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Collecting Societies face the music - General Court hearing underway

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On 28 September 2011 the General Court embarked on the first in a series of appeal hearings that are scheduled to run until 24 October 2011. These hearings represent the culmination of almost ten years of regulatory investigation and litigation in relation to the alleged anti-competitive activities of European collecting societies.

In 2003, Music Choice Europe complained to the European Commission about the International Confederation of Authors and Composers ("CSAC") and its 24 European collecting society members. It alleged that the CSAC model contract governing reciprocal arrangements between the collecting societies contained anti-competitive territorial restrictions. The Commission agreed and, on 16 July 2008, issued a decision concluding that the restrictions had infringed Article 101(1) TFEU.

CSAC, and 22 of its members, each launched an appeal against that decision. Whereas the CSAC appeal focuses on annulling the finding that the collecting societies had engaged in a concerted practice, the appeals by the individual members have challenged a wider variety of elements of the Commission decision, particularly with regard to how it applies to each individual set of agreements.

The next month, therefore, will be a particularly cathartic moment for many of these appellants. In the first hearing on 28 September 2011, in relation to SACEM, the French collecting society, the presiding Judge, Eric Missonier Marmont, acknowledged the significance of this case to competition jurisprudence, and governance of music rights management in Europe, by stating that in each appeal the parties will be granted an additional 15 minutes of pleading. Interveners will be given an extra five minutes to deliver their opening statements. Whilst this may not seem like much, in the context of a court which is notoriously tight on the time granted to parties to make oral representations, it is a significant gesture.

Reportedly, the SACEM hearing was characterised by impassioned outbursts from enthusiastic counsel, which is perhaps unsurprising given how long the parties have been waiting to have their moment in court. The second hearing, involving GEMA, the German collecting society, was apparently more civil in tone, although it addressed many of the same issues.

With 22 hearings to get through, it is anticipated that the panel of judges will make the most of the opportunity to focus on the issues specific to each case, whilst repeatedly testing the central issues relevant to all. Consistency of the evidence provided by the various collecting societies, and the Commission itself, will undoubtedly be a factor in the final decision.

Of these common themes, the most important is likely to be the question of the burden of proof. The Commission maintains that having found evidence of parallel conduct and collusion, it was up to the collecting societies to prove that there was no anti-competitive intent. The collecting societies, on the other hand, do not consider that the Commission did enough to prove the existence of parallel conduct and collusion in the first place, pointing to the fact that there are plausible explanations as to why collecting societies acted in the way they did and that this had not been given due consideration.

Given the time it has taken to reach this point, and the sheer weight of evidence that will be placed in front of the judges during a month's worth of hearings, it is unlikely that the final decision will be turned around quickly. It will also be hard, however, for the Court to ignore the wider picture. The question of how collecting societies should be structured, and how the demands for pan-European rights licensing solutions should be managed, is a highly complex and politically sensitive subject which has been considered by many different European institutions over the last ten years. As the market continues to evolve, however, the need to find a workable solution to this issue, which satisfies a plethora of competing needs, whilst keeping pace with the market itself, means that the General Court has an interesting, but potentially difficult, case to hear in the coming months. What is for certain, however, is that this case should get more answers than unresolved questions.

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