) JIPITEC 256 para 1.

7 See for example History of Collective Management, CISAC, https://www.cisac.org/Newsroom/expert-articles/history-collective-management (last visit 9.1.2025.)

right by collective management organisations, most often (but not always) established as non-for-profit organisations, which bring together authors as their members, *i.e.* individuals who control them.[8] Despite their non-commercial business, CMOs are considered undertakings and fall within the competition rules. A layer contributing to this status is that CMOs are usually *de facto* and sometimes even *de jure* monopolies.[9] The activities of collective management are, in brief, collecting the remunerations from users due to authors for the use of their copyrighted works and distributing them to individual authors, either directly or through other collecting management organisations established in other territories. The network of CMOs worldwide is organised under the umbrella of their international association, CISAC.[10] This network is based on reciprocal representation agreements, whereby CMOs mutually mandate each other to exercise rights on behalf of the authors who are their members, within the territory of their establishment. So, collective management, in principle, shall apply in copyright where authors are not in a position to exercise their rights individually through individual negotiations and contracts with users because this way of exercising their rights would be technically impossible or economically unfeasible. Therefore, they merge their rights in a bundle and negotiate the prices for the whole repertoire.[11] As a result of the network created by all the reciprocal representation agreements, each CMO can offer a global portfolio of musical works to commercial users,[12] but only for use in its national territory.

---

8 Precise definition see in Art. 2 a) of the Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market *[2014] OJ L 84/14 Hereinafter, Directive on collective management of copyright.*

9 An informative overview of countries that have a *de jure* or *de facto* monopoly of collective management organizations, as of September 2019, can be found at Matanovac Vučković, R. General Report: Collective Management of Rights, in Leška, R. (ed) Managing Copyright – Emerging Business Models in the Individual and Collective Management of Copyright, 2021, p. 226.

10 CISAC – the International Confederation of Societies of Authors and Composers – is the world's leading network of authors' societies. With 227 member societies in 116 countries, CISAC represents more than 5 million creators from all geographic areas and all artistic repertoires; music, audiovisual, drama, literature and visual arts. CISAC protects the rights and promotes the interests of creators, worldwide. Founded in 1926, CISAC is a non-governmental, not-for-profit organisation with headquarters in France and regional offices in Africa, South America (Chile), Asia-Pacific (China) and Europe (Hungary). cisac.org (last visit 30.9.2024)

11 The functioning of CMOs, including the explanations on the repertories see for example in Ficsor, M., Collective Management of Copyright and related Rights, 3rd edition, WIPO, 2022

12 For voluntary, mandatory and extended collective management see also Matanovac Vučković, *op. cit.* in ft. 8.

The principle of territoriality is inherent to intellectual property;[13] therefore, from the inception of their activities, CMOs have been established on a territorial basis. This idea of territorial organisation of CMOs was under severe scrutiny by the European Commission.[14] It identified specific clauses in the reciprocal representation agreements related to membership and exclusivity and the concerted practice that CMOs apply, leading to a strict domestic territorial segmentation of licensing areas. All mentioned clauses were declared anti-competitive by a Commission. A couple of years later, the CJEU annulled Art. 3[15] of the Commission's Decision, by explaining that "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."[16] This was an excellent "victory" for the system of collective management because reciprocal representation agreements are at its core, making the system stable and reliable. The Court's judgement confirmed that there are reasonable grounds for specific exclusivity of mandate and strict domestic territorial segmentation of licensing areas, which should not be regarded as a concerted practice related to the national territorial limitations.

However, the die was cast, and collective management took a different direction in the following years. The Directive on collective management of copyright in 2014 introduced a dramatically new view of CMOs acting on the online market. Since territorial delineation is not applicable online, the new rules for online cross-border licensing introduced non-exclusivity in mutual representation among CMOs as the binding principle.[17] This, supported by new membership

---

13 The principle of teritoriality may impose competition issues if authors prition the internal market of the European Union. For examples see Hugenholtz, P.B., Dealing with Territoriality in EU Copyright, in Leška, R. (ed) Managing Copyright – Emerging Business Models in the Individual and Collective Management of Copyright, 2021, p. 192.

14 Summary of Commission Decision of 16 July 2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/C-2/38.698 — CISAC) (notified under document number C(2008) 3435 final), 2008/C 323/08.

15 Article 3. of the Commission Decision of 16 July 2008 regulates that CMOs 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.

16 Judgment of the General Court (Sixth Chamber) of 12 April 2013, CISAC v European Commission, T442/08, EU:T:2013:188, at 182.

17 Art. 29 para 1 and rec. 44 of the Directive on collective management of copyright, which regulates that any representation agreement between CMOs whereby a CMO mandates another CMO to grant multi-territorial licences for the online rights in musical works in its own music repertoire is of a non-exclusive nature.

rules,[18] created an environment for full competition among CMOs online. The efficiency of this approach still remains under review.[19] Nevertheless, the traditional relations among CMOs based on the reciprocal representation agreements were also affected by this change. Therefore, today, the monopoly position of CMOs and strict territorial delineation cannot be seen as an untouchable fundament of collective management.

The explained situation falls within Art. 101 of TFEU and refers to agreements between undertakings, decisions by undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

In addition, many disputes against CMOs in the CJEU were based on Art. 102 of TFEU, examining whether a CMO of a dominant position within the internal market or a Member State abuses this position by imposing unfair prices or other unfair trading conditions or applying dissimilar conditions to equivalent transactions with different trading parties, thereby placing them at a competitive disadvantage. The question may arise why would CJEU be competent for assessing the abuse of a dominant position if the CMO is setting tariffs only for the country with its principal establishment concerning undertakings, *i.e.* users, who are also established in the relevant country? Where would a cross-border element here entitle CJEU to act within the competencies given to it within the European Union? CJEU gave several explanations for those questions. The rates charged by a CMO which holds a monopoly are capable of affecting cross-border trade among Member States because the CMO in every Member State, in addition to the representation of domestic authors, also manages the rights of foreign authors based on the network of reciprocal representation agreements with CMOs in other countries.[20]

The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position, which is such as to influence the structure of a market. As a result of the very presence of the undertaking in question, the degree of competition is weakened. Through recourse to methods different from those

---

18 See in particular Arts. 4 to 10 of the Directive of collective management of copyright.

19 For the critical view see Matanovac, *op. cit.* in ft 6, p. 47 to 56.

20 CJEU explained this in C177/16, Autortiesību un komunicēšanās konsultāciju aģentūra/Latvijas Autoru apvienība v Konkurences padome, EU:C:2017:689 (Hereinafter *AKKA/LAA*) at 28, 29, and 30, referring to C-395/87, Ministère public v Jean-Louis Tournier, EU:C:1989:319 (hereinafter referred to as *Tournier*), C-110/88, François Lucazeau and others v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others (hereinafter referred to as *Lucazeau)* and C351/12, OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.,– *OSA*, EU:C:2014:110. (hereinafter referred to as *OSA)*.

which condition normal competition in products or services on the basis of the transactions of commercial operators, dominant position has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.[21] So, one CMO with a *de jure* or *de facto* monopoly on the market is abusing its dominant position mainly by imposing excessive prices due to unfair criteria or methodology for calculating remuneration when setting tariffs.[22] Excessive prices are those which do not correspond to the economic value of the service provided.[23] Therefore, in examining whether the CMO is abusing its dominant position, the tariff should be examined in relation to the economic value of the service provided by the respective CMO.[24]

Abuse of a dominant position may also occur in the situation when the dominant undertaking applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, which may happen when the CMO applies different criteria and methodology for the calculation of tariff towards different users for the same type of right.

3. CRITERIA FOR SETTING THE TARIFFS IN LIGHT OF COMPETITION RULES

The Directive on collective management of copyright is a milestone in regulating collective management across the European Union. This piece of legislation also systematically approaches the criteria for setting tariffs by CMOs to give direction and simultaneously allow the Member State to introduce additional criteria into their legislation, if appropriate. This is a so-called minimum harmonisation rule, which, in terms of regulatory discretion that member states retain when implementing EU directives, means that national legislation may impose additional criteria for setting the tariffs by CMOs. The provisions of the Directive that regulate criteria for setting tariffs are based on the previous case law of the CJEU and other European Union directives, which shall be analysed here.

---

21 CJEU gave this explanation in the case C-52/07 Kanal 5 Ltd and TV 4 AB v Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa., EU:C:2008:703 (hereinafter referred to as *Kanal 5*), at 25. CJEU referred to the previous cases 85/76 HoffmanLa Roche v Commission EU:C:1979:36, at 91, and C62/86 AKZO v Commission, EU:C:1991:286, at 69.

22 See *Kanal 5*, at 28.

23 This idea is based on several cases: C-26/75 *General Motors Continental* v *Commission*, EU:C:1975:150, at 12, and C-27/76, *United Brands and United Brands Continentaal* v *Commission,* EU:C:1978:22 , at 250.

24 *Kanal 5*, at 28 and 37.

3.1. Tariffs for discotheques

In the European union, among the first are the cases *Tournier*[25] and *Lucazeau*,[26] where the CJEU examined the criteria for setting tariffs. The tariffs considered remunerations for using music in discotheques.

3.1.1. *Tournier*

In *Tournier,* the Court examined whether the rate of royalties applied to discotheques demanded by SACEM[27] was arbitrary and unfair and, therefore, constituted an abuse of the dominant position. The level of royalties was appreciably higher than that applied in the other Member States. It was based on a fixed rate of 8.25% to the turnover, including value-added tax. Although the discotheques claimed to use music of Anglo-American origin considerably, SACEM refused to grant access to just part of its repertoire. At the same time, due to reciprocal representation agreements between CMOs, discotheques could not deal directly with the CMOs in other countries since they refused to grant direct access to their repertoires. So, although they no longer had exclusivity clauses in their reciprocal representation agreements, the question was raised whether they were engaged in concerted practices because of such a refusal. However, the source of the dispute was the methodology used to set the tariff for discotheques. The users claimed that the methodology is incorrect and that a comparison with other Member States dismantles the unjustified percentage. The Court answered the questions (in brief): In general, when CMOs refuse to grant a direct licence for their repertoire on a cross-border basis, it may be understood as a concerted practice, but the circumstances of every case must be assessed. On the other hand, when the CMO refuses to grant a licence only for the foreign repertoire it represents, this shall not be considered as restricting competition unless access to a part of the protected repertoire could entirely safeguard the authors' interests without increasing the management costs because the CMO shall, in this case, be obliged to organise its own management and monitoring system in another country. A CMO imposes unfair trading conditions by charging appreciably higher remunerations than the ones charged in other Member States, the rates being compared on a consistent basis. If the CMO can justify such a difference by reference to objective and relevant dissimilarities between Member States, this will not be considered as imposing unfair trading conditions.[28] This case shows that methodology based on the percentage

---

25 Judgement of the Court of 13 July 1989, *Tournier*, C-395/87, EU:C:1989:319.

26 Judgement of the Court of 13 July 1989, *Lucazeau*, C-110/88, EU:C:1989:326.

27 SACEM is French CMO for music authors.

28 Detailed findings see in *Tournier.*

of the gross income is a relevant criterion for discotheques. It also revealed that other criteria may influence tariffs in this case but comparing them across Member States should be done on consistent criteria, considering their relativity.

3.1.2. *Lucazeau*

In essence, in *Lucazeu*, the Court repeated the same conclusions, namely that the reciprocal representation agreements are not in themselves restrictive of competition.[29] On the other hand, exclusivity clauses in those contracts may restrict competition. Also, refusal to grant direct licences in other territories is a concerted practice unless there are grounds to justify such behaviour. For example, justification may be found where, in the case of direct licensing, CMOs would bear excessive costs because of the obligation to organise their own management and monitoring systems in another country. The Court also repeated that abuse of a dominant position should be where the royalties charged are appreciably higher than in other Member States, the rates being compared consistently.[30]

So, in *Tournier* and *Lucazeau*, SACEM proved that there are objective and relevant dissimilarities in copyright management in different Member States. The remuneration charged to discotheques in France was appreciably higher than in other countries because of particular circumstances which justify this. The parties in both cases presented many arguments. The Court didn't take any particular argument as decisive. Still, it concluded there was no proof that music licensing fees for discotheques in France were unjustifiably higher than in other Member States. The higher fees were based on various arguments that were neither specifically analysed nor explained by the Court. Interestingly, the *Cour d'appel* (Court of Appeal) in Aix-en-Provence raised the criterion in its third question: "Royalty is disproportionate to the economic value of the service provided."[31] It corresponds with the general criteria for assessing whether the price is excessive.

3.2. Tariffs for broadcasting and retransmission

Particularly interesting, both in legislation on the European Union's level and in the case law of CJEU, were tariffs related to broadcasting. This is because this type

[29] CJEU in *Lucazeau* acknowledged that those agreements have a dual purpose: to make the global repertoire subject to the same conditions (because of the principle of assimilation provided for in the Berne Convention) and to enable CMOs to rely on the organisational and administrative capacities of the sisters CMOs in other Member States without being obliged to organise own local management system which would significantly increase costs of operation.

[30] Detailed findings see in *Lucazeau.*

[31] *Tournier*, at 7.

of business reflects intensive commercial interests, and the users who engage in uses covered by broadcasting and retransmission rights are usually powerful and skilled in performing their legal interests. In this chapter criteria for broadcasting and retransmission shall be presented from the perspective of competition law.

3.2.1. *SatCab* 1 Directive

The criteria for setting tariffs were rarely touched upon in copyright directives because the collective management was not regulated before 2014 except in several cases. One of those cases is the *SatCab*1 Directive.[32] According to this Directive, cable retransmission rights must be exercised collectively, *i.e.* compulsory collective management applies.[33] This hinders the authors' ability to exercise their rights in individual contracts. However, according to the *acquis*, broadcasting rights are not mandatorily collective but only optional. Music rights are usually exercised collectively, while audiovisual rights are managed through individual contractual arrangements. The *SatCab*1 Directive gives directions towards criteria for tariffs for broadcasting. According to them, all aspects of the broadcast should be taken care of when setting the tariff. This mainly includes the actual audience, the potential audience and the language version.[34]

Regarding cable retransmission, *SatCab* 1 Directive did not indicate any criteria for setting the tariffs, although this right must be exercised collectively. Therefore, Member States are free to determine the methodology and criteria for tariffs for cable retransmission. In national copyright laws, there are two different approaches to criteria for tariffs for cable retransmission rights. The first is based on the percentage of gross income (VAT tax is usually excluded), and the second is based on the lump sum calculated per subscriber and number of channels included in the package.

Nevertheless, the explained provision regulated in the preamble of the Directive shall apply only to situations where broadcasting rights are exercised collectively. In individual arrangements, the prices for the content are subject to individual negotiations, and laws regularly only prescribe general directions toward criteria that may be considered in those cases. Those criteria shall usually be taken into account only when the price was not set by an individual copyright agreement

---

[32] 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 L 248, 6.10.1993, p. 15–21 [1993], as amended. Consolidated version available at http://data.europa.eu/eli/dir/1993/83/2019-06-06. (Hereinafter referred to as SatCab1 Directive).

[33] Art 9 para 1 of SatCab 1 Directive.

[34] Rec. 17 of the preamble of SatCab 1 Directive.

or when calculating damages or other compensations for unauthorised uses. So, when competition rules apply to CMOs with a dominant position in the market, those criteria shall be taken into account to assess whether the remuneration from the tariff is excessive. On the other hand, even though every individual copyright is a small monopoly of its author, no rule may force any author to give authorisation for broadcasting of their work at any price in individual arrangements or to set a price or other conditions for use in a way which does not correspond with their economic or personal interests.

3.2.2. *SENA*

SENA[35] is an example of how CJEU analysed the criteria for tariff-setting for broadcasting. It concluded that the concept of equitable remuneration appearing in Article 8(2) of the Rental and Lending Directive[36] must be regarded as an autonomous provision of EU law[37] and be interpreted uniformly throughout the EU.[38] CJEU stated that it is for the Member States alone to determine, in their territory, what the most relevant criteria are for ensuring, within the limits imposed by EU law and particularly Directive 92/100, adherence to that EU concept.[39] In defining the criteria for determining equitable remuneration, in particular the value of the right's use in trade should be considered.[40] CJEU further stated that EU law does not preclude the national model for calculating equitable remuneration by taking into account the following criteria: number of hours of broadcast, the viewing and listening densities achieved by the radio and TV broadcasters represented by broadcasting organisations, tariffs for musical works, tariffs set in the Member States bordering with the one in question, tariffs paid by the commercial stations, the balance of interests of the parties in question and principles of EU law.[41] *SENA* did not question any aspects of competition law. Still, it is worth saying that this landmark case introduces the value of the right in use as a criterion, which is particularly relevant for competition issues. It is also important

---

35 Judgement of 6 February 2003, Stichting ter Exploitatie van Naburige Rechten (SENA) v Nederlandse Omroep Stichting (NOS). – *SENA*, C-245/00, EU:C:2003:68.

36 CJEU referred to the Art. 8(2) of the Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJEU L 346 of 27 November 1992. (Hereinafter referred to as Rental and lending directive).

37 In the time of the deliverance of SENA case, it was Community law and European Communities as predecessors to the EU law and EU.

38 *SENA*, at 22 and 24.

39 *SENA*, at 34 and 38.

40 *SENA*, at 37.

41 *SENA*, at 46, 47.

to sum up all criteria that CJEU evaluated in examining equitable remuneration for broadcasting.

3.2.3. *Lagardère*

In the specific circumstances of *Lagardère,*[42] where transmission was not considered a satellite transmission, CJEU concluded that the remuneration for the use may be governed by the law of the Member State on which territory the broadcast company is established and in addition also by the legislation of the Member State in which, for technical reasons, the terrestrial transmitter broadcasting to the former is located.[43] It further established that the actual and potential audience was not entirely absent in the latter. Therefore, it was assessed that a certain economic value is attached to the use in this Member State, even though it was low. Namely, in this specific situation, actual commercial exploitation occurred only in France since the advertising slots were marketed only to French undertakings, the broadcast at issue could only be received by the public in a small area of Germany, and the broadcast itself was in French.[44] The Court repeated that when determining the remuneration for broadcasting, it is necessary to consider all the parameters of the broadcast, such as the actual audience, the potential audience, and the language version of the broadcast.[45] *Lagardère* is also not about the competition, but the findings of CJEU on the criteria for setting the tariffs in broadcasting and confirmation of the principle of territoriality shaped the understanding of the specialities of copyright and criteria for setting tariffs in collective management of broadcasting rights, which may affect the assessment whether the tariff is excessive. Namely, if the Court said that the principle of territoriality is out of the question[46] and that the CMO is entitled to determine and ask for the payment of the remuneration for broadcasting in a situation where the actual and potential audience is relatively low but not entirely absent, and the broadcasted program is

---

42 Judgement of 14 July 2005, Lagardère Active Broadcast v Société pour la perception de la rémunération équitable (SPRE) and Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) Lagardère, C-192/04, EU:C:2005:475. (hereinafter referred to as *Lagardère)*.

43 *Lagardère*, at 44.

44 *Lagardère*, at 53 and 54.

45 *Lagardère*, at 51. It repeats what is determined by the rec. 17 of *SatCab* 1 Directive.

46 The consequence of the strict application of the principle of territoriality was that Member States of the European Union are free to determine the criteria for tariff-setting as well as to decide on the methodology by which the remuneration amounts are calculated. In case of the French law which was applied in *Lagardère*, Article L. 214-1 of the French *Code de la propriété intellectuelle* (Intellectual Property Code) regulated that remuneration shall be based on the income from exploitation, failing which it shall be assessed on a flat-rate basis …See *Lagardère*, at 11 and 54.

mainly in a language not spoken in the actual territory, this shall affect the understanding of the economic value of the right in question.

3.2.4. *Kanal 5*

In *Kanal 5,*[47] CJEU examined the tariff for broadcasting in relation to the abuse of a monopoly position and found that the abuse may lie in the imposition of a price which is excessive in relation to the economic value of the service provided.[48] As commercial broadcasting companies, Kanal 5 and TV 4 asked for a broadcasting licence for musical works from STIM.[49] STIM asked for remuneration based on a percentage of gross income (derived from television broadcasts to the general public and subscription sales), the percentage of which varies based on the amount of music involved in the broadcast.[50] At the same time, a public broadcaster SVT[51] pays STIM a lump sum, the amount of which is agreed in advance. Because of different methodologies applied in setting the remuneration for similar services, *i.e.* broadcasting services, the Kanal 5 and TV 4 initiated the action before the competition authority, claiming that STIM is engaged in abusing its dominant position as a monopoly CMO in Sweden. CJEU concluded that applying the tariff based on a percentage of the broadcaster's income while taking as another criterium quantity of musical works included in the broadcast shall not amount to abuse of a dominant position unless another method enables the CMO to identify more precisely the works and the audience without resulting in a disproportionate increase in the management costs.[52]

CJEU considered that different methodologies and criteria in determining remuneration, applied to commercial versus public broadcasters, could potentially constitute an abuse of the dominant position of the CMO. To constitute an abuse, dissimilar conditions to equivalent services, *i.e.* different criteria in setting the tariff for commercial versus public broadcasters, should lead to placing them at a competitive disadvantage. In principle, the CMO needs to impose the same method of calculation (lump sum or percentage) of royalties for equivalent services, both for commercial companies and public service undertakings. But, it simultaneously emphasised that the practice of STIM may be objectively justi-

47 Judgement of 11 December 2008, Kanal 5 Ltd and TV 4 AB v Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa.,, C-52/07, EU:C:2008:703 (hereinafter referred to as *Kanal 5*).

48 *Kanal 5*, at 28 and 37.

49 STIM is Swedish CMO for music copyrights.

50 *Kanal 5*, at 39

51 SVT is a public service channel Sveriges Television.

52 *Kanal 5*, at 41.

fied.[53] The justification grounds could potentially arise from the task and method of financing public service undertakings,[54] from the fact that public broadcasters have no advertising or subscription income, and the revenue charged to it takes no account of the number of protected works actually broadcasted.[55]

CJEU found that the abuse of a monopoly position may lie in the imposition of a price that is excessive in relation to the economic value of the service provided.[56] Also, the nature of the right needs to be taken into consideration, as well as the interests of the authors and those of the broadcasting companies, the values of the use of music in trade, and the number of musical works used.[57] Finally, the CJEU concluded that the model according to which the amount of royalties corresponds partly to the revenue of the broadcasting company is justified, provided also that this amount corresponds to the number of musical works broadcasted,[58] unless another method would be more precise without incurring additional costs.[59]

3.2.5. *SatCab 2*

SatCab 2 Directive shows that not much has changed since *SatCab* 1 in the approach to criteria applied to broadcasting. It extends the scope of the principles from cable retransmission to all other forms of retransmission and thereby ensures that the rights of content owners are equally protected in new digital retransmission media as they are in traditional cable networks. It also mentions the principle of territoriality applied in broadcasting, including satellite broadcasting, saying that it is a standard in licensing audiovisual works.[60] This leads to the conclusion that territorial licences as such, given by CMOs are not contrary to the competition rules. The principle of the country of origin, which was earlier applied to satellite broadcasting, is in *SatCab* 2 Directive extended to own ancillary online services of the broadcasting organisation. However, the principle of the country of origin does not prevent authors and broadcasting organisations from arranging any limitation to the licence, including territorial limitation.[61] The principle of

---

53 *Kanal* 5, at 48.

54 *Kanal* 5, at 47.

55 *Kanal* 5, at 45.

56 *Kanal 5*, at 28 and 37.

57 *Kanal 5*, at 30, 31, 36 and 39.

58 *Kanal 5*, at 41 and 48.

59 *See* also Guibault L., van Gompel S., Collective Management in the European Union. In: Gervais D(ed), Collective Management of Copyright and Related Rights. Kluwer Law International 2nd edn., Netherlands, pp 135-167, p.142, 143.

60 See rec. 10 of the preamble of *SatCab 2* Directive.

61 Rec. 10 of *SatCab* 2 Directive.

the country of origin regulates a legal fiction that satellite broadcasting and ancillary broadcasting service occur solely in the Member State where the broadcasting organisation has its principal establishment.[62] This means that copyright needs to be cleared only in the country of origin, although it actually takes place in all Member States (and broader) where the satellite signal or ancillary online service is accessible. It is clear that those services are provided cross-border. Therefore, when setting the tariff for satellite broadcasting or ancillary broadcasting service it is appropriate to consider the actual and potential audience in combination with the language version, as already given in *SatCab*1.

Nevertheless, *SatCab* 2 Directive adds to these special criteria for ancillary broadcasting services. With this respect, all aspects of the ancillary online service shall be taken care of, such as the features of the service (including the duration of the online availability of programmes included in the service), the audience (including the audience in the Member State in which the broadcasting organisation has its principal establishment and in other Member States in which the ancillary online service is accessed and used), and the language versions provided.[63] It should nevertheless remain possible to use specific methods for calculating the amount of payment for the rights subject to the country of origin principle, such as methods based on the revenues of the broadcasting organisation generated by the online service, which is used, in particular, by radio broadcasting organisations.[64] The latter means that the remuneration may be calculated as the percentage of the gross income of the broadcaster generated by that online service. This methodology is regularly used by radios.

Furthermore, *SatCab* 2 Directive adds to the criteria for the tariffs for retransmission right.[65] Following that, in determining the fee for retransmission, the economic value of the use of the rights in trade, including the value allocated to the means of retransmission, should, *inter alia*, be taken into account, together with the criteria set by Directive of collective management of copyright.[66]

The explained criteria from *SatCab* 2 are in the preamble of this Directive, not in its legislative part. Nevertheless, they should be observed by anyone who applies them since recitals give clear directions towards the interpretation of the legislative part in line with the intentions of the legislator. Therefore, eventhough they may not be part of national copyright laws, the CMOs, the users, competitions

62 Art. 3 para 1 of *SatCab 2* Directive.

63 Art. 3 para 2 of *SatCab 2* Directive.

64 Rec. 12 of *SatCab* 2 Directive.

65 Rec. 15 of *SatCab* 2 Directive.

66 Rec. 15 of *SatCab* 2 Directive.

authorities and courts shall be obliged to follow those directions and apply them in setting and evaluating remunerations in tariffs.

3.3. Synthesis of criteria for setting tariffs

3.3.1. Directive on collective management of copyright

All described developments led to the regulations of the criteria for setting tariffs in the Directive on collective management of copyright. According to Art. 16 para 2, licensing terms shall be based on objective and non-discriminatory criteria. Authors shall receive appropriate remuneration for the use of their rights. Tariffs for exclusive rights and rights to remuneration[67] shall be reasonable in relation to, *inter alia*, the economic value of the use of the rights in trade, taking into consideration the nature and scope of the use of the work and in relation to the economic value of the service provided by the CMO. CMO is obliged to inform the user of the criteria applied for setting the respective tariff. The said provision is further explained in the rec. 31 of the preamble of the respective Directive. Namely, this recital emphasises that fair and non-discriminatory commercial terms in licensing are particularly important for users and authors. Furthermore, the criteria must be objective. By using the phrase *inter alia* in cited provisions of the Directive on collective management of copyright, it is emphasised that the said criteria are not the only ones applied but that CMOs may also use other criteria. This makes provisions from Art. 16 para 2 of the said Directive a minimum harmonisation rule, which entitles the Member States to explicitly provide more criteria aligned with the said ones in their copyright laws. However, even if it is not explicitly regulated in the respective national copyright law, every CMO may consider additional criteria when setting the tariffs.

It is clear that criteria from Art. 16 para 2 of Directive on collective management of copyright, as well as the explanations given in rec. 31 of the same Directive apply to collective management of copyright. At the same time, individual negotiations and individual contracts and licences remain out of the scope of this Directive, and authors are entirely free to determine the price for using their work. Therefore, this aspect falls beyond the remit of this discussion. Although it is not

[67] The difference between exclusive right and right to remuneration is regulated in European and national copyright laws. In brief, exclusive right means that the author has a right to allow or forbid the use of their work and claim remuneration for such use. On the other hand, the right to remuneration entitles the author only to claim remuneration for their work, but the use of the work is out of their control. Namely, they are not entitled to allow or forbid because a legal licence entitles users to use their work without the author's permission.

explicitly regulated this way, the following provisions of other Directives on criteria need to be interpreted in the same light.

It is clear from the previous analysis that the criteria set in Art. 16 para 2 of the Directive on collective management of rights are well based on the competition rules. Namely, excessive prices are generally examined in relation to the economic value of the object of the price and the economic value of the service provided. Those criteria were introduced through the case law also to the collective management of rights and ended up in the respective Directive. The idea of this Directive was in many aspects to synthetise the rules which would affect the monopolistic position of CMO by not addressing it directly, just to leave it to the market to do so. Among others, this Directive imposes rules which weaken the dominant position of CMOs.

3.3.2. *OSA*

OSA[68] is a landmark case which confirms that the monopoly position of CMOs is not denied by the Directive of collective management of copyright. While this Directive was undermining the dominant position of CMOs, many asked themselves whether it denies the possibility of *de facto* and *de jure* monopolies of CMOs. *OSA* came together with the Directive and cleaned the view. The facts of the case say that *OSA* claimed from Léčebné lázně the payment for having installed radio and television sets in the bedrooms of its spa establishments. Léčebné lázně claims that *OSA* was abusing its monopoly position in the market since the amount of the fees set out in its fee scales is disproportionately high in comparison with the fees demanded by CMOs in neighbouring countries for the same kind of use of works, which undermines its position in the market and its ability to compete with spa establishments in neighbouring countries. CJEU repeated that the monopoly position of the CMO is consistent with EU law, in particular with Art. 16 of the Services Directive[69] and Arts. 56 and 102 of the TFEU.[70] Nevertheless, it stressed that the imposition by a CMO with a monopoly position of fees for its services

---

68 Judgement of 27 February 2014, OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.,– *OSA*, C-351/12, EU:C:2014:110. OSA is Czech CMO for music copyright.

69 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market OJ L 376, 27.12.2006, p. 36–68 (hereinafter referred to as Services Directive)

70 It is clear that the CJEU is not opposed to the possibility of a legal monopoly of the CMO by the national law (*OSA*, at 10 with reference to Art. 98(6)(c) of the Czech CRRA, which regulates that the relevant ministry may grant an authorisation for performing the management of copyright only if no other person already has such an authorisation for the exercise of the same right in relation to the same subject-matter and, in so far as a work is concerned, for the exercise of the same right in relation to the

which are appreciably higher than those charged in other Member States (a comparison of fee levels having been made on a consistent basis) or the imposition of a price which is excessive in relation to the economic value of the service provided is indicative of an abuse of a dominant position.[71]

3.3.3. *AKKA/LAA*

New case law after the Directive on collective management of rights entered into force stays on the same path and confirms and clarifies the tariff-setting criteria. *AKKA/LAA*[72] judgement gives some directions towards arguments for determining excessive prices, which are specific for collective management of copyright and shall not appear so often in other areas of competition.[73] The questions asked from the CJEU referred, in essence, to examining whether *AKKA/LAA* was posing an unfair tariff if, comparing its tariff to the Estonian and Lithuanian ones, they were two and three times higher. If put in relation to the purchasing power parity index (hereinafter referred to as PPP index), compared the fees in force in approximately 20 other Member States it was found that the rates payable in Latvia exceeded the average level of those charged in those other Member States by 50% to 100%. For the same type of users, only the rates applied in Romania were higher. It was a tariff for the use of musical works in shops and service centres where rates were set according to the surface area of the shop or service centre concerned.[74]

Apart from the usual understanding that the abuse of a dominant position might lie in the imposition of a price excessive in relation to the economic value of the service provided, there are also other methods by which it can be determined whether a price may be excessive.[75] The CJEU didn't give a minimum threshold when comparing prices in different Member States adjusted in accordance with the PPP index. It only said that the comparison needs to be regarded consistently and that the countries must be selected according to objective, appropriate, and

---

same kind of work). CJEU further pointed out that the legal monopoly is consistent with Art. 16 of the Services Directive and Arts. 56 and 102 of the TFEU.

71 *OSA*, at 85, 87, 88, 92 and 93.

72 Judgement of 14 September 2017, Autortiesību un komunicēšanās konsultāciju aģentūra/Latvijas Autoru apvienība v Konkurences padome, C-177/16, EU:C:2017:689 (Hereinafter *AKKA/LAA*)

73 For the analysis of *AKKA/LAA* case see *e.g.* Botteman Y., Barrio D., C-177/16 *AKKA/LAA*: How to Determine Excessive Prices Under Article 102 TFEU?, European Competition and Regulatory Law Review, Vol 4 (2020), Issue 1, DOI https://doi.org/10.21552/core/2020/1/12, p. 49 – 53 (last visit 29 September 2024).

74 *AKKA/LAA* at 9,10.

75 Kanal 5, at 28 and *AKKA/LAA* at 35, 36 and 37.

verifiable criteria.[76] Therefore, there can be no minimum number of markets to compare, and the choice of an appropriate comparable markets depends on the circumstances specific to each case.[77] Those specificities may be consumption habits, other economic and sociocultural factors, such as gross domestic product per capita, and cultural and historical heritage.[78] Considering this, the difference must be significant for the rates concerned to be regarded as abusive. It must persist for a certain length of time and must not be temporary or episodic. CMO must show that its prices are fair by reference to objective factors that impact management expenses or the remuneration of authors.[79] It is permissible to compare the rates charged in one or several specific user segments if there are indications that the excessive nature of the fees affects those segments.[80]

3.3.4. *MEO*

One of the most recent cases is *MEO*.[81] As a monopoly CMO in Portugal, GDA[82] issued licences to providers of a paid television signal transmission service and television content. It applied three tariffs simultaneously, set by the arbitration decision. *MEO*[83] claimed that GDA was abusing a dominant position by applying different tariffs towards providers of the same service. In light of those facts, CJEU examined the concept of competitive disadvantage.[84] In the circumstances of the case, CJEU drew attention to the following facts: the existence of a certain negotiating power of MEO (and NOS[85]) towards GDA as a factor relevant in the assessment of abuse and the negotiating power; GDA applied tariff set by the arbitration court; the price differences represented a relatively low percentage of MEO's total costs, and therefore a difference had only limited effect on its profits; and GDA had no interest in excluding one of its trading partners from the down-

76 See *AKKA/LAA* at 51 and 72.

77 See *AKKA/LAA* at 41, also D'Ostuni M., Meriani M., Excessive pricing and copyright industry: still blurred lines?, Kluwer Copyright Blog, Dec 14, 2017, https://copyrightblog.kluweriplaw.com/2017/12/14/excessive-pricing-copyright-industry-still-blurred-lines/ (last visit 29 September 2024)

78 *AKKA/LAA*, at 42, 44.

79 *AKKA/LAA*, at 55, 56, 61.

80 *AKKA/LAA*, at 50, 51.

81 Judgement of 19 April 2018, MEO — Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência, GDA — Cooperativa de Gestão dos Direitos dos Artistas Intérpretes ou Executantes, CRL, C-525/16, EU:C:2018:270 (Hereinafter reffered to as *MEO*).

82 Cooperativa de Gestão dos Direitos dos Artistas Intérpretes ou Executantes.

83 Serviços de Comunicações e Multimédia SA.

84 Art. 102, para 2 (c) of TFEU.

85 Another provider of the same service as MEO.

stream market.[86] CJEU concluded that where a dominant undertaking applies discriminatory prices to trade partners on the downstream market, it can distort competition between them. To prove a competitive disadvantage, it is not necessary to prove an actual quantifiable deterioration in the competitive situation. Still, it must be based on an analysis of all the relevant circumstances of the case leading to the conclusion that that behaviour affects the costs, profits, or any other relevant interest of one or more of those partners so that that conduct is such as to affect that situation.[87] It may be summarised that price discrimination by a dominant undertaking between its (non-associated) customers (downstream market) may be qualified as abuse only if strict conditions are met, notably an impact on competition.[88] So, applying different criteria for setting the remuneration owed to CMO leads to a competitive disadvantage only if strict conditions are met, *i.e.* if this affects the costs, profits, or any relevant interest of the user. In those circumstances, this behaviour does not lead to the strengthening or, in any other way, affecting the monopoly position of the CMO that abuses its dominant position.

3.3.5. *SABAM*

In the *SABAM* case,[89] the Companies Court from Antwerp, Belgium,[90] requested a preliminary ruling from the CJEU on Article 102 TFEU, abuse of a dominant position against SABAM.[91] The abuse of the dominant position of the CMO, which has a *de facto* monopoly position, *i.e.*, the dominant position on the Belgian market, was scrutinised because of the charging scheme which serves as a basis for the tariff for the performance of musical works at music festivals. The relevant tariff based on gross receipts from ticket sales was examined. The question was posed of whether such a methodology is reasonable in relation to the collective management organisation's service and the music repertoire that was actually performed. The opposing party claimed that the methodology for setting the tariff where the

---

86 Szczodrowski, J.; The Principles of Article 102(c) TFEU in Cases of Non-exclusionary Secondary Line Discrimination on Grounds Other than Nationality Case Comment to the Judgment of EU Court of Justice of 19 April 2018 Meo-Serviços de Comunicações e Multimédia (C-525/16), Yearbook Of Antitrust And Regulatory Studies (Yars®), VOL. 2019, 12(20), DOI: 10.7172/1689-9024.YARS.2019.12.20.12, p. 275. See MEO, at 32 to 35.

87 MEO, at 37.

88 O'Donoghue, R., The Quiet Death of Secondary-Line Discrimination as an Abuse of Dominance: Case C-525/16 MEO Journal of European Competition Law & Practice, Volume 9, Issue 7, September 2018, Pages 443–445, https://doi.org/10.1093/jeclap/lpy040

89 Judgement of 20 November 2020, Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Weareone.World BVBA, Wecandance NV, C372/19, EU:C:2020:959 (Hereinafter referred to as *SABAM*).

90 Ondernemingsrechtbank Antwerpen.

91 SABAM is Belgian CMO for music authors.

gross receipts from ticket sales were taken as the basis, without deduction of costs connected with the event's organisation, constitutes the abuse of a dominant position. The courts examined the concept of unfair prices in relation to Art. 16 of the Directive on collective management of copyright.[92]

CJEU concluded that there is no abuse of a dominant position when a CMO imposes tariffs on organisers of musical events where the remuneration is calculated based on a rate applied to the gross revenue from ticket sales, without deducting organising costs unrelated to the works performed, provided that the remuneration imposed is not excessive in light of all relevant circumstances, particularly the nature and extent of the use of the works, the economic value generated by that use, and the economic value of the services provided by the CMO, and if a staggered flat-rate system is used to determine which proportion of the musical works performed were taken from the CMO's repertoire.[93] The latter is justified if no other, more precise method for identifying and quantifying the works used exists that would similarly protect the interests of the authors without disproportionately raising management costs. [94]

3.4. Other relevant matters

Criteria for setting tariffs were mentioned in relation to remuneration for public lending in the Rental and Lending Directive. In this case, the cultural promotion objectives should be observed.[95]

This text only considers the criteria for setting the tariffs for exclusive rights. In the respective directives, some criteria are provided for setting fair compensation

---

92 The Belgian law transposing Art. 16 para 2 of the Directive on collective management of copyright and related rights mentions the following: the criteria must be objective and non-discriminatory, the remuneration for authors shall be appropriate, tariffs shall be reasonable in relation to, *inter alia*, the economic value of the use of the rights in trade, taking into account the nature and scope of the use of the works and services, as well as in relation to the economic value of the service provided by the management organisation. See Art. 63 of *Wet van 8 juni 2017 tot omzetting in Belgisch recht van de richtlijn 2014/26/EU van het Europees Parlement en de Raad van 26 februari 2014 betreffende het collectieve beheer van auteursrechten en naburige rechten en de multiterritoriale licentieverlening van rechten inzake muziekwerken voor het online gebruik ervan op de interne markt* which amended Article XI.262 of the Code de droit économique (Belgian Code of Economic Law).

93 *SABAM*, at 60, 61.

94 *Ibid*.

95 *See* Art. 6(1) and rec. 13 of the Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJEU L 376 of 27 December 2006 (codified version).

for private copying[96] and criteria to establish fair compensation for using orphan works.[97] The exact percentages of the selling price that should be paid as royalties for resale rights are regulated in the respective directive.[98] Finally, according to the Directive on the Extension of the Term of Protection,[99] the performing artists deserve 20 % of the revenue which the phonogram producer has derived.[100]

4. CONCLUSION

Being engaged in economic activities, CMOs are considered undertakings within the meaning of the European competition law. Before the adoption of the Directive on collective management of copyright they have enjoyed either *de facto* monopoly or also a legal monopoly established by national laws of the Member states concerned. Arguments in favour of this monopoly were that this ensures effective collective management of copyright, in the interest of both authors and users. However, it has been clear from the very first cases brought before the CJEU that this dominant position of the CMOs is subject to the application of the rules on the abuse of the dominant position (Art. 102 TFEU), as well as rules on prohibited agreements (Art 101 TFEU). The case law and the EU directives have provided the criteria for determining the tariff system that would be fair and transparent and not amount to the abuse of the dominant position of the CMOs.

The criteria are well established in competition law but further developed by taking into account the specific features of copyright, the interests of authors protected by copyright, and the particularities of the collective management of copyright. Therefore, in assessing whether a CMO is abusing its dominant position by imposing excessive tariffs on users, at least the following criteria must be considered: the economic value of the use of the rights in commerce, taking into account the nature and scope of the use of the work and in relation to the economic value of

---

96 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society**,** OJEU L 167 of 22 June 2022 (hereinafter InfoSoc Directive), see rec. 35 of the Preamble.

97 Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works *OJEU L 299 of 27 October 2012 (hereinafter Orphanworks Directive), see rec. 18 of the Preamble and Art. 6 para 5.*

98 Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art *OJEU L 272 of 13. October 2001 (hereinafter Resale Right Directive), see Art. 4.*

99 Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJEU L 265 of 11 October 2011(hereinafter Directive on the Extension of the Term of Protection).

100 See rec. 11 and Art. 1 para 2 of Directive on the Extension of the Term of Protection.

the services provided by the CMO. The tariff must be set on fair and non-discriminatory commercial terms, and all applied criteria must be objective.

REFERENCES

BOOKS AND ARTICLES

1. Botteman Y., Barrio D., C-177/16 *AKKA/LAA*: How to Determine Excessive Prices Under Article 102 TFEU?, European Competition and Regulatory Law Review, Vol 4 (2020), Issue 1, DOI https://doi.org/10.21552/core/2020/1/12, p. 49 – 53
2. D'Ostuni M., Meriani M., Excessive pricing and copyright industry: still blurred lines?, Kluwer Copyright Blog, Dec 14, 2017, https://copyrightblog.kluweriplaw.com/2017/12/14/excessive-pricing-copyright-industry-still-blurred-lines/
3. Ficsor, M., Collective Management of Copyright and related Rights, 3rd edition, WIPO, 2022
4. Guibault L., van Gompel S., Collective Management in the European Union. In: Gervais D(ed), Collective Management of Copyright and Related Rights. Kluwer Law International 2nd edn., Netherlands, pp 135-167
5. Hugenholtz, P.B., Dealing with Territoriality in EU Copyright, in Leška, R. (ed) Managing Copyright – Emerging Business Models in the Individual and Collective Management of Copyright, 2021, p. 192.
6. Hviid M., Schroff S., Street J., Regulating Collective Management Organisations by Competition: An Incomplete Answer to the Licensing Problem?, 7 (2016) JIPITEC 256 para 1.
7. Matanovac Vučković, R. General Report: Collective Management of Rights, in Leška, R. (ed) Managing Copyright – Emerging Business Models in the Individual and Collective Management of Copyright, 2021, p. 226.
8. Matanovac Vučković, Romana, Implementation of Directive 2014/26/EU on Collective Management and Multi-Territorial Licensing of Musical Rights in Regulating the Tariff-Setting Systems in Central and Eastern Europe, IIC (2016) 47:28-59, DOI 10.1007/s40319-015-0438-5.
9. Szczodrowski, J.; The Principles of Article 102(c) TFEU in Cases of Non-exclusionary Secondary Line Discrimination on Grounds Other than Nationality Case Comment to the Judgment of EU Court of Justice of 19 April 2018 Meo-Serviços de Comunicações e Multimédia (C-525/16), Yearbook Of Antitrust And Regulatory Studies (Yars®), VOL. 2019, 12(20), DOI: 10.7172/1689-9024.YARS.2019.12.20.12, p. 275.

EU LEGISLATION

1. Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L 84/14
2. 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 L 248, 6.10.1993, p. 15–21 [1993], as amended. Consolidated version available at http://data.europa.eu/eli/dir/1993/83/2019-06-06. (SatCab1).

3. Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJEU L 346 of 27 November 1992
4. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market OJ L 376, 27.12.2006, p. 36–68
5. Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJEU L 265 of 11 October 2011

EU COMMISSION DECISIONS

1. Summary of Commission Decision of 16 July 2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/C-2/38.698 — CISAC) (notified under document number C(2008) 3435 final), 2008/C 323/08.

CJEU CASE LAW

1. Judgement of 14 September 2017, Autortiesību un komunicēšanās konsultāciju aģentūra/ Latvijas Autoru apvienība v Konkurences padome, C-177/16, EU:C:2017:689 (*AKKA/ LAA*)
2. Judgement of 20 November 2020, Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Weareone.World BVBA, Wecandance NV, C372/19, EU:C:2020:959
3. Judgment of the General Court (Sixth Chamber) of 12 April 2013, CISAC v European Commission, T442/08, EU:T:2013:188, at 182.
4. Judgement of 11 December 2008, Kanal 5 Ltd and TV 4 AB v Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa.,, C-52/07, EU:C:2008:703
5. Judgement of 14 July 2005, Lagardère Active Broadcast v Société pour la perception de la rémunération équitable (SPRE) and Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) Lagardère, C-192/04, EU:C:2005:475
6. Judgement of the Court of 13 July 1989, *Lucazeau*, C-110/88, EU:C:1989:326.
7. Judgement of 27 February 2014, OSA – Ochranný svaz autorský pro práva k dílům hudebním
8. o.s. v Léčebné lázně Mariánské Lázně a.s.,– *OSA*, C-351/12, EU:C:2014:110.
9. Judgement of 19 April 2018, MEO — Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência, GDA — Cooperativa de Gestão dos Direitos dos Artistas Intérpretes ou Executantes, CRL, C-525/16, EU:C:2018:270
10. Judgement of 6 February 2003, Stichting ter Exploitatie van Naburige Rechten (SENA) v Nederlandse Omroep Stichting (NOS). – *SENA*, C-245/00, EU:C:2003:68.
11. Judgement of the Court of 13 July 1989, *Tournier*, C-395/87, EU:C:1989:319.

12. Request for a preliminary ruling from the Krajský soud v Brně (Czech Republic) lodged on 29 February 2024 – OSA - Ochranný svaz autorský pro práva k dílům hudebním, z.s. v Úřad pro ochranu hospodářské soutěže (Case C-161/24, OSA).

OTHERS

1. History of Collective Management, CISAC, https://www.cisac.org/Newsroom/expert-articles/history-collective-management (last visit 9.1.2025.)