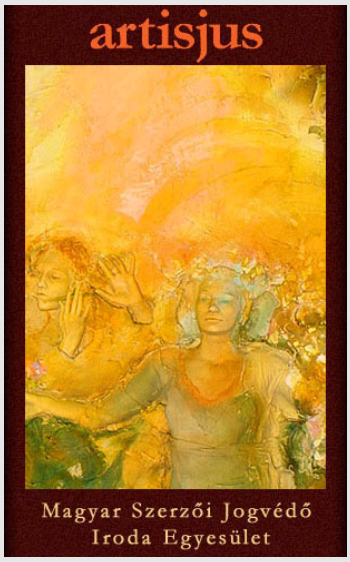
President of the Court of First Instance EC, 14 November 2008, Artisjus v Commission



LITIGATION

Requirements for interim measures

- **The urgency of an application for interim measures, as referred to in Article 104(2) of the Rules of Procedure, must be assessed in relation to the need for an interim decision in order to prevent serious and irreparable damage to the party applying for interim measures.**

It is not sufficient for the purpose of satisfying the requirements of that provision merely to allege that the measure the suspension of whose operation is being sought is about to be put into effect, but it is for that party to prove that he cannot wait for the outcome of the main proceedings without suffering damage of that nature. To be able to determine whether the damage which the applicant fears is serious and irreparable and therefore provides grounds for, exceptionally, suspending the operation of the contested decision, the judge hearing the application must have specific evidence allowing him to determine the precise consequences which the absence of the measures applied for would in all probability entail (…).

- **In addition, the alleged damage must be certain, or at least shown with a sufficient degree of probability, and the applicant is required to prove the facts alleged to form the basis of the likelihood of the damage.**

Damage of a purely hypothetical nature, in that it is based on the occurrence of future and uncertain events, cannot justify the ordering of interim measures (…).

Irreparable damage not substantiated

- **Accordingly, in the absence of specific factors put forward by the applicant, its bald assertion as to the collapse of the system of reciprocal representation agreements and the serious financial damage which it would suffer as a result, in terms of threatening its existence, does not justify suspending the operation of the contested decision.**

44 In addition, it is not irrelevant to note that, as at 14 November 2008, a week after the expiry of the period of 120 days fixed by Article 4(2) of the contested decision, most of the 24 collecting societies to which the contested decision was addressed had not made applications for interim measures, which likewise appears to cast doubt on the applicant's forecasts of catastrophe if the present application for interim measures were dismissed.

- **(…) the applicant's obligation to review its reciprocal representation agreements, imposed in Article 4(2) of the contested decision, cannot be regarded as causing it serious and irreparable damage.**

Lack of Urgency

It follows from all the foregoing that the application for interim measures must be dismissed on the ground of lack of urgency, without there being any need to examine whether the other conditions for ordering the suspension of operation sought, in particular the existence of a prima facie case, are satisfied

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President of the Court of First Instance EC, 2 November 1997

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
14 November 2008 (*)

(Applications for interim measures – Commission decision ordering the cessation of a concerted practice in connection with the collective management of copyright – Application for suspension of operation of a measure – No urgency)

In Case T-411/08 R,

Artisjus Magyar Szerzői Jogvédő Iroda Egyesület, established in Budapest (Hungary), represented by Z. Hegymegi-Barakonyi and P. Vörös, lawyers,

applicant,

v

Commission of the European Communities, represented by F. Castillo de la Torre and V. Bottka, acting as Agents,

defendant,

APPLICATION for suspension of operation of Articles 3 and 4(2) and (3) of Commission Decision C(2008) 3435 final of 16 July 2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/C2/38.698 – CISAC) in so far as they relate to the applicant,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

makes the following

Order

Context and subject-matter of the dispute

1 By this application for interim measures, the applicant Artisjus Magyar Szerzői Jogvédő Iroda Egyesület, a Hungarian association for the collective management of copyright, seeks partial suspension of the operation of Commission Decision C(2008) 3435 final of 16 July 2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/C2/38.698 – CISAC) ('the contested decision').

2 The contested decision concerns the conditions of management and licensing of public performance rights for musical works. It is addressed to the 24 collecting societies established in the European Economic Area (EEA) which are members of the International Confederation of Societies of Authors and Composers (CISAC), one of which is the applicant.

3 The collecting societies which are members of CISAC and established in the EEA ('the collecting societies') manage the rights held by the authors (lyricists and composers) in the musical works created by them. Those rights usually 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 right-holders or by transmission from another collecting society managing the same categories of rights in another EEA country, and grants exploitation licences on behalf of its members (authors and publishers) to commercial users such as broadcasting companies and organisers of events.

4 The management of copyright involves each collecting society in ensuring that all right-holders receive the remuneration due to them for the exploitation of their works, whatever the territory in which the exploitation takes place, and monitoring to make sure that no unauthorised exploitation of protected works takes place. The cost of monitoring is such that the collecting societies have concluded representation agreements between themselves by which they entrust each other, on a reciprocal basis, with the management of their repertoire in their respective operating territories, in order to avoid a multiplicity of monitoring systems in each territory.

5 In this context CISAC has drawn up a non-mandatory model contract, the original version of which goes back to 1936, which has to be supplemented by the contracting collecting societies, in particular as regards the definition of the territory. On the basis of the model contract the collecting societies have set up a network of reciprocal representation agreements by which they mutually confer on each other the right to grant licences. Those agreements cover not only the management of rights for traditional 'off-line' applications (concerts, radio, discotheques etc) but also exploitation by internet or satellite or cable retransmission.

6 Because of that network of reciprocal representation agreements, each collecting society is able to grant, on its own territory, licences for the public performance of musical works extending not only to the repertoire of its own members but also to the repertoire of all the other collecting societies belonging to the network ('multi-repertoire mono-territory' licences). The network created by the conclusion of all the reciprocal representation agreements means that each collecting society can thus offer commercial users a global portfolio of musical works. This also allows those users to have access to all the repertoires via the same collecting society, namely the society established in the country in which the repertoires are to be exploited, without having to apply for permission to each collecting society whose repertoire is concerned by the intended use ('one-stop shop').

7 Where the collecting societies obtain from their author members the right of worldwide management of user rights, and provided they do not transfer their repertoires to each other on an exclusive basis under their reciprocal representation agreements, they are entitled, despite the network of reciprocal representation agreements, themselves to manage the repertoire of their own members outside their own territory as well ('mono-repertoire multi-territory' licences).

8 According to the contested decision (point 193), the United Kingdom and German collecting societies, the Performing Right Society (PRS) and the Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA), set up a joint venture to act as a 'one-stop shop' at pan-European level for granting commercial users established in any EEA country multi-territory licences for 'online' and 'mobile' rights for the Anglo-American repertoire of Electric & Musical Industries (EMI).

9 In 2000 RTL Group SA, a radio and television broadcasting group, filed a complaint with the Commission against a collecting society which was a member of CISAC, complaining of its refusal to grant it a licence at Community level for its music broadcasting activities. In 2003 Music Choice Europe Ltd, which provides internet radio and television services, filed another complaint, directed against CISAC and relating to CISAC's model contract. Those complaints led the Commission to open a procedure for the application of the Community competition rules, which concluded with the adoption of the contested decision.

10 In the contested decision the Commission challenges the lawfulness of certain clauses in the reciprocal representation agreements, namely the clause on the membership of the member authors and the exclusivity clause, and of the collecting societies' concerted practice concerning the territorial delineation of the mandate to grant licences, the result of which is territorial exclusivity. According to the Commission, those clauses and that practice are contrary to Article 81 EC.

11 As regards the membership clause, Article 11(II) of the CISAC model contract provides that the collecting societies cannot accept as a member an author who is already a member of another collecting society or who has the nationality of one of the countries in which another collecting society operates, except under certain conditions. According to the contested decision, a

number of bilateral agreements still contain such a clause, which restricts the ability of an author to become a member of the collecting society of his or her choice, or to be a member simultaneously of several collecting societies operating within the EEA for the management of his or her rights in different territories.

12 As regards the exclusivity clause, Article 1(I) of the CISAC model contract provides for one of the collecting societies to confer on the other the exclusive right, in the territories in which the latter operates, to grant the necessary authorisations for all public performances. According to the contested decision, that clause – by which the collecting societies mutually guarantee each other a monopoly in their national markets for the grant of 'multi-repertoire' licences to commercial users – is still present in the bilateral agreements concluded by 17 collecting societies.

13 It appears from the contested decision that CISAC and all the collecting societies acknowledged during the administrative procedure before the Commission that those two clauses were anti-competitive and unjustified.

14 As regards the alleged concerted practice relating to territorial delineation, it appears from the contested decision that each collecting society in its bilateral agreements limits the right to issue licences for its repertoire to the national territory only of the other collecting society which is a party to the contract. In so far as all the collecting societies have concluded reciprocal agreements with each other, each collecting society has a global portfolio of works and grants licences for the use of that global portfolio only in its own country.

15 In the contested decision the Commission challenges the lawfulness of that concerted practice solely as regards exploitations by internet, satellite and cable, while 'off-line' forms of exploitation (concerts, radio, discotheques, bars etc) are not the subject of the decision. The Commission considers that, as a result of the concerted practice, competition is restricted at two levels: on the market for the administration services which the collecting societies offer each other, and on the market for the grant of licences.

16 According to the contested decision, the concerted practice causes a systematic delineation of territory at national level, which was preceded by contacts and cannot be explained by a supposed need for geographical proximity between the collecting society which grants the licence and the commercial user, because a local presence is not necessary to monitor the use of the licence in the context of exploitation by internet, satellite or cable retransmission. Nor is the concerted practice objectively necessary to ensure that collecting societies grant each other reciprocal mandates.

17 The Commission confined itself to finding, in the operative part of the contested decision, the infringements set out below, and did not impose fines. The operative part reads 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(II) of the model contract of [CISAC] ("the CISAC model contract"), or by de facto applying those membership restrictions:

...

ARTISJUS

...

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(I) and (II) of the CISAC model contract:

...

ARTISJUS

...

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:

...

ARTISJUS

...

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.

Article 5

The Commission may at its sole discretion and upon reasoned and timely request by one or several undertakings listed in Article 3 grant an extension of the time provided for in Article 4 second paragraph.

...'

Procedure and forms of order sought by the parties

18 By application lodged at the Registry of the Court of First Instance on 30 September 2008 the applicant brought an action for the partial annulment of the contested decision.

19 By separate document lodged at the Registry on the same date, the applicant brought the present application for interim measures, in which it claims essentially that the President of the Court should:

– suspend the operation of Articles 3 and 4(2) and (3) of the contested decision, in so far as they relate to the applicant, under Article 105(2) of the Rules of Procedure of the Court of First Instance, until such time as an order is adopted determining this application for interim measures, and in any event until the Court rules on the main application;

– grant any other appropriate interim measures;

– order the Commission to pay the costs.

20 In its written observations on the application for interim measures, lodged at the Registry of the Court of First Instance on 17 October 2008, the Commission contends that the President of the Court should:

– dismiss the application for interim measures;

– order the applicant to pay the costs.

21 By document lodged at the Registry of the Court of First Instance on 23 October 2008, RTL Group, CLT-UFA SA and Music Choice Europe applied for leave to intervene in support of the form of order sought by the Commission. By pleadings of 24 and 29 October 2008 the Commission and the applicant made observations on that application.

Law

22 By virtue of Articles 242 EC and 243 EC in conjunction with Article 225(1) EC, the judge hearing an application for interim measures may, if he considers that circumstances so require, order that application of the act contested before the Court of First Instance be suspended or prescribe any necessary interim measures.

23 Article 104(2) of the Rules of Procedure provides that an application for interim measures is to state the subject-matter of the proceedings, the circumstances giving rise to urgency, and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Suspension of the operation of an act or other interim measures may thus be ordered if it is established that such an order is justified prima facie in fact and in law and that it is urgent in that it must, in order to avoid serious and irreparable harm to the applicant's interests, be made and produce its effects before a decision is reached in the main action. Those conditions are cumulative, so that an application for interim measures must be dismissed if any one of them is absent (order of the President of the Court of Justice in Case C-268/96 P(R) SCK and FNK v Commission [1996] ECR I-4971, paragraph 30).

24 Moreover, in the context of that overall examination, the judge hearing the application enjoys a broad discretion and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of Community law imposing a preestablished scheme of analysis within which the need to order interim measures must be analysed and assessed (order of the President of the Court of Justice in Case C-149/95 P(R) Commission v Atlantic Container Line and Others [1995] ECR I-2165, paragraph 23, and order of the President of the Court of Justice in Case C-459/06 P(R), not published in the ECR, paragraph 25).

25 Finally, it must be pointed out that Article 242 EC lays down the principle that actions do not have suspensory effect (order of the President of the Court of Justice in Case C-377/98 R Netherlands v Parliament and Council [2000] ECR I-6229, paragraph 44, and order of the President of the Court of First Instance in Case T-191/98 R II Cho Yang Shipping v Commission [2000] ECR II-2551, paragraph 42). It is therefore only exceptionally that the judge hearing an application for interim measures can suspend the operation of an act which is being challenged before the Court of First Instance or order other interim measures.

26 Having regard to the material in the case-file, the President of the Court considers that he has all the information necessary to rule on the present application for interim measures, without there being any need first to hear oral argument from the parties.

27 In the circumstances of the present case, it should be examined first whether the condition of urgency is satisfied.

Arguments of the parties

28 The applicant submits that the operation of the contested decision must be suspended in order to avoid serious and irreparable damage being caused to it before the Court gives judgment in the main proceedings.

29 According to the applicant, it is not clear what the Commission means by the obligation of a 'bilateral review' of the reciprocal representation agreements in Article 4(2) of the contested decision. However, it follows from the statement of reasons of the contested decision that the Commission's intention is to introduce a system in which mandates are not limited to the national territory of each collecting society and each society can grant 'multi-repertoire multi-territory' licences to commercial users.

30 That would require partial amendment of the reciprocal representation agreements which the applicant has concluded with each of the other collecting societies, which at present limit the mandate to represent the Hungarian repertoire to the national territory of each foreign collecting society, with respect also to cable, satellite and internet use. The mandate to grant licences for public performances of musical works has in fact always been uniform for all types of use, and a partial amendment would give rise to disparities as a result of the varying interpretations of economic rights: those rights are interpreted differently in different Member States. Furthermore, the amendment required by the Commission would be fundamentally contrary to the applicant's commercial interests, in particular because it would dramatically reduce its income, possibly even endangering its existence.

31 The applicant fears that the partial amendment of its reciprocal representation agreements and the introduction of the model envisaged by the Commission would cause it irreparable damage, since that would result in changes which would be extremely difficult if not impossible to undo, even if the contested decision

were subsequently annulled (order of the President of the Court of First Instance in Case T-395/94 R Atlantic Container Line and Others v Commission [1995] ECR II-595, paragraph 55). Once a reciprocal representation agreement is amended, the changes can no longer be reversed by the applicant on its own initiative alone, as it will not be in a position unilaterally to reintroduce the present arrangements, in so far as that will necessarily depend on the consent of the other party to the contract.

32 Moreover, if on the basis of their extended mandates foreign collecting societies grant long-term multi-territory licences to commercial users, they will have no interest in reintroducing territorial limitations. In addition, whether and how the collecting societies can agree to limit their mandates to their national territories again will be entirely beyond the control of the applicant, as that would affect the rights of third parties, namely the commercial users who had acquired those long-term multi-territory licences.

33 Consequently, if the model envisaged by the Commission were put into practice, it would bring about lasting changes in the field of reciprocal representation agreements to the detriment of the applicant's interests. Those changes would destroy a system which has proved to serve the interests of authors, commercial users and the general public, and has played an important part in promoting cultural diversity during the last hundred years. The changes required by the Commission would entail a risk that the present network of reciprocal representation agreements would disappear, which would endanger the existence of 'niche repertoires' (order in Atlantic Container Line and Others v Commission, cited in paragraph 31 above, paragraphs 51 to 57).

34 The applicant emphasises, finally, the uncertainty surrounding the correct implementation of the contested decision. It actually infringes the principle of legal certainty for the Commission to require in the contested decision a 'bilateral review' of the reciprocal representation agreements without defining the conduct it requires. It is thus impossible for the applicant to know whether it is obliged to extend the mandates it has granted to other collecting societies, to the detriment of its commercial interests, or whether the territorial clauses of reciprocal representation agreements, allegedly the result of an unlawful concerted practice, are to be regarded as void under Article 81(2) EC, and if so, from what date.

35 The Commission replies essentially that the applicant's arguments are based on a wrong reading of the operative part of the contested decision. In any event, the serious damage alleged is purely hypothetical and has not been made out with sufficient probability. Moreover, that loss cannot be regarded as irreparable, since nothing prevents the applicant from providing, in its contractual relations with other collecting societies, for a return to the situation criticised in the contested decision, if the decision were to be annulled in the main proceedings.

Findings of the President of the Court

36 The urgency of an application for interim measures, as referred to in Article 104(2) of the Rules of Procedure, must be assessed in relation to the need for an interim decision in order to prevent serious and irreparable damage to the party applying for interim measures. It is not sufficient for the purpose of satisfying the requirements of that provision merely to allege that the measure the suspension of whose operation is being sought is about to be put into effect, but it is for that party to prove that he cannot wait for the outcome of the main proceedings without suffering damage of that nature. To be able to determine whether the damage which the applicant fears is serious and irreparable and therefore provides grounds for, exceptionally, suspending the operation of the contested decision, the judge hearing the application must have specific evidence allowing him to determine the precise consequences which the absence of the measures applied for would in all probability entail (order of the President of the Court of Justice in Case 378/87 R Top Hit Holzvertrieb v Commission [1998] ECR 161, paragraph 18; order of the President of the Court of First Instance in Case T-196/01 R Aristoteleio Panepistimio Thessalonikis v Commission [2001] ECR II-3107, paragraph 32; order of the President of the Court of First Instance in Case T-163/00 R Carotti v Court of Auditors [2000] ECR-SC I-A-133 and II-607, paragraph 8; and order of the President of the Second Chamber of the Court of First Instance in Case T-143/99 R Hortiplant v Commission [1999] ECR II-2451, paragraph 18).

37 In addition, the alleged damage must be certain, or at least shown with a sufficient degree of probability, and the applicant is required to prove the facts alleged to form the basis of the likelihood of the damage. Damage of a purely hypothetical nature, in that it is based on the occurrence of future and uncertain events, cannot justify the ordering of interim measures (see, to that effect, the order of the President of the Court of Justice in Case C-335/99 P(R) HFB and Others v Commission [1999] ECR I-8705, paragraph 67; order of the President of the Court of First Instance in Case T-241/00 R Le Canne v Commission [2001] ECR II-37, paragraph 37; and order of the President of the Court of First Instance in Joined Cases T-195/01 R and T-207/01 R Government of Gibraltar v Commission [2001] ECR II-3915, paragraph 101).

38 In the present case, first, the applicant expresses its fear that the system of reciprocal representation agreements, which, it says, has proved itself over the last hundred years inter alia in promoting cultural diversity, might be destroyed completely and the present network of those agreements disappear if the model envisaged by the Commission were applied before the Court gives judgment in the main proceedings. According to the applicant, the introduction of that model would reduce its income dramatically, possibly endangering its existence.

39 In this respect, it must be observed that in the application for interim measures the applicant confines itself to seeking suspension of the operation of Articles

3 and 4(2) and (3) of the contested decision in so far as they require it, in the first place, to bring to an end the infringement consisting in coordinating, by means of an unlawful concerted practice, the territorial delineations in such a way as to limit the extent of a licence to the national territory of each collecting society and, in the second place, to review bilaterally with the other collecting societies concerned the territorial extent of their mandates ('the contested provisions'). The applicant has not, on the other hand, sought interim judicial protection against the application of Articles 1 and 2 of the contested decision, even though in those provisions the Commission states that in its reciprocal representation agreements it has provided for two unlawful restrictions, and in Article 4(1) of the contested decision orders it to terminate those restrictions immediately.

40 It must be added that the contested provisions concern the reciprocal representation agreements only in so far as the agreements relate to satellite, cable and internet retransmission. As the Commission has rightly observed, those are comparatively recent methods of exploitation, in respect of which the reference to the long tradition of reciprocal representation agreements does not appear appropriate. Moreover, according to the Commission, the applicant itself stated in the administrative proceedings that those forms of exploitation represented only a small fraction of its total income, less than [confidential](1) % for internet use, [confidential] % for satellite use, and less than [confidential] % for cable retransmission, with the income produced by the grant of licences for the Hungarian repertoire abroad representing less than [confidential] % of its total income.

41 The applicant for its part has not produced any figures to correct or update those statements by the Commission, or to demonstrate in any other way the seriousness of the alleged financial damage by showing that the 'online' field represented the great majority of its income. Such detailed figures, which were within the applicant's power, should already have appeared in the application for interim measures itself. Such an application must be sufficiently detailed in itself to enable the defendant to prepare his observations and the judge hearing the application to rule on it, where necessary, without other supporting information, and the essential elements of fact and law must be apparent from the application for interim measures itself (order of the President of the Court of First Instance in Case T-236/00 R Stauner and Others v Parliament and Commission [2001] ECR II-15, paragraph 34; order of the President of the Court of First Instance in Case T-306/01 R Aden and Others v Council and Commission [2002] ECR II-2387, paragraph 52; and order of the President of the Court of First Instance in Case T-85/05 R Dimos Ano Liosion and Others v Commission [2005] ECR II-1721, paragraph 37).

42 Furthermore, the applicant asserted that it was not a concerted practice but, contrary to the Commission's findings in the contested decision, legitimate and objective considerations relating to its commercial interests which induced it to limit the mandates granted to the other collecting societies to their national territories. In so far as the applicant thus states that its conduct was based not on a concerted practice but on its independent choice in accordance with its economic interests, it necessarily follows that the immediate application of the prohibition of the concerted practice under Article 4 of the contested decision cannot in this respect have the devastating financial impact alleged.

43 Accordingly, in the absence of specific factors put forward by the applicant, its bald assertion as to the collapse of the system of reciprocal representation agreements and the serious financial damage which it would suffer as a result, in terms of threatening its existence, does not justify suspending the operation of the contested decision.

44 In addition, it is not irrelevant to note that, as at 14 November 2008, a week after the expiry of the period of 120 days fixed by Article 4(2) of the contested decision, most of the 24 collecting societies to which the contested decision was addressed had not made applications for interim measures, which likewise appears to cast doubt on the applicant's forecasts of catastrophe if the present application for interim measures were dismissed.

45 Second, the applicant complains of the uncertainty surrounding the implementation of the contested decision, Article 4(2) of which is said to infringe the principle of legal certainty by requiring it to 'review bilaterally' with the other collecting societies the territorial extent of their reciprocal representation agreements without defining precisely the conduct required by the Commission. It is not possible, in the applicant's view, to know whether it should extend the mandates it has granted to the other collecting societies or whether the territorial clauses in its reciprocal representation agreements are void under Article 81(2) EC.

46 On the latter point, it suffices to note that Article 81(2) EC makes void only 'agreements [between undertakings] or decisions [by associations of undertakings]' prohibited under Article 81(1) EC, whereas that civil-law sanction does not apply to prohibited 'concerted practices'.

47 In the present case, there is nothing in the contested decision to allow the conclusion that the reciprocal representation agreements entered into by the applicant fall under Article 81(2) EC because of the territorial delineations criticised in Article 3 of the decision. In Article 3 the Commission limits itself to stating that the collecting societies mentioned have infringed Article 81 EC 'by coordinating the territorial delineations' in order to limit the extent of the licences. The unlawfulness of the concerted practice referred to in the contested decision cannot therefore make void the alleged result of that practice, namely the reciprocal representation agreements.

48 In particular, such nullity cannot be inferred from Article 4(2) of the contested decision, which requires the undertakings listed in Article 3 to 'review' bilaterally with each other the territorial extent of their mandates in each of their reciprocal representation

agreements and to provide the Commission with copies of the reviewed agreements.

49 In any event, as the Commission rightly points out, any argument relating to Article 81(2) EC is immaterial in the present context. Even an order suspending the operation of the contested provisions would not make provisionally valid an agreement which had been declared void on the basis of Article 81(1) EC with the consequences prescribed by Article 81(2) EC, since the judge hearing an application for interim measures cannot substitute his own appraisal for that of the Commission (order of the President of the Court of Justice in Case 71/74 R and RR Nederlandse Vereniging voor de Fruit- en Groentenimport and Nederlandse Bond van Grossiers in Zuidvruchten en ander Geimporteerd Fruit v Commission [1974] ECR 1031, paragraph 5, and order of the President of the Court of Justice in Joined Cases 207/78 R to 215/78 R and 218/78 R Van Landewyck and Others v Commission [1978] ECR 2111, paragraph 5).

50 As regards the alleged uncertainty as to the outcome of the 'review' of the agreements required by Article 4(2) of the contested decision and the failure of the Commission to specify the conduct required of the applicant, it is clear that the Commission is not empowered to issue specific instructions requiring the collecting societies to make a particular choice from among several possible lawful courses of action with respect to the review in question, such as the complete abandonment or the partial amendment of the reciprocal representation agreements (see, to that effect, Case T-24/90 Automec v Commission [1992] ECR II-2223, paragraphs 51 to 53). It is not therefore for the Commission to decide how those agreements should be worded after they have been reviewed.

51 It follows that the applicant, as indeed each of the other collecting societies, has a certain freedom as regards the review of the agreements in question.

52 The Commission indicated in the contested decision, the operative part of which must be interpreted in the light of its statement of reasons (Case C-91/01 Italy v Commission [2004] ECR I-4355, paragraph 49), that the decision left the collecting societies the possibility of adapting the system of reciprocal representation agreements to the needs of the online environment and thereby making it more attractive for right-holders and users. The Commission pointed out in the contested decision that it did not prohibit the system of those agreements as such, and did not prevent the collecting societies from using some territorial delineations, but took issue with the coordinated nature of the approach adopted for that purpose by all the societies. Thus, according to the contested decision, the grant of a licence limited to a certain territory does not in itself restrict competition, as the grantor of a licence can limit it to a particular territory without infringing Article 81(1) EC (see, in particular, points 95, 201 and 215 of the contested decision).

53 The Commission is therefore right to submit that it is possible to comply with Article 4 of the contested decision while maintaining the network of reciprocal representation agreements.

54 Moreover, in Article 5 of the contested decision, the Commission allows the addresses of the decision, in case of difficulty, to ask it for an extension of the review period of 120 days. The applicant does not submit that the Commission rejected such a request on its part or refused to enter into dialogue with it with a view to resolving any problems in carrying out its obligation of review.

55 In so far as the applicant appears also to fear that the contested decision might, as a result of the alleged legal uncertainty, expose it to the risk of being penalised by the Commission for breaching its obligation of review, it suffices to observe that that risk is purely hypothetical, in that it is based on the occurrence of future and uncertain events. In any case, it would be for the Commission, on which the burden of proof lies, to show that the applicant's future conduct amounted to an infringement, if it ever intended to impose a penalty on the applicant. If the applicant did not agree with the Commission's approach, nothing would prevent it from bringing an action before the Community judicature to complain that the penalty was unlawful, relying on the ambiguity of the review obligation imposed in the contested decision.

56 It follows that the applicant's obligation to review its reciprocal representation agreements, imposed in Article 4(2) of the contested decision, cannot be regarded as causing it serious and irreparable damage.

57 The same applies to the applicant's complaint against the Commission alleging, third, that the required amendment of its reciprocal representation agreements is fundamentally contrary to its commercial interests and will entail irreversible changes to the detriment in particular of 'niche repertoires', as it will be unable unilaterally to restore the present network of those agreements if the contested decision is annulled in the main action.

58 Those are mere assertions which are not supported by any evidence. In particular, the applicant has not specified, still less demonstrated, why it would be impossible for it to reamend its revised reciprocal representation agreements after the annulment of the contested decision, or to provide even now for such an amendment. It has failed to explain why the other collecting societies would oppose a request made by it for the current system to be reintroduced. By thus basing its argument on the anticipated reaction of the other contracting parties, the applicant relies on damage that is entirely hypothetical and cannot justify granting the suspension of operation sought (see, to that effect, the order in Government of Gibraltar v Commission, cited in paragraph 37 above, paragraph 101).

59 It follows from all the foregoing that the application for interim measures must be dismissed on the ground of lack of urgency, without there being any need to examine whether the other conditions for ordering the suspension of operation sought, in particular the existence of a prima facie case, are satisfied.

60 In those circumstances, there is no need to rule on the application for leave to intervene of RTL Group, CLT-UFA and Music Choice Europe.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.
2. Costs are reserved.

Luxembourg, 14 November 2008.

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* Language of the case: English.

1 – Confidential data omitted.
