



Reports of Cases

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-401/08,

Säveltäjien Tekijänoikeustoimisto Teosto ry, established in Helsinki (Finland), represented by H. Pokela, lawyer,

applicant,

v

European Commission, represented initially by E. Paasivirta, F. Castillo de la Torre and P. Aalto, and subsequently by E. Paasivirta and F. Castillo de la Torre, acting as Agents,

defendant,

APPLICATION for annulment 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 Fragoso and M. van der Woude, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearings on 4 October 2011 and 29 June 2012,

gives the following

* Language of the case: Finnish.

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) which are members of the International Confederation of Societies of Authors and Composers (CISAC) ('the collecting societies'), including the applicant, Säveltäjien Tekijänoikeustoimisto Teosto ry.
- 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 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.

I – *Administrative procedure*

- 5 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.
- 6 On 8 April 2005, the applicant sent a letter to the Commission in response to its request for information of 14 March 2005, enclosing extracts from its RRAs.
- 7 On 31 January 2006 the Commission addressed a statement of objections to CISAC and the collecting societies ('the statement of objections'), to which the applicant replied on 10 April 2006.
- 8 CISAC and most of the collecting societies, including the applicant, were heard by the Commission at the hearing on 14, 15 and 16 June 2006.

- 9 On 18 September 2006, la Commission sent the applicant a further request for information, to which the latter responded by letter of 3 October 2006.
- 10 In March 2007 the applicant and 17 other collecting societies, as well as CISAC, 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).
- 11 At recital 72 to the contested decision the Commission asserted that, in the light of the observations received, the commitments referred to in paragraph 10 above would not give an appropriate answer to the competition concerns raised in the statement of objections.

II – *Relevant clauses of the model contract*

- 12 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.
- 13 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).
- 14 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).
- 15 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).
- 16 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).

III – *Relevant markets*

- 17 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).
- 18 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).
- 19 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).
- 20 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).

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

A – *Membership clauses, exclusivity clauses and non-intervention clauses*

- 21 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).
- 22 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.
- 23 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).

B – *Concerted practice relating to the national territorial limitations*

- 24 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).

- 25 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).
- 26 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).
- 27 According to the Commission, the existence of a concerted practice emerges from a number of elements.
- 28 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).
- 29 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).
- 30 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).
- 31 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).
- 32 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.

- 33 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).
- 34 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).
- 35 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).
- 36 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).
- 37 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).
- 38 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).
- 39 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).

- 40 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).
- 41 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).
- 42 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).
- 43 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).
- 44 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).
- 45 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).

V – Operative part

- ⁴⁶ 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:

...

TEOSTO

...

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:

...

TEOSTO

...

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:

...

TEOSTO

...

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

- 47 By application lodged at the Registry of the General Court on 24 September 2008, the applicant brought an action for the annulment of the contested decision.
- 48 By separate document lodged at the Registry of the General Court on the same day, the applicant brought an application for interim relief, seeking an order to suspend the enforcement of Article 4(2) and (3) of the contested decision, read in conjunction with Article 3 of that decision. By order of 14 November 2008 in Case T-401/08 R *Säveltäjän Tekijänoikeustoimisto Teosto v Commission*, not published in the ECR, the President of the General Court dismissed that application and reserved the costs.
- 49 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 of the General Court, invited the parties to answer a number of questions. The parties complied with those requests.
- 50 At the hearing on 4 October 2011, the parties presented oral argument and answered the questions put to them by the Court.
- 51 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.
- 52 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.
- 53 The parties again presented oral argument and replied to the questions put by the Court at the hearing on 29 June 2012.
- 54 Consequently, the President of the Sixth Chamber decided to close the oral procedure.

55 The applicant claims that the Court should:

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

56 The Commission contends that the Court should:

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

Law

57 In support of its action, the applicant raises, in essence, three pleas in law, alleging:

- misapplication of Article 81(1) EC;
- misapplication of Article 81(3) EC;
- that the Commission acted *ultra vires* in requiring the collecting societies to modify conduct which was not contrary to Article 81 EC.

I – The first plea in law, alleging the misapplication of Article 81(1) EC

58 The first plea in law is composed of three parts concerning the absence of an infringement of Article 81(1) EC as regards, first, the membership clause, secondly, the exclusivity clause and, thirdly, the territorial limitations.

A – The first part of the first plea in law, concerning the membership clause

59 First, the applicant claims that the membership clause does not appear in 5 of its 23 RRAs. In its reply, it states that the membership clause was deleted in all of its RRAs. It also submits that the membership clause was never applied in practice. The Commission has neither demonstrated that the applicant actually applied the membership clause, nor specifically indicated the charges against the applicant, thereby disregarding the obligation to state reasons.

60 Secondly, the applicant claims that the membership clause has neither the object nor the effect of restricting competition. The right holders will naturally turn to the collecting society established in their country, for, in essence, linguistic and cultural reasons, and for its knowledge of the local market. That is, in the applicant's view, all the more so in respect of the Finnish repertoire, which is essentially intended for local use.

61 It must, first of all, be found that the membership clause has an anti-competitive object, as the Commission pointed out in recitals 127 and 130 to the contested decision. That clause is intended to allow collecting societies to divide the authors according to their nationality or, at the very least, to make it more difficult for an author to affiliate with a collecting society other than the one established in the country of which he is a national. On the basis of that clause, the collecting societies divide up and share the internal market. According to the case-law, restrictive agreements of this type are among the examples of agreements explicitly declared to be incompatible with the common market in Article 81(1)(c) EC and must be categorised as obvious restrictions of competition. Such agreements, by obliging the parties to respect distinct markets, often delimited by national frontiers, cause the

isolation of those markets, thereby counteracting the Treaties' main objective of integrating the internal market (see, to that effect, Case T-241/01 *Scandinavian Airlines System v Commission* [2005] ECR II-2917, paragraph 85, and Joined Cases T-49/02 to T-51/02 *Brasserie nationale and Others v Commission* [2005] ECR II-3033, paragraph 173 and 174).

- 62 As regards the distinction to be drawn between restrictive agreements having an anti-competitive object and those with anti-competitive effects, it must be borne in mind that an anti-competitive object and an anti-competitive effect constitute not cumulative but alternative conditions in determining whether a practice falls within the prohibition in Article 81(1) EC. The alternative nature of that requirement, indicated by the conjunction 'or', means that it is necessary, first, to consider the precise object of the restrictive agreement, in the economic context in which it is to be applied. Where, however, an analysis of the terms of the restrictive agreement does not reveal a sufficient degree of harmfulness for competition, its effects should then be considered and, for it to be caught by the prohibition, it is necessary to find that those factors are present which establish that competition has in fact been prevented or restricted or distorted to an appreciable extent (see Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraph 28 and the case-law cited).
- 63 Moreover, in deciding whether a restrictive agreement is prohibited by Article 81(1) EC, there is no need to take account of its actual effects once it is apparent that its object is to prevent, restrict or distort competition within the common market. The distinction between 'infringements by object' and 'infringements by effect' arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition (see *T-Mobile Netherlands and Others*, paragraph 29 and the case-law cited).
- 64 Furthermore, proof of the intention to restrict competition is not a necessary factor in determining whether an infringement has such a restriction as its object (see Case T-450/05 *Peugeot and Peugeot Nederland v Commission* [2009] ECR II-2533, paragraph 55 and the case-law cited; see also, to that effect, *T-Mobile Netherlands and Others*, paragraph 27).
- 65 Likewise, the fact that a clause whose object is to restrict competition has not been implemented by the contracting parties is not sufficient to remove it from the prohibition in Article 85(1) EC (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, paragraph 175, and Case T-176/95 *Accinauto v Commission* [1999] ECR II-1635, paragraph 110).
- 66 It follows that the Commission was not required to demonstrate that the applicant actually applied the membership clause.
- 67 As regards the applicant's argument that it removed the membership clause from all of its RRAs, it must be noted that the applicant has neither claimed, nor demonstrated, that the membership clause had been deleted in all of the RRAs before the adoption of the contested decision. Accordingly, the Commission could validly find an infringement of Article 81(1) EC, since the membership clause still appeared in some of the applicant's RRAs at the time of the adoption of the contested decision.
- 68 Having regard to, inter alia, the elements recalled in paragraphs 61, 66 and 67 above, it must be concluded that the Commission complied with its obligation to state reasons as regards the membership clause.
- 69 In the light of the foregoing, the first part of the first plea in law must be rejected as unfounded.

B – The second part of the first plea in law, concerning the exclusivity clause

- 70 The applicant argues that only some RRAs still contain the exclusivity clause, and that, in practice, that clause is not applied. Moreover, the applicant claims that the exclusivity clause has neither the object nor the effect of restricting competition, since the situation would be identical in the absence of that clause. The Commission itself confirmed this in acknowledging that the exclusivity clause produces the same effects as the national territorial limitations.
- 71 It must be recalled that the exclusivity clause provides that collecting society A confers on collecting society B the exclusive right, in territory B, to grant licenses in respect of repertoire A, and vice-versa. Under that clause, no collecting society other than collecting society B may grant, in territory B, a licence in respect of repertoire A.
- 72 Moreover, that exclusivity clause also excludes the grant of direct licences; such an exclusion was found to be anti-competitive in Case 395/87 *Tournier* [1989] ECR 2521, paragraph 20, and Joined Cases 110/88, 241/88 and 242/88 *Lucazeau and Others* [1989] ECR 2811, paragraph 14).
- 73 It is true that, according to the case-law, Article 81(1) EC does not, as a general rule, preclude the conclusion of any contract containing a clause which provides a form of exclusivity (see, to that effect, Case 5/69 *Völk* [1969] ECR 295, paragraph 7; Case 1/71 *Cadillon* [1971] ECR 351, paragraph 9; and Case T-9/93 *Schöller v Commission* [1995] ECR II-1611, paragraph 161). However, in the present case it must be found that the exclusivity clause, as provided for in the model contract and reproduced in the RRAs, has an anti-competitive object inasmuch as it is intended to grant to one sole collecting society, in a defined territory, the exclusive right to grant licences in respect of a given repertoire, thereby creating a monopoly, for each collecting society, over the grant of licences for the exploitation of musical works on the territory in which it is established.
- 74 In those circumstances, on the basis of the case-law cited in paragraphs 62 to 65 above, since the very object of the exclusivity clause is anti-competitive, it is not necessary to examine its effects and to assess, inter alia, whether its effects are the same as those of the national territorial limitations.
- 75 In the light of the foregoing, the second part of the first plea in law must be rejected as unfounded.

C – The third part of the first plea in law, concerning the territorial limitations

1. Preliminary observations

- 76 For the purposes of examining the third part of the first plea in law, certain aspects of the context of the present case must be recalled, as a preliminary. 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.
- 77 In respect of the forms of copyright exploitation which the contested decision concerns, the collecting societies and CISAC 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.
- 78 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.

- 79 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.
- 80 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.
- 81 The third branch of the applicant's first plea in law, concerning the absence of an infringement of Article 81(1) EC as regards the national territorial limitations, must be examined in the light of those elements, in particular.

2. The proof of the concerted practice relating to the territorial limitations

- 82 The applicant claims that the Commission has not proved that the territorial limitations are the result of coordination between collecting societies. It disputes the finding that the model contract, and in particular Article 6, may be considered as evidence of the alleged coordination. In the reply, it adds that the Santiago and Sydney Agreements, like the reference to the previous system based on the exclusivity, are also incapable of establishing the existence of a concerted practice.
- 83 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 CISAC, 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.
- 84 Moreover, the Commission submits that the applicant's explanations, put forward in the reply and intended to challenge the evidential value of certain contacts between the collecting societies referred to in the contested decision, constitute a new plea in law, inadmissible under Article 48 of the Rules of Procedure.
- 85 The factors referred to in the first, second, and fourth indents of paragraph 83 above 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.
- 86 According to the Commission, the factors referred to in paragraph 83 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.

- 87 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-7583, paragraph 90).
- 88 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-2491, paragraph 129).
- 89 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 (*Romana Tabacchi v Commission*, paragraph 129; see also, to that effect, Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, paragraphs 149 and 150, and Case C-235/92 P *Montecatini v Commission* [1999] ECR I-4539, paragraphs 175 and 176).
- 90 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.
- 91 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).
- 92 Furthermore, it must be recalled that, although the Commission did not impose a fine in the contested decision, the finding of a concerted practice and the order to bring an end to that infringement contained in the contested decision nevertheless expose the applicant to significant consequences, such as the possibility of being fined under Article 24(1)(a) of Regulation No 1/2003.
- 93 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).
- 94 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).

- 95 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).
- 96 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 *Ahlström Osaakeyhtiö and Others v Commission*, paragraphs 71 and 126).
- 97 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.
- 98 In that respect, it must be noted that the applicant's explanations, put forward in the reply, concerning the Santiago and Sydney Agreements and the reference to the previous system based on the exclusivity, supplement the complaint already put forward in the application, concerning the absence of evidential value of the model contract to demonstrate the existence of concertation as regards the national territorial limitations.
- 99 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 purpose of proving that practice. It was therefore only after the defence was lodged that the applicant was in a position to specifically identify the factors on which the Commission claims to have relied to show the existence of a concerted practice.
- 100 It follows that, contrary to what is claimed by the Commission, the explanations put forward by the applicant in the reply concerning the Santiago and Sydney Agreements and the reference to the previous system based on the exclusivity are admissible.

- 101 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).
- 102 In the present case, it must be recalled that the factors capable of proving concertation between the collecting societies are those referred to in paragraph 83 above, namely 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 CISAC, the Santiago Agreement, the Sydney Agreement, and the historical link between the exclusivity clause and the national territorial limitations.
- 103 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.
- 104 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 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 CISAC

- 105 As regards the discussions held between the collecting societies in the context of the activities managed by CISAC (paragraph 83 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 CISAC. Rather, the Commission criticises the coordinated nature of the approach adopted by all of the collecting societies with regard to territorial limitations.
- 106 Therefore, the mere fact that collecting societies met in the context of the activities managed by CISAC 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 meeting 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 CISAC in which the applicant participated concerned the restriction of competition relating to the national territorial limitations.

- 107 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

- 108 The Santiago Agreement (paragraph 83 above, second indent) provided, with regard to the exploitation of copyright via 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.
- 109 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.
- 110 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.
- 111 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.
- 112 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.

- 113 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

- 114 By the Sydney Agreement (paragraph 83 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.
- 115 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).
- 116 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.
- 117 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.
- 118 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

- 119 As regards the alleged historical link between the exclusivity clause and the national territorial limitations (paragraph 83 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 CISAC.
- 120 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.
- 121 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 133 to 180 below).
- 122 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).
- 123 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.
- 124 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.

- 125 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.
- 126 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.
- 127 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.
- 128 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.
- 129 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.
- 130 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

- 131 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.
- 132 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

- 133 The applicant submits that mere parallel conduct cannot be indicative of concertation where that conduct can be explained by other reasons, as in the present case, since, in the applicant's view, the territorial limitations are consistent with the logic of the market and constitute the sole rational option in the conclusion of its RRAs.
- 134 First, the national territorial limitations can be explained, according to the applicant, by the need to ensure a close link with users and effective monitoring of the uses in question, in the light of, inter alia, the difficulties involved in the remote monitoring of those uses. Secondly, the current system, based on the national territorial limitations, is advantageous for the users, as it allows them to obtain a comprehensive licence from a single collecting society. Thirdly, the applicant indicates that it is rational to have recourse, in the context of the exploitations targeted by the Commission in the contested decision, to the system implemented in the context of offline exploitations, which has already demonstrated its effectiveness.
- 135 It must be recalled, first of all, that in *Tournier* and *Lucazeau and Others* 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.
- 136 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).
- 137 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).

138 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

139 Among the various explanations for the parallel conduct of the collecting societies, other than the existence of concertation, put forward by the applicant, it is necessary to first examine the explanation according to which the national territorial limitations were a means of fighting effectively against the unauthorised use of musical works.

140 The applicant claims that the local collecting society is best placed to manage the rights of right holders in the territory in which it is established, because of its proximity to the users, which allows it to monitor effectively the use of the works. The applicant stresses, in that respect, the difficulties involved in the remote monitoring of uses and challenges the perception – which it considers to be unrealistic – of remote management and monitoring advanced by the Commission in the contested decision.

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, 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-8947, 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. If the collecting society which monitors a given territory had no guarantee of recovering – by the revenue it receives from granting licences – the expenses related to that monitoring, 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.

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 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.

155 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).

- 156 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.
- 157 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.
- 158 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.
- 159 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.
- 160 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 CISAC 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

- 161 The Commission first cited the NBC model (see paragraph 37 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.
- 162 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.

163 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.

164 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.

165 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 applicant's choice to retain the national territorial limitations in its RRAs.

– The Simulcasting and Webcasting agreements

166 In recital 191 to the contested decision, the Commission referred to the Simulcasting and Webcasting agreements (see paragraph 36 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.

167 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.

168 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

169 In recital 192 to the contested decision, the Commission refers to the Santiago Agreement (see paragraphs 29, 31 and 108 to 113 above), which, in the Commission's view, demonstrates the possibility of granting multi-territorial licences.

170 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.

171 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.

172 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

173 In recital 193 to the contested decision (see paragraph 38 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.

174 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.

175 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.

176 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.

177 The same applies to the initiative of a publisher (see paragraph 44 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, 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'

178 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.

179 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.

180 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.

c) Conclusion on the proof of a concerted practice relating to the national territorial limitations

181 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 applicant and the other 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. In those circumstances, it is not necessary to examine the other explanations put forward by the applicant.

D – Conclusions on the outcome of the action

182 As the first and second parts of the first plea in law, concerning, respectively, the membership clause and the exclusivity clause, have been held to be unfounded, it is necessary to dismiss the action in so far as it concerns Articles 1 and 2 of the contested decision.

183 In addition, since it follows from the foregoing that the third part of the applicant's first plea in law, concerning the national territorial limitations, is well founded, Article 3 of the contested decision must be annulled, in so far as it concerns the applicant. In that respect, it must be pointed out that the applicant's claim seeking the annulment of that article is clearly inadmissible to the extent that it concerns the other collecting societies referred to in that article. If an addressee of the contested decision decides to bring an action for annulment, the matter to be tried by the Courts of the European Union relates only to those aspects of the decision which concern that addressee. Aspects concerning other addressees, on the other hand, do not form part of the matter to be tried by those courts (see, to that effect, Case C-310/97 P *Commission v AssiDomän Kraft Products and Others* [1999] ECR I-5363, paragraph 53, and Case T-304/02 *Hoek Loos v Commission* [2006] ECR II-1887, paragraphs 59 and 60).

184 In those circumstances, it is not necessary to examine the applicant's other pleas in law.

185 Consequently, Article 4 of the contested decision must also be annulled, to the extent that it refers to Article 3 of that decision, in so far as it concerns the applicant.

Costs

186 Under Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that each party bear its own costs.

187 As the action has been successful in part, the Court will make an equitable assessment of the circumstances of the case and hold that the Commission is to bear its own costs and pay one half of the applicant's costs, and that the latter is to bear one half of its own costs. As regards the costs relating to the interim relief proceedings, the applicant and the Commission are to each bear their own costs.

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 Säveltäjän Tekijänoikeustoimisto Teosto ry;**
2. **Annuls Article 4 of Commission Decision C(2008) 3435 final, to the extent that it refers to Article 3 of that decision, in so far as it concerns Säveltäjän Tekijänoikeustoimisto Teosto;**
3. **Dismisses the remainder of the action;**
4. **Orders the European Commission to bear its own costs and pay one half of Säveltäjän Tekijänoikeustoimisto Teosto's costs;**
5. **Orders Säveltäjän Tekijänoikeustoimisto Teosto to bear one half of its own costs;**
6. **Orders Säveltäjän Tekijänoikeustoimisto Teosto and the Commission to each bear their own costs relating to the interim relief proceedings.**

Kanninen

Soldevila Fragoso

Van der Woude

Delivered in open court in Luxembourg on 12 April 2013.

[Signatures]

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