**UFOs over Italy – why *OSA* is good law and the Italian law is in accordance with**

**the EU norms concerning the status of IMEs at issue in the *LEA v Jamendo* case**

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***Introduction: overview of the “liberalization”[[2]](#footnote-2) of the European collective management system[[3]](#footnote-3)***

There have been various waves of attempts at the “liberalization” of the collective management system in Europe, with two basic objectives: first, to encourage or even constrain collective management organizations (CMOs) – which had traditionally a *de facto* and, in certain countries, even *de iure* monopoly status – to “compete”; second, to establish an all-European single market where the CMOs of any Member States might begin collective management activities and compete with each other anywhere in the E.U. without the need for authorization from the governments of given Member States.

The “liberalization,” in general, has not been initiated by the members of the CMOs, although there have always been a smaller number of rightholders who were not satisfied with the functioning of their CMOs and who sought an alternative organization (which, due to the system of monopolies, they were able to find only in the CMOs of other countries or choose individual exercise of their rights (which, however, where collective management was really needed, was not a realistic option). In contrast, certain groups of users have been key initiators and strong supporters of the “liberalization.” They have been complaining about the – according to them – high tariffs of the domestic CMOs and were hoping that, if several CMOs were competing in the same territory, it would result in decreasing tariffs.

The Commission has been good partner for this, although not necessarily in order to support the users’ cost-minimizing objectives. The promotion of competition and the free movements of goods and services in the internal market are exclusive[[4]](#footnote-4) or shared[[5]](#footnote-5) competence of the Union and in exercising of these competences, the Commission has key obligations, including launching infringement procedure where, in view of the Commission, Member States do not respect the EU norms in these respects.[[6]](#footnote-6) It is understandable that, as the EU organ to fulfill these tasks, it has tended to have had less attention to certain other aspects that, in contrast, justify less competition and/or the integrity of the domestic markets. Such situations have typically emerged in the fields of collective management where there are natural monopolies and where the transformation of domestic markets into a single internal one would have been in conflict with the cultural interests and policy of the Member States (which happens to be their competence with only supportive competence of the Union).

A legislative body which represents all layers of the society and all stakeholders of the legal-political problems to solve and the courts which must take into account all aspects of the legal regulations and all legitimate interests may have, however, different position about the same issues. This has manifested also concerning the question of “liberalization” of collective management, where the European Parliament and the Court of Justice of the E.U. (CJEU) have had a balancing role by slowing the process or even partly stopping it where they found it justified. When, in trying to react to the really new effects of online digital technology, the Commission went too quickly and too far in its 2005 Recommendation on online musical licensing in the “Europeanisation” of collective management, the European Parliament warned, in its 2007 Resolution, about the potential detrimental effect on the collective management systems and cultural identity of the Member States, and asked the Commission to work out new regulation with more appropriate attention to those aspects. And, when the Commission felt that the *de iure* monopoly of CMOs in certain Member States is in conflict with the EU law, including the Services Directive and initiated an infringement procedure against the Czech Republic, the CJEU rules in *OSA* that in a situation – the description of which corresponded to the economic science category of “natural monopoly” – like the one at issue in the case, even *de iure* monopoly is not against the EU law and that the Services Directive is not applicable to collective management. It is also the CJEU that found that there were no proofs that CISAC and its member societies were responsible of anti-competition practices due to the system of mutual representation agreements by which the various domestic CMOs were able to license the use practically all the active world repertoire.

In the case of the Collective Management Directive (adopted on February 26, 2014, one day before the *OSA* judgment of the CJEU), again it was the mainly European Parliament which opposed the statement in the Commission’s draft about the applicability of the Services Directive and achieved its removal from the text. Nevertheless, a “liberalizing” trend prevails in the Directive which raises certain interpretation questions as discussed below. This trend seems to be particularly strongly manifested in the provisions on the (in the field of collective management previously unknown category of) “independent management entities” the status of which – more precisely the non-recognition of their collective management status concerning certain rights – in Italy is at issue in the *LEA v Jamendo* case.

In this paper, the opinion is expressed that it would be justified to the CJEU to rule basically in favor of LEA (at least as regards the key aspect of the management of the right of public performance). This would correspond to the EU law, including to the settled case law of the CJEU, and it would be desirable for maintaining the integrity of the collective management structures and the protection of cultural diversity of the Member States.

***Outline -- through the titles and sections of the paper***

A kind outline is presented below which consists verbatim of the titles of the various parts and sections of the paper and, as such, may serve also as a kind of abstract:

*Part I. Context and background of the attempts at “liberalizing” the European collective management system*

* 1. *The definition of “collective management organization” in the CRM Directive – according to which it is sufficient that two rightholders manage rights for profit-making purposes – adopted in order to introduce competition between CMOs, is not suitable to express the real nature and**functions of CMOs, and particularly not in cases where a natural monopoly situation requires de facto or de iure monopoly of CMOs*

*1.2. In the case of management of certain rights, there is a natural monopoly situation where, for adequate application of the rights, the CMOs have to be in de facto or de iure monopoly position (and where, thus, the introduction of competition decreases efficiency and legal certainty, increases costs, and decreases the distributable remuneration)*

*1.3. The idea that several organizations – both domestic and foreigners – should be allowed to manage the same rights contradicts the objectives and raison d’être of mandatory and extended collective management*

*1.4. The CJEU in OSA –which, in that respect, has remained good law also after the entry into force of the CRM Directive – has confirmed that, in a natural monopoly situation, it is in accordance with the EU law to prescribe de iure monopoly of CMOs*

*1.5. Where there is no natural monopoly situation and where mandatory or extended (or presumption-based) collective management is not justified, in principle, parallel CMOs may be set up to manage the same rights, which, however – in particular in small cultural markets – is not necessarily advisable*

*1.6. Through appropriate interpretation, the provisions of the CRM Directive on the freedom of rightholders to join a CMO or CMOs to manage their different rights in different Member States may be reconciled with the de facto or de iure monopoly position of CMOs in a given Member State*

*1.7. The CJEU may find it necessary to further refine OSA by clarifying that it applies to a natural monopoly situation (and in that respect it stands as good law), but it does not apply where there is no such a situation (and there is no other possible reason either, such as the protection of cultural diversity); in particular it does not apply to online trans-border licensing of musical works (in respect of which also the disclaimer in OSA is to take into account that its findings have been adopted “as European Union Law stands at present”)*

*1.8. Collective management of copyright is not that kind of “service” to which the Services Directive (and Article 56 of the TFEU) might be applied – as confirmed both by the European Parliament and by the CJEU, and as the statement on its applicability appearing in draft CRM Directive has been deleted*

*1.9. Through appropriate interpretation, Article 37(2) of the CRM Directive may be reconciled with the rejection of the application of the Services Directive to collective management*

*1.10. The EU Members States – in accordance with the TFEU under which it is an obligation to always take into account the cultural aspects and with the binding norms of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions – have the right to adapt the regulation of collective management in their territories in accordance with their cultural policy to protect the integrity of their cultural areas and cultural diversity*

*Part II. The regulation of the status of IMEs in the CRM Directive has taken place without due preparatory procedure, without appropriate impact studies and without the necessary involvement of the key stakeholders; the adopted rules are in conflict with the principle of equal chances in the market to those who carry out the same activities as well as with the international and EU provisions on the protection of cultural diversity, and have the potential to undermine the normal functioning of the collective management system*

*2.1. There are only scarce provisions on IMEs without any substantive explanation why they have been included in the Directive which regulates the establishment and functioning of CMOs*

*2.2*. *No real impact study had been made before the inclusion of the provisions of IMEs into the Directive, except for one prepared by the staff of the Commission that had pointed out that such sort of parallel licensing would have a negative impact on cultural diversity*

*2.3. The provisions on IMEs have been included into the CRM Directive without appropriate preparation and without due involvement of the interested stakeholders*

*2.4. There is a contradiction between the definition of IME and the recital related to it*

*2.5. The members of the European Parliament (at least several of them) did not seem to be aware (or did not care) what kinds of provisions they have adopted on IMEs, so much that the various language versions adopted and published were in contradiction with each other*

*2.6. Various ideas and variants had emerged leading to the inclusion of provisions on IMEs*

*2.7. There are numerous important aspects where unjustified competition advantages are granted to IMEs vis-à-vis CMOs*

*2.8. Badly founded allegations had been made about the superiority of IMEs over CMOs and about their “royalty-free” licensing systems*

*III. Key previous lawsuits about the legal status of IMEs: Audiovalley (MusicMatic, Jamendo) v SACEM and SIAE v Soundreef*

*3.1. Allegations about “royalty-free licensing” and about the conflict with the EU law where IMEs are not allowed to carry out mandatory collective management*

*3.2. Judgment of the Cour de cassation: the phonograms licensed by Jamendo – contrary to the allegations about ”royalty-free” and non-commercial CC licenses – had been published for commercial purposes*

*3.3. Judgment of the Cour de cassation: it is not against the French and EU law that IMEs are not allowed to carry out mandatory collective management of copyright or related rights*

*3.4. Lawsuit of SIAE against Soundreef where the latter alleged that the Italian copyright law is in conflict with the EU law, in particular with the CRM Directive, because it has only extended the possibility of parallel management of certain rights to CMOs and not to IMEs*

*3.5. Preliminary question of the Tribunal of Rome (the same as which later was asked again in the LEA v Jamendo case) and the out-of-court settlement with the involvement of LEA*

*3.6. The SIAE – LEA/Soundreef settlement: recognition of the reality of natural monopoly and the need for one-stop-shop licensing*

*Part IV. LEA v Jamendo: why a ruling in favor of LEA would be justified*

*4.1. SIAE v Soundreef recycled as LEA v Jamendo*

*4.2. Brief overview of the AG’s arguments on the basis of which he has suggested that the CJEU rule in favor of Jamendo and the reasons for which his arguments are not well-founded*

*4.3. Licensing of public performance of musical works as background music by Jamendo is the same as about which the CJEU has found in OSA that granting de iure monopoly is justified*

*4.4. Licensing of “synchronization” of musical works by Jamendo requires more thorough analysis*

*4.5. Jamendo, in its IME function, is not “information service provider”, and even if it were such a provider, the provision of Article 3(2) of the Electronic Commerce Directive prohibiting the restriction of the freedom to provide such services from another Member State is not applicable to collective management of copyright and related rights*

*4.6. The CJEU did not err when it ruled in OSA that the Services Directive does not apply to collective management of copyrights and related rights – neither did the European Parliament when it declared the same and when it opposed to alleging its applicability in the CRM Directive*

*4.8. The AG’s argument according to which, since Italy has eliminated the de iure monopoly of SIAE by allowing other CMOs to manage the same rights, it must allow this also to IMEs is badly founded, since the CRM Directive provides IMEs huge unjustified advantages vis-à-vis CMOs which would gravely distort competition if it were allowed under such conditions*

*4.8. The AG despite the obligation under Article 167(4) of the TFEU, has not taken into account the cultural aspects**of the case*

*Conclusions*

***Part I. Context and background of the attempts at “liberalizing” the European collective management system***

***1.1. The definition of “collective management organization” in the CRM Directive – according to which it is sufficient that two rightholders manage rights for profit-making purposes – adopted in order to introduce competition between CMOs, is not suitable to express the real nature and functions of CMOs, and particularly not in cases where a natural monopoly situation requires de facto or de iure monopoly of CMOs***

Before the adoption of the Collective Management Directive (Directive 2014/26/EU; hereinafter: CRM Directive), only a few national laws contained definitions of “collective management organization” or “collective management” (or of some synonyms of these expressions). By the time the need for statutory regulations of the activities of CMOs emerged these concepts had become well known and were considered to be more or less granted.

In fact, the terms “collective management (or administration) of copyright” and “collective management (or administration) organization” themselves expressed appropriately what they meant (most typically, for a long while, societies of authors, mainly composers and lyricists of musical works in alliance with their publishers). First, an “*organization*” is more than just a couple of, or a small group of, loosely connected persons; it is supposed to have an organizational structure and internal rules of operation to serve an objective for which it has been set up.[[7]](#footnote-7) Second, it follows from the expression, that the objective of the organization is “*management* of copyright” which is more than just exercising copyright through contracts. And *management* means “the activity or job of being in charge of an organization” by “a group of people responsible for controlling and organizing” (the organization).[[8]](#footnote-8) Third, it is “*collective*” management in the sense that it is “done or shared by every member of a group”[[9]](#footnote-9) and, in the case of traditional CMOs, for a “*collectivity* [which] can be used as a basis of cooperation, for sharing tasks, [and] giving mutual support.[[10]](#footnote-10)”

As mentioned above, performing rights societies of authors, composers and music publishers were the first fully-fledged CMOs performing all the basic activities of such organizations – monitoring uses, licensing, collecting remuneration and distributing it. These societies have been established as natural monopolies (see below), one in each country. And not because this would have been prescribed in law, but because, due to the natural monopoly features of the management of musical performing rights, this was the only meaningful way of exercising these rights. These societies, like SIAE in Italy, functioned – and many of them still do function – as collectivities in the spirit of cooperation and solidarity in the common interests of their members. They play active role in the cultural life of the countries where they work, by promoting creativity, supporting young talents, sponsoring cultural programs, assisting creators in need, etc. Through the network of mutual representation agreements, they have become able to grant blanket licenses for practically the entire active world music repertoire. The spirit of solidarity has been manifested also in that they have agreed, in the bilateral agreements, to the deduction of a certain percentage – normally up to 10% – for cultural and social purposes also from the remuneration due to the authors represented by each-others.

This concept of “collective management” better corresponds to the author/creation-centric civil law legal systems (and to authors’ and performers’ organizations) than to the more product/market/competition-oriented common law systems (and to organizations of legal entities). In common-law countries, the term “collective management organization,” in general, is not even used; but such expressions are as ‘collecting organization”, “collecting society”, “licensing agency” or, for example, in the UK Copyright, Designs and Patents Act: “licensing body”.

Section 116(2) of the UK Act, as adopted in in 1988, defined “licensing body” in this way:

In this Chapter [Chapter VII. Copyright Licensing] a “licensing body” means a society or other organization which has as its main object, or one of the main objects, the negotiation or granting either as owner or prospective owner of copyright or as agent for him, of copyright license, and whose objects include the granting of licenses covering works of *more than one author*. [Emphasis added.]

The drafters of the CRM Directive choose this definition as a basis. Article 3(a) of the draft read as follows:

(a) 'collecting society' means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement, by *more than one rightholder*, to manage copyright or rights related to copyright as its sole or main purpose and which is owned or controlled by its members”.[[11]](#footnote-11)

This did not correspond to the concept of “organization” – not even to the minimalist Latin dictum: “*tres facient collegium*” – and it had nothing to do with the real nature of collective management known in the EU Member States (including at that time still EU Member U.K., where PRS and MCPS as well as other CMOs were managing the rights of big number of rightholders both nationals and foreigners of all over the world; practically the entire active world repertoire).

The above-quoted draft definition seemed to reflect the apparent intention of the drafters to introduce, and in a way constrain, competition between CMOs. This had been expressed in a number of provisions of which the most extreme example was the idea to extend the application of the Services Directive (Directive 2006/123/EC ) to collective management (more precisely, just to the „management” of rights; the adjective “collective” has been left out from the definition) on the clearly expressed idea that any licensing body should be able to begin collective management in another Member State in a way that the government thereof should not have any real say about it.

In the final text of the Directive, certain amendments have been made and “collective management organization” rather than “collecting society” has been defined in Article 3(a):

(a) ‘collective management organisation’ means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which fulfils one or both of the following criteria:

(i) it is owned or controlled by its members;

(ii) it is organised on a not-for-profit basis.

As it can be seen, not only the adjective “collective” has been included and not only the “organization” nature has been emphasized but also the rights are to be managed “for the collective benefit” of the rightsholders. All this, however, has been debased and contradicted by maintaining the definitional element according to which already more than one rightholder (that is already two) may forms a CMO – that is the “collectivity” may consist of two persons – and that the objective of the CMO may be a for-profit organization.

This definition, in one aspect, has become more anachronistic than the definition of in the CDPA,[[12]](#footnote-12) which, in section 116(4) includes this clarification: “(4) References in this Chapter to licences or licensing schemes covering works of more than one author do not include licences or schemes covering only (a) single collective work or collective works of which the authors are the same”. That is, the U.K. Act, at least, has excluded the bizarre possibility that two co-authors (such as the composer and the lyricist) of a work may also form a CMO. Of course, it may be said that it should not be taken seriously, because it certainly does not happen, but this would be a strange suggestion about the basic definition of a voluminous directive. It would be difficult not to recognize that the definition, adopted with the intention to introduce and enforce competition, is unsuitable to express the real nature and functions of CMOs.

Competition is usually for profit. Thus, although the overwhelming majority of the European laws provided (and even now, in general, provide) that CMOs must not work for profit, it corresponded to the intention of the drafters of the Directive to introduce competition that, under the definition, a CMO may be organized on a for-profit basis – although, in that case, it must be “owned or controlled by its members”. If this definitional element is taken into account, it may be seen what kind of CMO only with two members the drafters might have imagined; namely, joint licensing of two for-profit companies having obtained the rights of various rightholders. This, however, does not correspond either to the realities of collective management. Although this is only one of the three possible variants – and the one according to which a CMO is owned or controlled by its members and is not organized on a for-profit bases would be at least in order from this viewpoint of a healthy collective management system – the third one is also problematic. In that case, a CMO, in principle, is not organized on a for-profit basis but it is *not* owned or controlled by its members. In this case, it is difficult to see how it may be guaranteed that such a CMO manages the rights “for the collective benefits of [the] rightholders” (and not rather for the persons who own or control the CMO). Furthermore, it may hardly be reconciled with the obligatorily applicable detailed provisions of the Directive to guarantee that a CMO’s activities are controlled by the members and to ensure transparency and accountability.

It is to be noted, that certain language versions of the definition in Article 3(a) of the Directive do not contain the anachronistic elements that already two rightholders may form a CMO; more realistic expressions – “several/more/various rightholders” – are used in them (such as, in French, “*plusieurs titulaires de droits*” or, in Spanish, “*varios titulares de derechos*”). The rest of the definition is, however, the same also in those versions.

***1.2. In the case of management of certain rights, there is a natural monopoly situation where, for adequate application of the rights, the CMOs have to be in de facto or de iure monopoly position (and where, thus, the introduction of competition decreases efficiency and legal certainty, increases costs, and decreases the distributable remuneration)***

It is not by chance that performing rights societies of authors – which were the first fully-ledged CMOs and have remained the most important category of CMOs – have been established as *de facto* monopolies (and have been recognized sometimes even *de iure* as such; as in Italy).

After the SACEM in France as the first such society established in 1850, similar societies were established as single organizations in their respective countries to manage musical performing rights: in Italy, in 1882, the SIAE; in Spain, in 1889, the SGAE; in Germany, in 1903, the AFMA – which may be regarded the predecessor of the current powerful GEMA; in Hungary, in 1907, the MARS – the predecessor of the present Artisjus; in Austria, in 1913, the AKM; in the United Kingdom, in 1914, the PRS; in Switzerland, in 1923, the SUISA; in Australia, in 1926, the APRA; in Uruguay, in 1929, the AGADU; in Argentina, in 1930, the SADAIC; in Japan, in 1939, the JASRAC; and so on. In 1926, CISAC was established as the Confederation of such societies.[[13]](#footnote-13) The national societies, through bilateral contracts between them, got step-by-step closer to a position to represent and to be able to license – as one-stop-shops – through a blanket license practically the relevant world repertoire of musical works.

These organizations were born as natural monopolies – even if, at that time, this expression was not necessarily used (by the founders of the organizations certainly not). Simply, the nature of the rights and the interests of both the rightholders and the users justified their *de facto* monopoly position in their respective countries.

In the OECD Glossary, “natural monopoly" is defined in this way:

A natural monopoly exists in a particular market if *a single [organization] can serve that market at lower cost than any combination of two or more [organizations].*

Natural monopoly *arises out*of the properties of productive technology, often in association with *market demand, and not from the activities of governments or rivals* (see monopoly).

Generally speaking, natural monopolies are characterized by steeply declining long-run average and marginal-cost curves such that *there is room for only one [organization] to fully exploit available economies of scale and supply the market* […]

In essence natural monopolies *exist because of economies of scale and economies of scope* which are significant relative to market demand… *Because productive efficiency requires that only one [organization] exist, natural monopolies are typically subject to* government regulation. Regulations may include price, quality, and/or entry conditions." [Emphasis added.][[14]](#footnote-14)

This seems to be the generally accepted concept in economics:

In the case of natural monopolies,*trying to increase competition by encouraging new entrants into the market creates a potential loss of efficienc*y. The *efficiency loss to society* would exist if the new entrant had to duplicate all the fixed factors - that is, the infrastructure.

*It may be more efficient to allow only one [organization] to supply to the market because allowing competition would mean a wasteful duplication of resources*. [Emphasis added.][[15]](#footnote-15)

Natural monopoly:a situation in which *one [organization] is able to supply the whole market for a product or service more cheaply than two or more [organizations] could.* (Emphasis added.´)[[16]](#footnote-16)

It is easy to see what circumstances justify *de facto* or *de jure* monopoly of CMOs to manage certain rights such as the right of public performance in musical works.[[17]](#footnote-17) If there is more than one CMO to manage the same right, two or more parallel managements, buildings, equipment, monitoring networks, staffs – and so on – are needed, and this inevitably increases the cost level (since, with the same quality of management, more or less the same costs emerge for each of the competing repertoires, which, however, are necessarily smaller than the repertoire of one organization that manages the right alone in the given country; thus, the costs burden becomes higher per work). Consequently, the remuneration per work and per rightholder decreases.

The increase of the number of organizations to manage the same right also increases the administrative costs of lawful users, since they have to obtain the repertoire needed by them from different sources, to negotiate with different CMOs, to fulfil their obligation to provide information on actual use of works on the basis of different databases, and so on. In contrast, for those users who rather try to avoid paying remuneration (or to pay as little as possible), the existence of parallel CMOs to manage the same rights may be useful; they can tell the representatives of each of the CMOs that they use exclusively or predominantly other CMO’s repertoires. The CMOs may protect themselves against potential misinformation about the use of their repertoires by increasing monitoring activity, but this leads to higher management costs and – consequently – also for this further reason, to the decrease of distributable remuneration.

It is to be noted, however, that ”natural monopoly" is not a legal category but a concept developed in economic science, and it does exist or does not exist objectively, depending on the circumstances. Therefore, the real question is whether or not the existence of such monopolies is recognized and the recognition is adequately reflected in the legislation, or rather it is not recognized and provisions are adopted to promote (or even directly or indirectly introduce) competition also where, in the given cases, the functioning of natural monopolies would be justified. However, it should be seen that the extension of the scope of CMOs as *de facto* or *de jure* monopolies beyond the cases where there are objective reasons for their existence would create unjustified limitations of the rights concerned. With the new technological and business-method developments, the conditions of exercising rights keep changing, and this necessarily influences the scope of rights where one-stop-shop licensing through management exclusivity is the appropriate way of exercising rights and where it is not.

It follows from this that, from the viewpoint of *de facto* or *de iure* monopoly, differentiation seems to be necessary. It is submitted that such differentiation would have been also possible in Italy with respect of the *de iure* monopoly of SIAE.

***1.3. The idea that several organizations – both domestic and foreigners – should be allowed to manage the same rights contradicts the objectives and raison d’être of mandatory and extended collective management***

The CRM Directive regulates in detail certain questions – such as the organizational structure of the CMOs and the legal requirements of their operation – many of which could have been left to the generic provisions of the Member States on the establishment and functioning of societies/associations (and it seems that the principles of subsidiarity and proportionality would have also justified this). At the same time, the Directive does not deal with certain issues the regulation of which would have been desirable; and the basic structural issues and applicable rules of mandatory, extended and presumption-based collective management have been definitely among them. The more so because some of the previous directives contained already provisions on such management in the case of certain rights but they did not offer a general framework of the regulation.

In the draft Directive, there was no reference to mandatory collective management, and extended collective management was also mentioned only once in an unsubstantiated statement according to which it is not suitable for online licensing. In view of this, the drafters seemed to believe that it would not be necessary to deal with the question of how the ideas of “liberalizing” collective management and introducing competition between CMOs could work in the case of such forms of collective management.

It has been in reaction to the warnings of certain Member States that the draft Directive was in conflict with the principles of subsidiarity and proportionality and the interventions by the interested stakeholders that recital (12) has been included in the text adopted.

*This Directive*, while applying to all collective management organisations, with the exception of Title III, which applies only to collective management organisations managing authors’ rights in musical works for online use on a multi-territorial basis*, does not interfere with arrangements concerning the management of rights* in the Member States *such as* individual management, *the* extended effect of an agreement between a representative collective management organisation and a user, i.e. *extended collective licensing, mandatory collective management, legal presumptions of representation* and transfer of rights to collective management organisations. [Emphasis added.]

However, this recital on these really important issues of the regulation that should have been addressed in a directive on collective management has remained an isolated – and quite alien – text in the Directive. Beyond the recital, there is no reference to extended collective management in the CRM Directive; consequently there is no provision to determine in which cases, under what conditions and with what kinds of guarantees such a management system may be established and operated (this lacuna has been eliminated only in Article 12 of the Digital Single Market Directive (Directive (EU) 2019/790)). Mandatory collective management is mentioned also only once beyond recital (12); namely in recital (19) where it is stated: “Where a Member State, in compliance with Union law and the international obligations of the Union and its Member States, provides for mandatory collective management of rights, rightholders’ choice would be limited to other collective management organisations.” As it is mentioned below, the latter clarification according to which only CMOs may carry out mandatory collective management (consequently IMEs not) has been helpful in France where Jamendo claimed that it is against the EU law that IMEs are not allowed to deal with such management (see sections 3.1 to 3.3 below), and it is also relevant in the *LEA v Jamendo* case.

The idea of competition between various collective management organizations is, however, also alien to the very objective and *raison d’être* of mandatory collective management. In such a case, collective management is mandatory because there is a need for such a consolidated form of management. The mandatory collective management of cable retransmission rights (which is doubly mandatory in the EU law, because the Member States are obligated to apply mandatory collective management) is a good example. Article (18) of the Satellites and Cable Directive (Directive 93/83/CEE) points out that mandatory collective management is needed to guarantee “smooth operation” of cable networks, which certainly could not be ensured if the cable operators were constrained to obtain licenses for the same category of rights from various CMOs competing with each other. The mandatory collective management of the right to remuneration for private copying is another such example. It is not by chance that it is mandatory; it follows from the very nature of the right; the use of the works to be copied privately cannot be identified at the moment of the manufacture, importation or distribution of equipment and/or recording materials when the obligation of the payment emerges (it may only indirectly and roughly assessed later, such as by means of some sampling techniques); thus, it would be anachronistic if various CMOs wanted to collect such remuneration. The application of the idea that the parallel operation of the CMOs of other Member States should be free – without any say allowed to the government of the given country whether or not it allows it – would be particularly anachronistic.

Free competition of CMOs managing the same category of rights does not seem to be in accordance with the very concept of extended (or presumption-based) collective management either. Now, in contrast with the CRM Directive, it is clarified in Article 12 of the Digital Single Market Directive that extended collective management is only applicable where collective management is a necessary (or even indispensable) way of exercising a right. Both extended and presumption-based collective management is supposed to be applied as a one-stop-shop system allowing blanket licensing which is valid to the rights of all rightholders except to those who “opt out” from collective management (and in the case of presumption-based systems, who rebut the presumption). (However, where collective management is a necessary or even indispensable form of exercising a right, opt-out may hardly be frequent.) If competition were introduced in such a case, a strange situation would arise that the effect of the license granted by CMO A would be extended to the rights of the rightholders who are members of CMO B, and *vice versa*. The users, in principle, were to pay twice for the same active world repertoire.

Thus, it may be stated that the “liberalization” and encouraging and even constraining competition between CMOs to manage the same categories of rights is not in accordance with the very nature, objectives and *reason d’être* of mandatory, extended and presumption-based collective management.

***1.4. The CJEU, in OSA – which, in that respect, has remained good law also after the entry into force of the CRM Directive – has confirmed that, in a natural monopoly situation, it is in accordance with the EU law to prescribe de iure monopoly of CMOs***

In *OSA*[[18]](#footnote-18), the CJEU has not used the expression “natural monopoly.” However, the judgment has been adopted in a case where collective management took place in a natural monopoly situation. The reasons on the basis of which the Court has stated that, in such a case, the EU law allows to the Member States to provide for *de iure* monopoly of CMOs correspond to the above-quoted principles of economic sciences.

The case took place following that, in 2008, the European Commission launched infringement proceedings against the Czech Republic and Hungary. The Commission claimed that the two countries had infringed EU law by creating obstacles to the freedom of establishment and to the freedom to provide services, by authorizing only one CMO to manage a certain right of a certain category of rightholders. The Commission alleged that thus these Member States had violated Article 16 of the Services Directive, under which a Member State must allow entities established in other Member States to provide services in their territory, and to ensure free access to and free exercise of service activity within its territory. This implied the idea that, in principle, as many CMOs might begin collecting remuneration in a Member State for the use of their repertoires as the number of Member States – that is, 28 at that time – and even more because competition is a good thing. And all this in a way that the government in the territory of which the CMOs began proliferating, creating chaos, and menacing cultural diversity could not stop it.

The Czech Republic and Hungary reacted in different ways to the above-mentioned infringement claims. The Czech Republic went to the CJEU to protect its national law in the *OSA* case, while Hungary gave in (in the view of the author of this article, unnecessarily) and changed its law (nevertheless, in a special way to guarantee the maintenance of one-stop-shop licensing in a natural monopoly situation).

In *OSA*, the CJEU rejected the idea of the application of the Services Directive [[19]](#footnote-19) and recognized the existence of natural monopoly situations – where the interests of the various stakeholders, and the public in general, justify that only one CMO be authorized to manage a given right of a given category of rightholders. In the judgment published on February 27, 2016, a day after the adoption of the CRM Directive (which took place on February 26, 2016) the Court ruled[[20]](#footnote-20) as follows:

Article 16 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, and Articles 56 TFEU and 102 TFEU must be interpreted as *not precluding national legislation*, such as that at issue in the main proceedings, *which reserves the exercise of collective management*of copyright in respect of certain protected works in the territory of the Member State concerned*to a single copyright collecting society...*[[21]](#footnote-21) [Emphasis added.]

This finding applied to Article 98(6)(c) of the Copyright Law of the Czech Republic by virtue of which only one organization was to be authorized to manage a given right. The Court pointed out that the statutory provision on CMO monopoly was ”suitable for protecting intellectual property rights, since it is liable to allow the effective management of those rights and an effective supervision of their respect in that territory”.[[22]](#footnote-22) This is a concise indication of the reasons for which, in a national monopoly situation as in the given case – licensing of communication to the public through television and radio sets in the rooms of a spa – the need for effective management of copyright, as discussed above, justifies that only one CMO be given authorization.

These findings of the CJEU have remained valid also after the entry in force of the CRM Directive. This is so, because what the Court stated was that *for the effective exercise of the right concerned* – the right of communication to the public in musical works – in the given context, the provision on *de jure* monopoly *was necessary*. The validity of this finding has not changed just because, one day before the adoption of the judgment, a Directive was adopted, some of the provisions of which stated the freedom of association of rightholders. It has not changed because it has remained true that, in such a natural monopoly situation, only the operation of a single CMO may guarantee truly effective exercise of the given right. It would be anachronistic to interpret the Directive in a way that it constrains the Member State to make the management of the rights ineffective and dysfunctional, in such cases, by introducing “competition”.

As mentioned above, Hungary has not followed the example of the Czech Republic. By Act CLXXIII of 2011, it modified Article 86(2) of its 1999 Copyright Law which contained the provision – similar to Article 98(6)(c) of the Copyright Law of the Czech Republic – opposed by the Commission, and allowed, in principle, the establishment of more than one CMO to manage the same rights. However, a safeguard criterion was included in Article 91(4) of the Copyright Law, by virtue of which *the authorization of another CMO still had not become possible in the case of mandatory and extended collective management* (see below in the next chapter) *where it would endanger the operability and efficiency of the collective management system* *(that is, practically where there is a natural monopoly situation).*

In that way, the new Hungarian regulation was based on the same kinds of considerations as the *OSA* judgment of the CJEU adopted four years *later*. The new Hungarian provisions – which, in principle, made possible the authorization of the operation of more than one CMO to manage the same rights – entered into force on January 1, 2012, much before the CJEU found on February 27, 2016, in *OSA* that such a provision in a natural monopoly situation is in accordance with the EU law.

When the CRM Directive was implemented in Hungary – the majority of its provisions in the separate new Collective Management Act (Act XCIII of 2016), which replaced Chapter XII of the Copyright Law on collective management – both the freedom of association of rightsholders and the principle that the operability of the collective management system must be preserved were confirmed. Under Articles 32 and 33 of the Collective Management Act, a CMO which fulfills the general conditions does not need authorization – beyond registering at the National Intellectual Property Office (HIPO) – if it does not wish to be recognized and registered as a “representative CMO” (the status of which is necessary for mandatory and extended collective management; see the following paragraph).

Thus, such CMOs may manage the same category of rights of different groups of the same category of rightholders in parallel. However, by virtue of Article 35 of the Collective Management Act, in the cases where mandatory or extended collective management applies, *the functioning of more than one CMO*, or a new CMO in addition to the already authorized one, *may only be authorized* to manage the same right of the same category of rightholders *if such authorization does not endanger the operation and efficiency of collective management*. The fulfillment of this condition may be proved – *inter alia* – by the presentation of an agreement among the CMOs concerned about the management of the rights of those right-holders that are *not* covered by the repertory of any of them (Article 89 of the Law) and on the establishment of joint tariffs, as well as the collection of remuneration for the right-holders represented by all of them (Article 90 of the Law).

If this condition is not met, that CMO must be authorized which better fulfills the conditions of authorization under Article 34, and a new CMO must be authorized – with the withdrawal of the registration of the already registered one – if it better satisfies those conditions. Where two or more CMOs ask for authorization as representative CMOs for the management of the same right of the same category of rightholders and they fulfill the conditions under Article 34, they – by virtue of Article 89 of the Act– must agree among themselves which of them grants licenses on the basis of extended collective management or collects remuneration in the framework of mandatory collective management on behalf of those right-holders who are not represented by any of them. Such CMOs, by virtue of Article 90 of the Act, must also agree between or among themselves on the establishment of jointly applicable tariffs and on which of them collects remuneration on behalf of the other or the others. If they are unable to reach agreement on these issues, the HIPO appoints the CMO which better meets the conditions under Article 34 of the Act.

The findings of the analysis of the status of mandatory and extended collective management above is relevant also in the *LEA v Jamendo* case where Jamendo claims that the Italian legislation is in conflict with the EU law because it does not allow IMEs to carry out the management of rights freely in parallel with a CMO in all cases, including where one-stop-shop management is needed (either in the form of mandatory or collective management or some other form guaranteeing one source of licensing on behalf of practically all the active world repertoire).

***1.5. Where there is no natural monopoly situation and where mandatory or extended (or presumption-based) collective management is not justified, in principle, parallel CMOs may be set up to manage the same rights, which, however – in particular in small cultural markets – is not necessarily advisable***

In a way, this goes without saying, but still it seems necessary to state. In particular, online trans-border licensing of musical works is such a case as regulated in Title III of the CRM Directive. Online digital technology has made possible also individual licensing and licensing by various entities. Nevertheless, although the licensing, the control of uses, and even the distribution and transfer of remuneration have become easier and less expensive with the use of such technology, for the smooth operation of online content providers and the management of rights, there is a need for aggregating the repertoires in the hands of a limited number of CMOs. The provisions of Title III are intended to guarantee such aggregation along with certain high-level requirements (in a way that, through the tag-on possibilities they also try to solve the problems of licensing of the repertoires of smaller CMOs that may not be able to fulfill the demanding higher requirements).

In principle, the establishment of parallel CMOs to manage the same rights is also possible to license certain off-line uses where there is no natural monopoly situation and the application of mandatory, extended or presumption-based collective management is not justified. It is to be noted that, also in such cases, the costs may augment and the efficiency along with the amounts of distributable remuneration may decrease. This may make it desirable – in particular in smaller countries with smaller cultural market and smaller repertoires – to try to avoid the operation of parallel CMOs, which may also justify to provide for *de iure* monopoly in a broader field of collective management.

***1.6. Through appropriate interpretation, the provisions of the CRM Directive on the freedom of rightholders to join a CMO or CMOs to manage their different rights in different Member States may be reconciled with the de facto or de iure monopoly position of CMOs in a given Member State***

Such reconciliation seems necessary in view of the principle of effectiveness of interpretation (expressed in the maxim *ut res magis valeat quam pereat*) according to which the application of legal provisions should be effective rather than not; that is, if there is a possible way of interpretation to guarantee the applicability of a provision, it should be chosen.

There is a possible way of providing for *de iure* monopoly of CMOs (in particular in natural monopoly situations) and still make it possible for a national rightholder to join another CMO; namely, if the righholder joins the CMO of another Member State. In such a case the rights in the works of such rightholders become parts of the repertoire of that other CMO which, however, normally concludes bilateral agreement with the CMO in a (*de facto* or) *de iure* monopoly status in the Member State where the rightholder is national. This is not just an abstract, imaginable option; it happens in practice, as it also happens that rightholders trust different CMOs to manage their rights in different territories. This is not a new feature of collective management. The management of the performing rights of Béla Bartók, the best known Hungarian composer, was a good example:[[23]](#footnote-23) from 1940, when he left for the US, his rights were managed, in general, by the US society ASCAP but, in Germany and in the Central and Eastern European countries that were under German occupation or influence at the time of his leaving Hungary, by the German society GEMA; and this remained in that way also after World War II for his successors-in-title.

Therefore, it is submitted that Italy could have transposed the provisions of the CRM Directive on the freedom of rightholders to join different CMOs to manage their rights also by maintaining the *de iure* monopoly status of SIAE for the management of the rights in the case of which there was a natural monopoly situation (on the understanding that, for example, this was not the case concerning online trans-border licensing of musical works).

***1.7. The CJEU may find it necessary to further refine OSA by clarifying that it applies to a natural monopoly situation (and in that respect it stands as good law), but it does not apply where there is no such a situation (and there is no other possible reason either, such as the protection of cultural diversity); in particular it does not apply to online trans-border licensing of musical work (in respect of which also the disclaimer in OSA is to take into account that its findings have been adopted “as European Union Law stands at present”)***

In *OSA*, the CJEU stressed that its findings applied to a situation in the case which fully corresponded to the economic science category of natural monopoly – even if it has not used this expression in the judgment:

76      The observations submitted to the Court *have not shown, as regards a communication such as that at issue in the main proceedings, that* – *as European Union Law stands at present* – *there is another method allowing the same level of copyright protection as the territory-based protection* and thus territory-based supervision of those rights, *a method of which legislation such as that at issue in the main proceedings forms a part.*

77      Moreover, the debate before the Court has shown that *– in circumstances such as those at issue in the main proceedings* – to allow a user of protected works to obtain authorisation for the use of those works and pay fees due through any collecting society established in the European Union would, as *European Union law stands at present*, give rise to significant monitoring problems relating to the use of those works and the payment of the fees due.

78      *In those circumstances, it cannot be found that legislation such as that at issue in the main proceedings, because it prevents a user of the protected works* – such as the spa establishment at issue in the main proceedings – from benefiting from the services provided by a collecting society established in another Member State, goes beyond what is necessary in order to attain the objective of protecting intellectual property rights. [Emphasis added, concerning certain parts of the text double both by italics and by underlining .]

In the situation described in the judgment, the national monopoly situation has hardly changed by the adoption of the CRM Directive one day before the OSA judgment. It is submitted that the CJEU has no reason to modify the settled case law applicable in such situations. What the Court may find necessary in *LEA v Jamendo* or in any other judgment is to clarify that, *a contrario*, where there is no such a situation – and neither there is any other possible specific reason, such as the need for protecting cultural diversity (see below) – the findings about the applicability of *de iure* monopoly does not apply.

As it can be seen, the CJEU has stressed that its findings applies “as European Union Law stands as present”. However, as pointed out above, the CRM Directive does not contain any provision according to which Member States would be obligated to introduce a legislation that, in such a natural monopoly situation, would not ensure the same level of copyright protection, and would decrease the efficiency of the management of rights (and with it, the value of the rights concerned). In Title III of the Directive, however, a different case is identified to take into account under the “European Copyright Law” to which reference is made in the above-quoted paragraphs. This may be also a reason for which the Court would find it necessary to make it clear to what *OSA* applies and to what it does not.

***1.8. Collective management of copyright is not that kind of “service” to which the Services Directive (and Article 56 of the TFEU) might be applied – as confirmed both by the European Parliament and by the CJEU, and as the statement on its applicability appearing in the draft CRM Directive has been deleted***

Since AG Szpunar expresses in his opinion in the *LEA v Jamendo* case that the Services Directive is applicable to the “services” of both CMOs and IMEs (see below), it is worthwhile reviewing this question from the viewpoint of CMOs proper.

As it was mentioned above, in *OSA*, the CJEU in 2014, one day after the adoption of the CRM Directive, rejected the application of the Services Directive, at least in a situation like the one in the given concrete case. However, the European Parliament had rejected it already before in 2007 in a resolution and, more importantly, then has rejected the statement in the draft of the CRM Directive on the applicability of the Service Directive to collective management; it does not appear in the Directive as adopted.

It is to be noted that, as quoted above, the CJEU in *OSA* along with the Services Directive has also rejected the application of Article 56 of the Treaty on the Functioning of the E.U. (TFEU) to collective management, article which states the basic principle of freedom of providing services.

As also mentioned above, the draft Directive included statements on the applicability of the Services Directive to collective management but the European Parliament did not support this and those statements have been deleted.

The draft Directive prepared by the European Commission stated the application of the Services Directive in recital (3) as follows:

[C]ollecting societies – as service providers – *must comply with* the national requirements pursuant to *Directive 2006/123/EC* of the European Parliament and of the Council of 12 December 2006 *on services in the internal market* […] which seeks to create a legal framework for *ensuring the freedom of establishment and the free movement of services* between the Member States. This implies that *collecting societies should be free* to provide their services across borders, *to* represent rightholders resident or established in other Member States *or grant licences to users resident or established in other Member States*. [Emphasis added.]

Furthermore, in Annex II to the draft Directive entitled “Explanatory Documents”, under the title “Consistency and interrelation with other initiatives”, this text may be found:

*Collecting societies must comply with the national requirements pursuant to the Services Directive (2006/123/EC).* They should be free to provide their services across borders to represent rightholders resident or established in other member states or grant licences to users resident or established in other member states.

They must also respect the competition rules of the treaty.

Therefore, in order to ensure that national rules transposing the proposed directive are consistent with the Services Directive and the competition rules, it is particularly important that the commission can keep an overview and undertake an appropriate review of the national transposition, on the basis of the necessary explanatory documents.

No such statements may be found in the CRM Directive as finalized and published.

The European Parliament rejected these ideas already seven years before the adoption of the Directive in 2007 on its Resolution in which it sharply criticized the Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC). The Parliament presented the reasons clearly for which forced competition among the CMOs of other Members States should be rejected. One of the preamble paragraphs read in this way:

[T]here is concern about the *potentially negative effects of some provisions of the Recommendation on local repertoires* *and on cultural diversity given the potential risk of favouring a concentration of rights in the bigger CRMs*, and whereas the impact of any initiative for *the introduction of competition between rights managers in attracting the most profitable right-holders must be examined and weighed against the adverse effects of such an approach on smaller right-holders, small and medium-sized CRMs and cultural diversit*y [emphasis added].[[24]](#footnote-24)

And, in one of the paragraphs of the operative part, the Resolution stressed this:

[I]n order to ensure the full and complete functioning of the system of reciprocity to the benefit of all right-holders*, it is crucial to prohibit* any form of exclusive mandate between major right-holders and CRMs for *the direct collection of royalties in all Member States, as this would lead to the rapid extinction of national CRMs and undermine the position of minority repertoires and cultural diversity in Europe* [emphasis added]*.*

It is discussed below why the cultural aspects of the question of applicability of the Services Directive to collective management is quite decisive under the TFEU and how the Services Directive itself gives a negative answer to it in Article 17(11) according to which the freedom of providing services in any Member States does not apply to “*copyright, neighbouring rights* and rights covered by Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products and by Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, as well as industrial property rights” [Emphasis added; footnotes left out].

***1.9. Through appropriate interpretation, Article 37(2) of the CRM Directive may be reconciled with the rejection of the application of the Services Directive to collective management***

The Commission had to accept the position of the European Parliament that the Services Directive is not applicable to collective management of copyright and that it must be deleted from the CRM Directive. However, Commissioner Barnier during the debate held at the European Parliament on February 4, 2014, stated that the Directive was to be considered “neutral” from the viewpoint of the Services Directive and that the scope of the application of the latter would remain the same.[[25]](#footnote-25) It was possible to interpret this statement in a way that that the question of whether or not the Services Directive was to be applicable to CMOs might be considered as an open issue that might be finally decided later. However, the CJEU, as discussed above, already the day after the adoption of the Directive made its position clear.

Nevertheless, the European Parliament and the Member States that rejected the applicability of the Services Directive did not seem to pay attention to certain provisions close to the end of the voluminous Directive that still seem to reflect this rejected idea. Article 37(2) of the Directive provides as follows:

(2) *Where* *a competent authority considers that* *a collective management organisation established in another Member State but acting within its territory* *may not be complying with the provisions of the national law of the Member State in which that collective management organisation is established* which have been adopted pursuant to the requirements laid down in this Directive, *it may transmit all relevant information to the competent authority of the Member State* *in which the collective management organization is established*, accompanied where appropriate *by a request to that authority that it take appropriate action* within its competence. The requested competent authority shall provide a reasoned reply within three months. [Emphasis added to show that a Member State is not in a position to take any action in respect of the activity of a CMO established in another Member State that acts in its territory; neither to authorize its operation as CMO or to supervise it in accordance with its own national law.]

This provision suggests that it is possible to provide “services” by a CMO established in one of the Member States in other Member States and the governments of those other Member States may do only one thing if a foreign CMO violates the laws applicable in their territory; namely, to complain about it in the Member State where that CMO has been established. These provisions may be seen in a way that they are in conflict with the fact that the applicability of the Services Directive has been rejected as a condition of the adoption of the Directive by the European Parliament, as well as, in the *OSA* judgment, by the CJEU.

It is submitted, however, that there is a possible basis in the context of the Directive to eliminate this sort of conflict. Due to the principle of effectiveness applicable for the interpretation of legal provisions, it would not be in order to find that Article 37(2) of the Directive is not applicable at all (irrespective of the fact that it has remained there, as overlooked, in conflict with decision of the EU legislators that the Services Directive is not applicable). In particular not if there is a possibility for its application in spite of the rejection the relevance of the Services Directive. And there is one.

It may be argued that Article 37(2) is applicable as regards trans-border licensing of online uses of musical works as provided in Title III of the Directive (taking into account that the reasons justifying legal monopoly of CMOs mentioned in the *OSA* judgment in that case do not necessarily exist), but it is not applicable in other cases (particularly not where there is a need for *de facto* and even *de jure* monopoly of CMOs, like in the case dealt with in *OSA*).

Since the application of the Services Directive has been rejected and it has been clarified by the CJEU in *OSA* that the freedom of providing services may be limited under certain conditions, it is possible for Member States not only making dependent of the operation of a CMO in their territory on approval (accreditation/registration) by a competent national authority, but also providing in such cases that only one CMO may be approved.

***1.10. The EU Members States – in accordance with the TFEU under which it is an obligation to always take into account the cultural aspects and with the binding norms of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions – have the right to adapt the regulation of collective management in their territories in accordance with their cultural policy to protect the integrity of their cultural areas and cultural diversity***

Two basic international instruments deal with the issues relating to the double nature of cultural goods and services: the UNESCO Universal Declaration on Cultural Diversity of 2001,[[26]](#footnote-26) and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions adopted in 2005.[[27]](#footnote-27) The legal status of the two instruments differs, but their objective is the same. The Convention has 150 contracting parties including the European Union and its Member States.[[28]](#footnote-28) Although only the Convention is binding, it is stressed in its Preamble that it has been built on the basic principles of the Declaration.

The Declaration stresses the double nature of cultural activities, productions and services. Its Article 8 states this: “particular attention must be paid to the diversity of the supply of creative works, to due recognition of the rights of authors and artists and to the specificity of *cultural goods and services which, as vectors of identity, values and meaning, must not be treated as mere commodities or consumer goods*”*.* [Emphasis added.] In accordance with this, Article 9 of the Declaration stresses that “*[i]t is for each State*, with due regard to its international obligations, *to define its cultural policy and to implement it through the means it considers fit*.” [Emphasis added.]

The Convention, in its binding norms, further emphasizes the importance of preserving national culture in adopting norms and measures – each State in the way “it considers fit” – for the protection of cultural diversity as a key “vector” of national identity. Articles 5(1) and 6(1) of the Convention make this particularly clear:

The Parties, in conformity with the Charter of the United Nations, the principles of international law and universally recognized human rights instruments, *reaffirm their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions*…

Within the framework of its cultural policies and measures as defined in Article 4.6[[29]](#footnote-29) and taking into account its own particular circumstances and needs, *each Party may adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory*. [Emphasis added.]

Article 167 of the TFEU is in accordance with the principles and provisions of the UNESCO Cultural Diversity Convention when it provides in paragraphs (1) and (4) as follows:

1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.[…]

4. The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures. [Emphasis added.]

Article 167(4) deserves special attention. It obligates all EU bodies to take cultural aspects into account in their actions also when they apply “other provisions” of the TFEU, in order to respect and promote the diversity of the cultures of the Member States. In this context, “other provisions of the TFEU” mean *not only some* of the other provisions *but all* other provisions. Therefore, it is clear that, even where the EU bodies have exclusive or shared competence in certain areas (such as competition and the internal market), they must take into account the cultural aspects, and in particular the protection and promotion of cultural diversity of the Member States, when they apply the relevant provisions. This clearly the case as regards the regulation of collective management of copyright – the activities of which directly concern the creation and use of cultural productions and services that is, they are clearly a matter of culture, in respect of which the Union does not have either exclusive or shared competence, but is in the Member States’ competence under Article 6(c) of the TFEU (and the Union competence is only “to carry out actions to support, coordinate or supplement the actions of the Member States”).

Recital (3) of the CRM Directive recognizes the key importance of the activities of CMOs for national culture, creativity and cultural diversity:

Collective management organizations play, and should continue to play, an important role as promoters of the diversity of cultural expression, both by enabling the smallest and less popular repertoires to access the market and by providing social, cultural and educational services for the benefit of their rightholders and the public.

This is to be interpreted and applied in the light of the relevant provisions of the UNESCO Cultural Diversity Convention binding the EU and its Member States. Under Article 6 of the Convention on “Rights of parties at the national level”, “each Party” (i.e., any EU Member State too) “may adopt” “[w]ithin the framework of its cultural policies and measures […] taking into account its own particular circumstances and needs” “aimed at protecting and promoting the diversity of cultural expressions within its territory” which may include [*inter alia*] “measures that, in an appropriate manner, provide opportunities for domestic cultural activities, goods and services […] including provisions relating to the language used for such activities, goods and services”.

Article 7(2) of the UNESCO Cultural Diversity Convention draws attention to the key importance of the domestic organizations of creators – and, of course, CMOs are in a pre-eminent position among them – in the protection of cultural diversity: “Parties shall also endeavour to recognize the important contribution of artists, others involved in the creative process, *cultural communities, and organizations* that support their work, *and their central role in nurturing the diversity of cultural expressions*.” [Emphasis added.]

In a way, this underlines that copyright and related rights should function as “advertised”; that is, to promote creativity – and not only creativity in general somewhere at certain points of the world, but in each country (even in small ones with more limited economic potentials). Under this provision (binding the Member States and the EU in general), Member States do not only have got the right to apply policies and measures to strengthen the position of *their* CMOs in order that they may fulfil more efficiently the role of protecting cultural diversity through promoting creativity in *their* countries, but they are also obligated, at least, to “endeavor” to do so.

As mentioned above, under the TFEU, the protection of cultural diversity is prescribed as an obligation. Through this, the EU – as bound by the UNESCO Cultural Diversity Convention – recognizes the Member States’ “‘sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions”.[[30]](#footnote-30) If all this is considered together with the statements in the CRM Directive on the cultural role of CMOs and with the flexibilities offered in the Directive, the Member States have broad freedom to implement the Directive in a way that it correspond to the specific cultural mandate of CMOs to support *their* creative communities, and the culture and cultural diversity in *their* respective countries – and through this also the interest of the Union (since it would be a wrong idea to regard the restriction of the Member States’ competence to take care of their cultural identity and the diversity of their cultural expressions as a step to “more Europe;” it would be rather a step to losing a valuable treasure of Europe; its extremely rich culture with certain common elements but formed from colorfully different national cultures).

The European Parliament has applied the provisions of TFEU on the role of culture and cultural identity in the most consequential way, for example in its Resolution[[31]](#footnote-31) mentioned above strongly criticizing the Recommendation No. 2005/737/EC on collective cross-border management of copyright and related rights for legitimate online music services. The criticism of the Parliament also concerned “constitutional,” distribution-of-power and procedural issues,[[32]](#footnote-32) but it was mainly directed against the overly unilateral competition-oriented nature of the Recommendation, not taking into account the relevant provisions of the Treaty and the binding norms of the UNESCO Cultural Diversity Convention. First of all, the foreseeable negative consequences from the viewpoint of national cultures of smaller countries and of the protection of cultural diversity were pointed out. These were the main points of the voluminous Resolution:

Recital H: “*music is not a commodity* and collective rights managers are mainly non-profit-making organisations”;

Recital I: “*national CRMs should continue to play an important role in* *providing support for* the promotion of new and minority right-holders, *cultural diversity*, creativity *and local repertoires*, which presupposes that national CRMs *should retain the right to charge cultural deductions*”;

Recital L: “*there is concern about the potentially negative effects* of some provisions of the Recommendation *on local repertoires and on cultural diversity* *given the potential risk of favouring a concentration of rights in the bigger CRMs,* […] the impact of any initiative for the introduction of *competition between rights managers in attracting the most profitable right-holders* *must be examined* and weighed *against the adverse effects* of such an approach *on* smaller right-holders, *small and medium-sized CRMs and cultural diversity*”;

Recital O: “*the system of reciprocal representation agreements should be maintained,* *as it enables* all commercial and individual users without discrimination to have *equal access to the world repertoire*, ensures better protection for the right-holders, *guarantees real cultural diversity* and stimulates fair competition in the internal market,

Operational point 1: [the European Parliament *i*]*nvites the Commission* […] *to present as soon as possible* – after consulting closely with interested parties *– a proposal for a flexible framework directive* […] *taking account of the specificity of the digital era and safeguarding European cultural diversity, small stakeholders and local repertoires*, on the basis of the principle of equal treatment;

In Operation points 6 and 7, the European Parliament determined what the regulation of collective management should serve, *inter alia*, to:

* *promote creativity and cultural diversity*, […]

– *preserve CRMs’ cultural and social role* while ensuring that they administer right-holder funds and provide services to rights users and right-holders in such a way as to ensure as far as possible that they are protected[…]

– *avoid the over-centralisation of market powers and repertoires* by ensuring that exclusive mandates may not be granted to a single or a very few CRMs by major right-holders, thereby guaranteeing that the global repertoire remains available to all CRMs for the granting of licences to users,

– *prohibit any form of exclusive mandate between major right-holders and CRMs for the direct collection of royalties in all Member States*, *as this would lead to the rapid extinction of national CRMs and undermine the position of minority repertoires and cultural diversity in Europe*”. [Emphasis added.]

It is submitted, again, that the above-mentioned provisions of the TFEU and the binding norms of the UNESCO Cultural Diversity Convention allow to any EU Member State (as the Convention puts it) “to apply measures aimed at protecting and promoting the diversity of cultural expressions within its territory”[[33]](#footnote-33) also in the field of collective management.

*It may take the form, for example, of determining certain conditions of approval of the operation of a* *CMO to be established in the territory of a Member State that guarantee an appropriate role of the national repertoire* (such as through prescribing the representativeness thereof as a requirement). This may be particularly justified for the authorization of CMOs to perform extended or mandatory collective management. The deductions for cultural and social purposes may not be prescribed in general, but appropriate provisions may encourage the application of such deductions to support cultural policy of the country. Furthermore, in the case of certain statutory rights to remuneration (offering “rough justice” as, for example, the right to remuneration for private copying), it may also be justified to use a certain percentage of the remuneration (without endangering the equitable nature thereof from the viewpoint of the rightholders concerned) for the promotion of national creativity.[[34]](#footnote-34) And all this may also justify, in natural monopoly situations, to provide not only for mandatory collective management (where this is in accordance with the international and EU norms) or extended collective management but also for *de iure* monopoly CMOs where this is necessary to protect the integrity of cultural market and cultural diversity of the country concerned.

***Part II. The regulation of the status of IMEs in the CRM Directive has taken place without due preparatory procedure, without appropriate impact study and without the necessary involvement of the key stakeholders; the adopted rules are in conflict with the principle of equal chances in the market by those who carry act the same activities as well as with the international and EU provisions on the protection of cultural diversity, and have the potential to undermine the normal functioning of the collective management system***

***2.1. There are only scarce provisions on IMEs without any substantive explanation why they have been included in the Directive that regulates the establishment and functioning of CMOs***

The definition of IMEs in Article 3(b) of the CRM Directive reads as follows:

(b) ‘independent management entity’ means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which is:

(i) neither owned nor controlled, directly or indirectly, wholly or in part, by rightholders; and

(ii) organised on a for-profit basis;

No explanation is offered why the category of IMEs has been recognized and regulated in the CRM Directive. In addition to Article 2(4) which simply lists the provisions on CMOs that are also applicable to IMEs (see below), it is only recital (15) in which IMEs are mentioned at all[[35]](#footnote-35):

(15) Rightholders should be free to entrust the management of their rights to independent management entities. Such independent management entities are commercial entities which differ from collective management organisations, inter alia, because they are not owned or controlled by rightholders. However, to the extent that such independent management entities carry out the same activities as collective management organisations, they should be obliged to provide certain information to the rightholders they represent, collective management organisations, users and the public. [Emphasis added.]

Allowing to pro-profit commercial entities to “carry out the same activities as collective management organisations” without any control by the rightholders, as Gábor Faludi points it out, is not in accordance with the declared objective of the Directive. He recalls that, under preambles (8) and (9) of the Directive, the aim is to provide for the harmonization of rules to lay down requirements applicable to CMOs, in order to ensure “a high standard of governance, financial management, transparency and reporting,” and the national laws of Member States may only differ from these harmonized requirements if they impose more stringent standards. He points out as follows:

In other words, one of the main objectives of the [Directive] is to offer broader protection, guarantees and right to control to rightholders represented by CMOs. Such broader protection and guarantees are not provided in the management activities of IMEs managing creators’ and performing artists’ rights. Such IMEs usually operate on the legal basis of assignment and buy-out of the economic rights exercised by [them] without any further rightholders’ control save for the eventual accounting if the remuneration of the creator/performing artist is set as a recurrent royalty. In the case of a final, irreversible and full assignment of economic rights one cannot speak any longer of the management of other rightholders’ rights.[[36]](#footnote-36)

It should be noted that there is no indication in the Directive why IMEs, as organizations that are *not* CMOs, may carry out – not just rights management in general, but – “*the same* activities as collective management organizations” although they are not collective management organizations, neither why then, in spite of this, *not the same* requirements but only a small fraction thereof apply to them. No clarification is offered either why rightholders “should be free” to choose IMEs with a highly privileged competitive position and how this might be reconciled with what is stated in recital (3):

Article 167 of the Treaty on the Functioning of the European Union (TFEU) *requires the Union to take cultural diversity into account in its action* and to contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore. *Collective management organisations play, and should continue to play, an important role as promoters of the diversity of cultural expression, both by enabling the smallest and less popular repertoires to access the market and by providing social, cultural and educational services* for the benefit of their rightholders and the public. [Emphasis added.]

The unilaterally preferred status and the multiple competition advantages of IMEs may hardly be regarded to be in accordance with the above-quoted recital – according to which “collective management organisations play, and should continue to play, an important role as promoters of the diversity of cultural expression, both by enabling the smallest and less popular repertoires to access the market and by providing social, cultural and educational services for the benefit of their rightholders and the public”. With the replacement of CMOs with business entities (or just undermining the chance of CMOs to function in a sustainable manner) the protection of cultural diversity, the chance of the smaller repertoires, and the role of CMOs to promote creativity are weakened or even eliminated – no matter how much the “importance” of all these aspects are stressed in a recital.

***2.2***. ***No real impact study had been made before the inclusion of the provisions of IMEs into the Directive, except for one prepared by the staff of the Commission that had pointed out that such sort of parallel licensing would have a negative impact on cultural diversity***

The contradiction mentioned above even more conspicuous in view of an Impact Assessment document prepared by the staff of the Commission precisely describing the foreseeable negative impact of licensing, by pro-profit commercial entities, the same rights in parallel with CMOs, from the viewpoint of the position of smaller CMOs, national cultures and cultural diversity. Although the description in the document basically related to possible parallel licensing of online uses of musical works, it is perfectly applicable to parallel licensing by IMEs in forced competition with CMOs (also – and, in fact, as discussed below rather mainly – concerning “traditional” off-line uses). The Impact Study described the foreseeable consequences of parallel licensing in this way:

Parallel licensing *would have a negative impact on cultural diversity*. Most creators (i.e. smaller rightholders) *would receive lower royalties*. Moreover, the direct licensing of popular repertoire *risks undermining the solidarity function* hitherto played by aggregating popular and less popular repertoire into one 'blanket' licence. *The commercial opportunities for the repertoire held by smaller collecting societies might be undermined*. The disappearance of this less “main stream” repertoire (e.g. niche or local repertoire) *would be detrimental to cultural diversity in Europe*.[[37]](#footnote-37)

It would be too early to form a definitive opinion, but the first experiences seem to indicate that the danger that the collective management system – in particular in the smaller cultural markets – and cultural diversity may suffer such negative consequences is real. As a “collateral damage”, also the social-political justification and public acceptance of copyright may be weakened, since all this may be regarded as a *further* step towards transforming copyright into a sort of new branch of industrial property rights where what is involved is the protection of rights owned by legal entities, managed by legal entities for the profit of investors and managers of legal entities (profit of which they may – or may not – share with the creators “hired” by them or from whom they have purchased the rights).

In the preceding paragraph, it is mentioned that allowing – and even promoting – the transfer of management of repertoires from CMO to IMEs is a *further* step towards weakening the social-political justification and public acceptance of copyright. The adjective “further” is a reference to the strong criticism by the European Parliament in its 2007 Resolution of the 2005 Commission Recommendation mentioned and quoted above pointing out that it endangered the position of CMOs managing smaller repertoires of smaller Member States and cultural diversity, as well as to the opinion expressed by various academics according to which the Directive has not truly fixed those problems either.

The team of copyright researchers of Max Planck Institute made a particularly thorough analysis of the draft Directive[[38]](#footnote-38) pointing out that what they saw in the case of the Recommendation as privileging big legal-entity rightholders to the detriment of creators, undermining the position of smaller CMOs of Member States with smaller cultural markets, and endangering cultural diversity had not been duly corrected in the proposed Directive (in which, at that time, the category of “independent management entities” as a further step in the criticized direction did not even appear yet). These were some of therfindings in the detailed opinion prepared in the name of the Institute:

When the Commission re**c**ommended rightholders to withdraw their rights, this only had an effect on the powerful major companies, who saw a chance to renegotiate the terms of collective administration of their rights with individual collecting societies.[…] *The Recommendation can be criticised for exclusively benefiting large rightholders such* as the major publishing companies. *The Commission Proposal will not change this* by making the rules of the Recommendation binding.[[39]](#footnote-39)

*The Recommendation of 2005 has inappropriately favoured the interests of the major publishing companies*, since only the e companies had sufficient market power to withdraw their rights from the existing **s**ystem and to negotiate better terms for multi‐territorial licensing with single collecting societies. Hence, strengthening the position of ‘rightholders’ as such may well *only benefit the economically most powerful rightholders in the market*.[[40]](#footnote-40)

Since *rightholders from smaller countries with music that is less popular in the international market may have difficulties getting direct access* to passport entities, and therefore have to rely on indirect access through smaller collecting societies without a passport, the Proposal may still create disadvantages for such rightholders and, thereby, *produce a negative impact on cultural diversity*.[[41]](#footnote-41)

Forcing collecting societies to compete among each other for their respective repertoires collides with fundamental ideas of collective rights management. *Competing for an attracti****v****e repertoire and managing a copyright catalogue is the core business of publishers and record companies, not of collecting societies*.[[42]](#footnote-42)

[Emphasis added.]

***2.3. The provisions on IMEs have been included into the CRM Directive without appropriate preparation and without due involvement of the interested stakeholders***

In the proposal for the Directive, there were no provisions yet on the category of IMEs. Therefore, it was understandable that the above-quoted opinion and the similar comments made by academics and researchers did not deal with this category. It was introduced in the system of management of rights suddenly, and without due preparation and alarm-warning, “under the radar”, in a way that no sufficient attention was paid to its foreseeable impact – and even to its very meaning – in the shadow of other issues in focus of the negotiations, in particular, concerning the regulation of multi-territorial licensing of rights in musical works for online uses.

This explains why there was quite a big perplexity about this new category; and not only in those countries where both the collective management system and the related technological background were still in a less advanced stage, but also in those Member States where duly established CMOs functioned, and not only among the policy-makers and the general public, but also among the experts of copyright and collective management. Julien Baupain, a French copyright expert expressed eloquently the surprise caused by the unexpected appearance of IMEs by comparing them to UFOs:

L’acronyme « OFNI » désigne dans le monde maritime un « objet flottant non identifté »[…] Tel un OFNI, les organismes de gestion indépendants sont apparus soudainement dans le monde de la gestion collective, qui jusqu’à présent ne connaissait qu’une seule forme identiftée d’organisme, les sociétés de gestion collective.[[43]](#footnote-43)

***2.4. There is a contradiction between the definition of IME and the*** recital ***related to it***

The inclusion of the new category without due preparation and without serious attention paid to it by the representatives and experts of the Member States were manifested in the strange uncertainty about the very criteria of the concept and definition of IMEs. As it can be seen above, in recital (15), only one of the specific criteria of IMEs is mentioned: “Such independent management entities are commercial entities which *differ* from collective management organisations, *inter alia, because they are not owned or controlled by rightholders.*” Since there are only two differing elements in the definition of IMEs in comparison with the definition of CMO, it is not easy to understand why the recital mentions only one of them “*inter alia*”, and not the other one according to which IMOs are “organized on a for-profit basis” (even if the term “commercial entities” may be regarded to hint to this, but much less clearly).

***2.5. The members of the European Parliament (at least several of them) did not seem to be aware (or did not care) what kinds of provisions they have adopted on IMEs, so much that the various language versions adopted and published were in contradiction with each other***

Another strange fact concerning the definition shows that there was no clarity about the concept of IMEs included into the Directive “under the radar”; namely the fact that some language versions of the definition of IMEs (the Romanian and the Spanish versions certainly) were published in the Official Journal of the European Union in a way that, in subparagraph (ii) of Article 3(b), not the criterion of “organized on a for-profit basis”, but just the contrary – “organized on a not-for-profit basis”[[44]](#footnote-44) – appeared; although in the meantime it has been clarified, in separate documents, that it should be understood as “organized on a for-profit basis” also in those language versions[[45]](#footnote-45)).

***2.6. Various ideas and variants had emerged leading to the inclusion of provisions on IMEs***

Although the category of IMEs seemed to be a suddenly appearing UFO even for many experts, those who followed the various stages of the rhapsodic preparatory work of the CRM Directive might have seen earlier such a phenomenon emerging on the horizon. Its outline was visible already in the Gallo report of the European Parliament prepared for the first reading of the draft Directive[[46]](#footnote-46) in which also the opinions of the various committees of the Parliament had been taken into account.

Even if there was no provision yet on IMEs in the draft Directive published by the Commission, one of the recitals referred already to such kinds of entities, although still as “service providers” and “agents”. At the end of what is recital (5) in the adopted text of the Directive (in the Commission’s proposal was still recital (4) with some wording difference) where the problems of the operation of certain CMOs are mentioned (no transparency, inefficiency, etc.), this text appeared in the Commission’s proposal: “*These difficulties do not arise in the functioning of independent rights management service providers* who act as agents for rightholders for the management of their rights on a commercial basis and in which rightholders do not exercise membership rights [emphasis added].” As the Gallo report reflected it, the European Parliament did not agree with the implied suggestion that the “independent rights management service providers” are superior to CMOs[[47]](#footnote-47); it was proposed in the report that it be deleted (which has been done; it does not appear in the text of the Directive).

The Impact Assessment document prepared by the staff of the European Commission referred several times to “direct licensing” by commercial entities (in the context of online licensing of the use of musical works) that may be applied as an alternative in parallel with licensing by CMOs. Since it was clear that this will create competition with CMOs, the Gallo report proposed a new provision (which became, in the adopted text of the Directive, with some minor changes, Article 3(4) quoted and discussed below):

Articles 10, 11(1), 12, 16, 19 and 20 of Title II and Articles 35(1) and 37 of Title IV shall apply to entities that manage on a commercial basis within the Union, as their sole or main purpose, copyright or rights related to copyright on behalf of more than one rightholder.

Although the main body of the Gallo report did not contain a definition, the opinions of some of the Parliament Committees did. The above-quoted amendment had been originated from the opinion of the Committee on Culture and Education. It was the introduction to the various proposals of the Committee where it was indicated why it had been found necessary that the application of certain provisions of the Directive be extended to what was, in the opinion, referred to as “independent commercial operators” and later defined as IMEs: “[*C*]*ommercial operators*, which are authorised by way of contractual arrangements to manage copyright or rights related to copyright on behalf of rightholders, although not in the scope of this Directive, *should be submitted to some transparency requirements* [emphasis added].”[[48]](#footnote-48) Although only the transparency requirements were mentioned in the opinion, the scope of the provisions proposed by the Committee to be applied to such “independent commercial operators” was much broader than in the new draft paragraph included in the main body of the Gallo report (and definitely broader than in Article 2(4) of the Directive as adopted):

Title I, Articles 10, 11(1), 12, 15, 16, 18, 19 and 20 of Title II, Title III and Articles 34, 35, 37 and 38 of Title IV shall also apply to *independent commercial operators,* to legal persons and any entity *that exercise the same function as a collective management organisation* based inside or outside the Union, *who act as agents* for rightholders for the management of their rights *and operate* in the Union *on a commercial basis****.***[[49]](#footnote-49)[Emphasis added.]

The new paragraph proposed by the Committee on Industry, Research and Energy (in which the term “independent rights management service providers” was used) also included a similarly broad scope of provisions to be applied also to such entities.[[50]](#footnote-50) The Committee on International Trade presented the following new definition: “‘commercial operator’ means any entity which is authorised by way of any contractual arrangement to manage copyright or rights related to copyright on behalf of rightholders on a commercial basis.”[[51]](#footnote-51) The Committee noted that its proposal was consistent with the opinion of the Committee on Culture and Education and added the following justification: “*In order to establish a level playing field* within the framework of rights management, publishers and record companies - who also manage rightsholders rights - should be subject to *a minimum set of transparency rules*.”[[52]](#footnote-52) [Emphasis added.]

There was a basic self-contradiction in the above-mentioned proposals on the extension of the provisions applicable to CMOs to IMEs. The comment of the Committee on International Trade quoted above seemed to take into account that the IMEs (referred to in the proposed amendments as “independent commercial operators” and “independent rights management service providers") were foreseen “to manage rights” and even to “exercise the same function as a collective management organization” as CMOs; that is, they were to compete with the CMOs to manage the same rights. The Committee rightly stated what was supposed to be achieved by the regulation of the relationship of IMEs with CMOs; namely, to guarantee a level playing field for CMOs. The Committee on International Trade, however, did not propose a concrete provision to take care of this task, but the provisions proposed by the other two Committees quoted above were to determine the scope of requirements to be fulfilled also by the IMEs quite broadly, much more broadly than just “some transparency requirements,” or “a minimum set of transparency rules.” This did not change the fact that the objective of was erroneously determined; it is obvious that, for ensuring a level playing field, the mere prescription of the application of certain transparency rules was insufficient. The regulation in the way in which it has taken place does not provide a level playing field for the CMOs; it has created to them a gravely unfavorable situation to compete with IMEs.

***2.7. There are numerous important aspects where unjustified competition advantages are granted to IMEs vis-à-vis CMOs***

It was a strange contradiction that, although the above-mentioned EP Committees referred only to the need for applying certain transparency requirements, they did also propose the application of a number other provisions going beyond such requirements that might have improved the chance of CMOs to compete with IMEs, but the draft provision included in the main body of the Gallo report (as quoted above) seemed to reflect the belief that it would be truly sufficient to apply some basic transparency rules. And the provision of Article 3(4) of the CRM Directive as adopted provides even more limited transparency requirements than those suggested in the Gallo report.

It is worthwhile indicating the contents of the provisions the application of which is prescribed in Article 3(4) also for IMEs: “4.  Article 16(1), Articles 18 and 20, points (a), (b), (c), (e), (f) and (g) of Article 21(1) and Articles 36 and 42 apply to all independent management entities established in the Union.” The contents of these provisions are presented below partly in a descriptive manner, partly by quoting some parts thereof (to which sometimes also emphasis is added to indicate the nature of the requirements):

*Article 16(1)*: a CMO (thus also an IME) must “*conduct negotiations* *for the licensing of rights in good faith” and provide* with users each other “*all necessary information*.”

*Article 18*: a CMO (thus also an IME) *must make available* “not less than once a year, to each rightholder to whom it has attributed rights revenue or made payments in the period to which the information relates, *at least the following information*”: (a) any necessary contact details; (b) “the rights revenue attributed to the rightholder”; (c) the amounts paid to the righthoder “per category of rights managed and per type of use”; (d) “the period during which the use took place”, unless there are objective reasons preventing the provision of the information; (e) and (f) deductions made. Where the CMO (and thus an IME) has as members entities responsible for distribution of the “rights revenue”, this information must be provided to such entities.

*Article 20*: A CMO (and thus an IME), “*in response to a duly justified request*,” *must make available* to any CMO (IME) with which it has concluded a representation agreement, to any rightholder, and to any user *the following information*: (a) the works or other subject-matter it represents, the rights it manages, directly or under representation agreements, and the territories covered; or (b) where due the scope of activity of the CMO (IME), such works or other subject-matter cannot be determined, at least “the types of works or of other subject-matter it represents, the rights it manages and the territories covered.”

*Article 21(1):* A CMO (and thus an IME) *must make public* at least *the following information*: (a) its statute; (b) (if not in the statute) membership terms and terms of withdrawal of authorization; (c) standard licensing contracts and standard applicable tariffs; (e) general distribution policy; of amounts due to rightholders; (f) general policy on management fees; (g) general policy on deductions, other than in respect of management fees, “including deductions for the purposes of social, cultural and educational services”.

*Article 36*: Member States *must have procedures* enabling members of a CMO (and thus also of an IME), rightholders, users, CMOs (IMEs) and other interested parties *to notify the competent authorities “of activities or circumstances* *which, in their opinion, constitute a breach of the provisions of national law* adopted pursuant to the requirements laid down in this Directive”. *The competent authorities must have the power “to impose appropriate sanctions or to take appropriate measures”* where the provisions of national law have not been complied with, which must be “effective, proportionate and dissuasive”.

*Article 42*: The *processing of personal data* carried out within the framework of the Directive must be subject to Directive 95/46/EC (on the protection of personal data).

As it can be seen, the overwhelming majority of the requirements truly only consist in the obligations to make available information. Consequently, the provisions on complaints and the possible sanctions and procedures to be applied by the competent authorities foreseen in Article 42 also only relate to these requirements. It is only the obligation to “conduct negotiations for the licensing of rights in good faith” under Article 16(1) may be regarded to go beyond the provisions on information aspects (although the reason for its inclusion may be just that Article 16(1) also prescribes information requirements: to “provide […] all necessary information”).

The grave absence of due level playing field to the detriment of CMOs and to the advantage of IMEs becomes even more conspicuous if those provisions that are applicable to CMOs but not to IMEs are reviewed. It is worthwhile starting with Article 16 of the Directive the application of paragraph (1) of which, as just mentioned above, is extended to IMEs. The rest of the provisions of the Article only apply to CMOs. The determination of the licensing terms, in particular as regards the remuneration to be paid, is one of the most important aspects for two entities competing with each other in the same field (as CMOs and IMEs are supposed to compete with each other). In view of this, it is difficult to understand what might have been the reason for not extending the application of the more concrete and more demanding requirements prescribed in Article 16 to IMEs; such as that:

* licensing terms must be based on *objective and non-discriminatory criteria* (paragraph (2)); an IME, must negotiate in good faith, but apart from it, contrary to a CMO, it is not bound by this requirement concerning the determination of the licensing conditions and fees;
* *the rightholders must receive appropriate remuneration* for the use of their rights (paragraph (2)); no such requirement binds an IME; although it has to compete for rightholders, its objective is to increase the management’s profit as much as possible without any control by the rightholders; thus, for an IME, contrary to a CMO, this is not an obligation to respect but, at maximum, a possible matter of business calculation;
* *the tariffs must be reasonable* *in relation to*, inter alia, *the economic value* of the use of the rights in trade, taking into account the nature and scope of the use of the work and other subject-matter, as well as in relation to the economic value of the service provided by the collective management organization (paragraph (2)); IMEs, contrary to CMOs, are not bound by these provisions; they may apply as high tariffs for the use of rights as they can, even if the nature, the scope and economic value of their “service” may not be as valuable;

- if a user requests so, *license must be offered* without undue delay or a reasoned statement must be provided why license is not offered (paragraph (3)); an IME, contrary to a CMO, is not bound by this rule.

In the preceding paragraph, it just on the basis of the analyses of one single article that it is pointed out how big – and hardly justifiable – advantages are granted to IMEs to compete with CMOs. The volume of this writing does not allow reviewing in detail all the provisions of the Directive from this viewpoint; only certain inexplicable competition privileges granted to IMEs are still mentioned:

- *IMEs*, contrary to CMOs, *are not obligated to accept rightholders* *as members* who fulfill the membership requirements (see Article 6(2)) *and to manage the rights of any rightholder within the scope of their activities* (Article 5(2)); *they are allowed to apply “cherry picking”* by only managing the rights of certain rightholders from whom they may expect easy profit, and leaving the rest to CMOs which do have such obligations.

- *IMEs*, contrary to CMOs, *are allowed to enjoy as stable repertoire as they wish* and can ensure this by contracts, since they are not bound by the provisions of Article 5(3) and (4) of the Directive on the freedom of righholders to withdraw their rights and repertoires.

**-** IMEs, contrary to CMOs, *are not bound by any rules on membership, on establishment and operation of governing bodies, on control mechanisms, on conflicts of interests and on complaint procedures* (see Articles 6 to 10); they are free to use all their energy on competition and profit making.

***-*** *Neither are IMEs bound*, contrary to CMOs, *by the rules on the use of “rights revenues”, investment, deductions and distribution* (see Articles 11 to 15); all their income may be used to guarantee stronger competition position and to maximize profit.

**-** Although the declared objective of Article 2(4) of the Directive was to extend the rules to ensure due transparency, from the provisions of Chapter 5, only the application of Article 20 and certain provisions of Article 21 are foreseen for IMEs; *they are not burdened* (as CMOs are) *with fulfilling the other transparency obligations* under the Chapter, *in particular not with the preparation of annual transparency reports* in accordance with Article 22 and the Annex, which does not only mean that they may function in a less transparent way, but also that they are freed from using money, time and energy for the preparation of such reports.

**-** *Title III of the Directive* on multi-territorial licensing of online rights in musical works*does not apply to IMEs*; they are free to choose any methods to compete without any requirements that CMOs must respect.

**-** Articles 33 on *complaints procedures*, Article 34 on *alternative dispute resolution procedures* and Article 35 on *dispute resolution do not apply* either to IMEs. It follows from this, *inter alia*, a further significant competition advantage of IMEs vis-à-vis CMOs, namely that, *while CMOs are subject to tariff control, no such control is foreseen for IMEs*.

In view of these discrepancies between the status of CMOs and IMEs, it may hardly come as a surprise that the commentators point out a serious absence of proper level playing field to the detriment of the CMOs:

L’introduction des entites de gestion indeppendantes pourrait être *un facteur de destabilisation du marche de la gestion des droits* en Europe, en ce *qu’elle pourrait provoquer des distorsions de concurrence* entre les differentes categories d’organismes intervenant sur ce marche. [...]

Au plan national tout d’abord, bien que les organismes de gestion indépendants se voient affectés d’un régime et d’obligations renforcés en France, il n’en reste pas moins que *ces obligations sont beaucoup moindres que celles imposées à leurs concurrents que sont les organismes de gestion collective*. [...]

*Comment envisager dans ce cadre une saine concurrence* [...] *entre des organismes qui n’ont pas les mêmes statuts et contraintes*?[[53]](#footnote-53) [Emphasis added.]

Currently, CMOs and IMEs are competing with each other in an *unfair music licensing market*, since *IMEs’ licensing activities are less restricted* by copyright laws. This is jeopardising CMOs’ performances further.[[54]](#footnote-54) [Emphasis added.]

PMOs [used by the author as a synonym of IMEs] could […] also directly compete with traditional CMOs. *[IMEs] have* two important *advantages that have little to do with their relative efficienc*y: first, without rights holder control [IMEs] have greater prospects to exploit market power on the rights holder side; second, so far *[IMEs]* seem *less restricted by statutory regulation*.[[55]](#footnote-55) [Emphasis added.]

The CRM Directive, by the inclusion of provisions on IMEs and only prescribing to them certain information requirements, has not only constrained CMOs into disadvantageous situation vis-à-vis IMEs in the so-called “market”[[56]](#footnote-56) of “collective rights management” but it has also granted IMEs a kind of accredited status and incentives to proliferate.

***2.8. Badly founded allegations had been made about the superiority of IMEs over CMOs and about their “royalty-free” licensing systems***

Two allegations seem to have served as justification to grant big advantage to for-profit IMEs in the competition against CMOs. First, that a *de facto* or *de jure* monopoly of CMOs is bad (of course, only someone completely ignorant about collective management could have believed this) while competition is good (again only someone not knowing about the economics category of “natural monopolies” could have made such a statement). Second, that CMOs do not function efficiently, while profit-driven IMEs do (alleging this without any due analysis and proof). Fortunately, the European Parliament represented a much more nuanced and, in certain aspects, just opposite position. This was quite clearly manifested in connection with recital (4) of the EC proposal for the Directive (in its final form, has become recital (5)) which, in another context, has been partly mentioned above. The entire text of the recital in the proposal for the Directive read as follows:

There are *significant differences* in the national rules governing the functioning of collecting societies, in particular as regards their *transparency and accountability* towards their members and rightholders. Beyond the *difficulties* non-domestic rightholders face when exercising their rights and the *too often poor financial management* of the revenues collected, *problems* with the functioning of collecting societies lead to *inefficiencies* in the exploitation of copyright and related rights across the internal market to the detriment of the members of collecting societies, rightholders and users alike. *These difficulties do not arise in the functioning of independent rights management service providers who act as agents for rightholders for the management of their rights on a commercial basis and in which rightholders do not exercise membership rights*. [Emphasis added.]

As mentioned above, the European Parliament, in the Gallo report, proposed the deletion of the last sentence stating the superiority of IMEs. The “relative efficiency” as referred to it by Handke in the text quoted above, probably existed – and, in the case of certain IMEs was partly due to the efficacy of the management – but it had been derived most decisively from the limited scope of their newly built repertoires that were easier to manage and the obvious absence of level playing field to the detriment of CMOs (which was noted in the course of the preparatory work, but has not been eliminated or truly improved in the Directive). However, here the draft recital is quoted above mainly in order to point out the bad opinion about CMOs expressed in the first two sentences and the implied suggestion, in the last sentence, that IMEs, since they are more efficient, deserve support in their competition with CMOs. In the following paragraphs it is briefly analyzed by what kinds of business methods the IMEs try to obtain further advantage in the competition against the societies of creators in the off-line environment that, in general, still represent the active world repertoire of creators.

Many IMEs have concentrated on offering, for background music, closed repertoires of authors from whom they require that they opt out from the collective management system. The business method of such IMEs is built on matching, on the one hand, the lower quality requirements of some users (department stores, restaurants, bars, hotels etc.), on the other hand, and the readiness of certain maybe less known authors and performers to deny solidarity with the community of creators, leave the collective management system, and allow the inclusion of their productions (usually assigning the rights therein) in the repertoires of such IME companies. For some of such authors and performers, this dissidence from the creative community may be advantageous since, by contributing to the repertoires of such IMEs, they may get remuneration (either in the form of an upfront payment for the assignment of their rights and/or as some modest recurring remuneration) which they might not have chance to get in that way if the users selected from the much broader musical repertoire of the creators who are members of, or are represented by, CMOs.

The users mentioned in the preceding paragraph usually do not use the repertoire of an IME because they – and their customers – like it better; they are perfectly aware that the CMOs’ repertoires are much richer, more divers and more popular. They rather select an IME repertoire because it costs less; they calculate in a way that, for their customers, it is also sufficient. This is a key element of the IMEs’ business method; they keep their tariffs somewhat lower (by which, of course, a race to the bottom may be triggered). They advertise themselves by stressing this advantage as their main attraction. Such IMEs frequently just look at the tariff systems of the local CMOs and “establish” their tariffs at a lower level. Due to their heavily advantageous position in the competition guaranteed by the preferential rules of the CRM Directive, these IMEs may appear “efficient” and “successful” also with such lower tariffs.

Their highly privileged competition advantage is further accentuated by the fact that it is in an order of magnitude easier to efficiently manage their smaller, freshly created, closed repertoire than practically the world repertoire of the CMOs which represent the entire community of creators (minus the erosion created by such not quite fair “competition”), including those the identification and location of whom is their obligation, quite costly to fulfill.

The size of the loss of the creative community depends on how much a CMO may take it as granted that the allegedly fool-proof closed systems – frequently based on cloud technology – for the use of IME repertoires of the opted-out dissidents of the creators’ community truly function as claimed. They cannot just accept that this is true just because it is alleged; thus some monitoring activity of the CMOs appears to be inevitable also in such a case.

One thing seems to be sure; namely that, if the IME companies’ pro-profit systems proliferated, the resulting fragmentation of the management of rights would lead to a qualitatively new situation, where the governments, no matter what kind of external norms dictated the permission of uncontrolled “competition”, not only might but also would have to act to prevent or eliminate the chaos undermining the due operation of their collective management system and their cultural identity and diversity.

The IMEs also tend to use the slogan of “royalty-free licensing” used against the CMOs. The best way to show what it really means seems to quote the self-description by an IME:

In the simplest terms possible, royalty-free music is *music that you pay for once and that you don't have to pay royalties for to use*. There is a lot of confusion surrounding royalty-free, namely because of that word ‘free’ […] [R]oyalty-free enables a single upfront payment to be made to the artist, which can be much better for other [than certain traditional] projects, especially smaller ones. […]

Royalty-free music *is NOT free*. As previously mentioned, the term free applies to the fact you won’t need to pay royalties after you license a song. Now, that said, royalty-free music does come with a cost. Many places charge significant licensing fees to use it for a single production. […] *[W]e charge you a monthly subscription that gives you FULL access to the entire catalog*.[[57]](#footnote-57) [While the emphasis to certain parts of the text is original, emphasis is added to the last sentence.]

Let us translate what “monthly subscription” for the use a music repertoire means in copyright language: it is the synonym of “monthly royalty” or tariff of remuneration to be paid on a monthly basis.

Certain IME companies try to deny the for-profit nature of their activities (which seems to be difficult for an entity the definitional element of which is that it is “organized on a for-profit basis”) by alleging that their repertoirer are made available on the basis of Creative Commons licenses. One of the first legal disputes about the legal status of IMEs emerged – in France – in a case where the role such licenses was also an issue (see below).

***III. Key previous lawsuits about the legal status of IMEs: Audiovalley (MusicMatic, Jamendo) v SACEM and SIAE v Soundreef***

***3.1. Allegations about “royalty-free licensing” and about a conflict with the EU law because IMEs are not allowed to carry out mandatory collective management***

In view of the business methods of IMEs, like the operation of the above-mentioned “royalty-free” schemes, serious doubts may emerge whether what is involved is truly management of rights of *others than the owners of the repertoires managed*[[58]](#footnote-58) and whether the activities are not rather similar to – or practically the same as – those of music publishers[[59]](#footnote-59) and even of online content providers making available musical works[[60]](#footnote-60). The volume of this paper could hardly allow discussing these aspects in detail; it should focus on the status of, and the rights managed by, the CMOs and IMEs. These issues, however, have led to some legal disputes, in particular concerning “royalty-free’ systems, as in France, where, after the first and second instance judgments, also the Supreme Court (*Cour de cassation*) had to deal with the*AudioValley [Jamendo] v. SACEM* case.

AudioValley (under a previous name MusicMatic), a Belgian group of companies pursuing different business activities concerning music was the plaintiff; Jamendo was one of its companies registered in Luxembourg as an IME. The legal qualification of Jamendo’s “royalty-free” system was one of questions to deal with, but it was relatively easy to settle, because, irrespective of how the IMEs advertise their services, they are *not remuneration-free* – as otherwise they also recognize it (see above). But the Court had to also deal with two other more complex questions that concerned the application of the right to a single equitable remuneration of performers and producers of phonograms for communication to the public (including public-performance-like acts) and broadcasting of phonograms published for commercial purposes. The right is provided in in Article L. 214 of the French Intellectual Property Code in accordance with Article 12 of the Rome Convention, Article 15 of the WPPT, and Article 8(2) of the Rental, Lending and Related Rights Directive (Directive 2006/115/EC). Under Article L. 214-5 of the Code, the right – as in many other European countries – may only be exercised through collective management (*that is, in the form of mandatory collective management*). The reason for which SACEM, the French authors’ society, was the defendant was that the single equitable remuneration was collected by it, on contractual basis, for SPREE, an umbrella organization of the CMOs managing the rights of performers (ADAMI and SPEDIDAM) and producers of phonograms (SCPP and SPPF).

AudioValley claimed that the phonograms made available to the user concerned in the case (a company operating more than hundred stores in France, specialized in the sale of carpets and interiors for houses) by Jamendo to be performed as background music had not been published for commercial purposes, and, thus, the right to a single equitable remuneration was not applicable; this was the first specific question to deal with. The second one, as mentioned above, was the question of applicability of mandatory collective management to this right. AudioValley claimed that, even if the right happened to be applicable, the provision for mandatory collective management of the rights of those – like the performers and producers of the phonograms represented by Jamendo – who did not intend to join a CMO, contradict to the EU law. It proposed that, if the Court did not find that this was obviously the case (that is, if this were not considered an *acte clair*), it should turn to the CJEU with preliminary questions to clarify this.

***3.2. Judgment of the Cour de cassation: the phonograms licensed by Jamendo – contrary to the allegations about ”royalty-free” and non-commercial CC licenses – had been published for commercial purposes***

In the *AudioValley [Jamendo] v. SACEM* case,[[61]](#footnote-61) the *Cour de cassation* – in accordance with the two lower instance courts – made it clear what a “royalty-free” license truly means. The judgement has been summed up on the website of the court in this this way:

*Une société qui diffuse dans ses magasins des phonogrammes mis en ligne sur une plate-forme par des artistes-interprètes*, qui font le choix de participer au programme commercial proposé par cette plate-forme *afin de sonoriser les locaux* des professionnels qui y souscrivent, réalise, indépendamment du moyen ou du procédé technique utilisé, la communication directe dans un lieu public de phonogrammes publiés à des fins de commerce et est, en application de l’article L. 214-1 du code de la propriété intellectuelle, tenue au paiement de la rémunération équitable.[[62]](#footnote-62)

The *Cour de cassation* rejected the allegations of the plaintiffs that the phonograms had not been made available for commercial purposes, but “royalty free” on the basis of Creative Commons licenses. This allegations was not well-founded because two CC licenses – a non-commercial and a commercial – had been combined in a way that, in fact, the use had become commercial: the phonograms were included in Jamendo’s database through a non-commercial Creative Commons license (CC BY-NC-ND 3.0), its nature, however, was “allowed” to be transformed in Jamendo’s “In-Store” program through a Creative Commons Plus (CC+) Commercial License.

The court pointed out: “the companies Storever France[[63]](#footnote-63), Audiovalley and Jamendo maintained, in their appeal conclusions, that the performers, who published their phonograms on the Jamendo platform, could participate in the commercial program called «In-Store» proposed by this platform, by choosing the corresponding type of «creative commons» license, which professionals could subscribe to the « In-Store» program in order to sound their premises, and that this commercial exploitation generated profits, which were partially paid back to the artists concerned.”[[64]](#footnote-64)

***3.3.******Judgment of the Cour de cassation: it is not against the French and EU law that IMEs are not allowed to carry out mandatory collective management of copyright or related rights***

The plaintiffs proposed that the court submit the following two preliminary questions to the CJEU:

Question 1: “Do Articles 8(2) and/or 10(2) and (3) of Directive 2006/115 [Rental, Lending and Related Rights Directive] preclude a national provision of a Member State such as Article L 214-5 of the Intellectual Property Code in that it provides for mandatory and systematic collection by a collective management company of equitable remuneration even for performers and/or producers who are not members of this collective management company?”

Question 2: “Do Articles 8(2) and/or 10(3) of Directive 2005/115 preclude a national provision such as Article L 214-5 of the French Intellectual Property Code which has the effect that artists-performers and the producers concerned who are not members of the collective societies concerned, but whose phonogram, published for commercial purposes, or a reproduction thereof, is used for broadcasting or for any communication to the public do not receive equitable remuneration because to them the remuneration collected systematically and obligatorily from users is not distributed?"[[65]](#footnote-65)

As regards, the second question, the *Cour de cassation*, on the basis of the documentation received from the French related-rights CMOs has confirmed that the allegation implied by the question was badly based; the remuneration – as it follows from the very concept of mandatory collective management – are distributed both to the members of the CMOs and to those rightholders whom they also represent because they may only exercise their rights through the given CMOs.

In response to the second question, the court first pointed out that, although Article 8(2) of the Directive does not provide for mandatory collective management for the exercise of the right provided in it (the right of performers and producers of phonograms to a single equitable remuneration in case of broadcasting and communication to the public of phonograms published for commercial purposes), Article 5 of the Directive offers freedom to the Member States how they take care of the exercise thereof: "Member States may regulate the question of, and to what extent, the management by collective management companies of the right to obtain equitable remuneration may be imposed...". And it added as follows:

Directive 2014/26 on collective management of copyright and related rights states in recital 2 that: "It is normally up to the rights holder to choose between the individual or collective management of his rights unless the Member States provide otherwise in accordance with Union law" and in recital 12: "This Directive... shall not interfere with arrangements relating to the management of rights in Member States such as... compulsory collective management.

On this basis, the *Cour de cassation* concluded that Article L 214-5 of the Intellectual Property Code providing for mandatory collective management is clearly in accordance with the EU law (therefore, it was not justified to submit a preliminary question to the CJEU about it). And that it follows from the very concept of mandatory collective management that individual rightholders and IMEs that allege to have obtained the right to the single equitable remuneration (the transfer of which, under the French law, rightly enough, is not valid) are not allowed to exercise the right in parallel.

***3.4. Lawsuit of SIAE against Soundreef where the latter alleged that the Italian law is in conflict with the EU law, in particular with the CRM Directive, because it has only extended the possibility of parallel management of the same rights to CMOs and not to IMEs***

In Italy, SIAE, the society of authors and editors, until the adoption of the CRM Directive, had enjoyed a *de iure* monopoly position. The transposition of the Directive, first, took place in a way that the SIAE’s *de iure* monopoly position was maintained. Later it was eliminated, and competition by other CMOs – but not for IMEs – became possible. Soundreef, an IME, alleged that the latter regulation still was not in accordance with the EU law. This led to a lawsuit and then a settlement as outlined below.

As mentioned, originally, Italy, by Decree No 35 of March 15, 2017 transposed the CRM Directive in a way that it maintained the *de jure* monopoly position for SIAE provided in Article 180 of the Copyright Law. This, in the cases covered by the *OSA* judgment of the CJEU (discussed above) would have been in accordance with the EU law, but it was not limited to those cases only. The new provision included in the Italian law corresponded, practically in a verbatim manner, to the provision of the first sentence of Article 5(2) of the Directive prescribing complete freedom of association of rightsholders – but it still differed from it in two aspects; from one viewpoint, the new provision seemed to be more liberal, and from another viewpoint it was less liberal than Article 5(2) of the Directive. It seemed to be more liberal because, while Article 5(2) of the Directive only foresees complete freedom of association concerning CMOs[[66]](#footnote-66), the Decree extended this principle also to IMEs (despite that Article 2(4) of the Directive itself has not extended the application of Article 5 to IMEs). In fact, however, the new provision was less liberal because it left the application of Article 180 (on SIAE’s *de jure* monopoly)[[67]](#footnote-67) intact.

The European Commission warned Italy that the provision preserving SIAE’s monopoly – in view of the provisions of the CRM Directive – was in conflict with the EU law. As a consequence, Italy, by Decree No 148 of October 16, 2017 – converted as Law 172 of December 4, 2017 – modified Article 180 of the Copyright Law on SIAE’s monopoly in a way that the possibility to manage the rights mentioned in the Article have become reserved not only for SIAE, but for SIAE *and* other CMOs foreseen in Decree 35 of March 15, 2017 (which, as mentioned above, had transposed the CRM Directive into the Italian law).

It was the latter new provision which has led to a lawsuit between SIAE and Soundreef, a U.K.-based IME. Soundreef claimed that limiting the freedom of managing the rights mentioned in the modified Article 180 to SIAE and CMOs – and not extending it the IMEs – is in conflict with the CRM Directive.

SIAE, in response, pointed out that, under *OSA*, in the case of the rights concerned (in particular the right of public performance) it is in accordance with the EU law to provide for *de jure* monopoly of a national CMO and that the protection of cultural diversity also justifies such a provision. Both reasons presented by SIAE were well-founded. It was erroneously raised in the lawsuit as an argument against the applicability of *OSA* that it concerned a legal situation that had been modified by the CRM Directive. This was not a well-founded argument, because, as discussed above in this paper, the analysis on which the CLEU has based its judgment in *OSA* is applicable in the same way after the entry into force of the Directive as it was applicable before it. This is so, because the Court, as pointed out above, has found that, for an efficient exercise of the right concerned in the case – the right of public performance of musical works – a national provision on *de jure* monopoly of a CMO is necessary, and there is no provision in the Directive to declare that such a *factual* situation does not exist anymore or that it would be justified to constrain Member States not to apply such provisions which are necessary for ensuring efficient exercise of rights of all rightholders concerned.

***3.5. Preliminary question of the Tribunal of Rome (the same as which later was asked again in the LEA v Jamendo case) and the out-of-court settlement with the involvement of LEA***

In the lawsuit, the Tribunal of Rome decided to submit the following preliminary question to the CJEU:

Must Directive 2014/26/EU be interpreted as precluding national legislation that reserves access to the copyright intermediation market, or in any event the granting of licences to users, solely to entities which can be classified, according to the definition in that directive, as collective management organisations, to the exclusion of those which can be classified as independent management entities incorporated in that Member State or in other Member States*?*[[68]](#footnote-68)

The preliminary question was registered at the CJEU under case number C-781/18. However the parties, on April 10, 2018, reached a peaceful settlement; they withdrew their claims, and terminated the lawsuit. The Tribunal of Rome informed the CJEU about this in December 2018, which, by its order of July 16, 2019, deleted the case from its registry.

The basis of the agreement was that Soundreef had found a solution. It had agreed with an, until that time, small Italian CMO – LEA (*Liberi Editori Autori*) – on the management of its repertoire in Italy. LEA’s status as a CMO was in accordance with the modified provision of Article 180 of the Italian Copyright Law.

***3.6. The SIAE – LEA/Soundreef settlement: recognition of the reality of natural monopoly and the need for on-stop-shop licensing***

The SIAE – LEA/Soundreef settlement has included the following elements:

- SIAE has acknowledged the legitimacy of LEA to receive remuneration on behalf of Soundreef and its direct members;

- SIAE has acknowledged that Italian users have to obtain a supplementary license from LEA (also on behalf of Soundreef) if they use the repertoire of LEA;

- for public performance of musical works through recordings or on the basis of broadcast programs, SIAE collects remuneration on behalf of LEA/Soundreef too (due to which alone, the SIAE tariffs do not change, but SIAE transfer the remuneration to LEA/Soundreef proportionally for the use of its repertoire);

- in contrast, for live performance of musical works, from July 1, 2018, a complex system was to apply under which, if only SIAE or only LEA/Soundreef repertoire is used, the license of the relevant organization was needed, and where the repertoires of both organizations were used, both organizations’ licenses were necessary, but in that case SIAE was to collect the remuneration also for LEA/Soundfreef (and to transfer to it the proportional part thereof). However, in the latter case, the system was complicated by the requirement that the users had to inform the organizations about the musical works to be used in the programs at least two days before (LEA had insisted on prescribing this requirement).

As it can be seen, the parties have recognized the decisive aspect for which natural monopoly is justified in the case of the management of musical performing rights; namely that there should be normally a one-stop-shop with a common tariff and licensing system for the users. (It is another matter that the obligation to inform the organizations of the works intended to be performed two days before, although it may be realistic for concerts, is hardly suitable for other forms of live public performances.[[69]](#footnote-69))

***Part IV. LEA v Jamendo: why a ruling in favor of LEA would be justified***

***4.1. SIAE v Soundreef recycled as LEA v Jamendo***

In section 3.4 above – in connection with the *SIAE v* *Soundreef* case – it is described how Italy has transposed the CRM Directive aimed at “liberalization” of collective management; namely that it has eliminated the *de iure* monopoly of SIAE for the collective management of the rights listed in Article 180 of the Copyright Law (musical performing, mechanical rights and “synchronization” rights) but, in addition to SIAE, it has only allowed to other CMOs – and not to IMEs – to carry out collective management of those rights. As it is discussed there too, in view of this, Soundreef, a U.K. based IME, launched a lawsuit in which the Tribunal of Rome submitted a question to the CJEU for preliminary ruling, but then the parties reached a compromise the essence of which was that Soundreef trusted its repertoire to LEA, an until that time small Italian CMO which than concluded an agreement with SIAE as a result of which *de facto* one-stop-shop licensing has been established for the management of the right of public performance of musical works. The question that was submitted by the Tribunal to the CJEU in the SIAE v Soundreef lawsuit read as follows:

Must Directive [2014/26] be interpreted as precluding national legislation that reserves access to the copyright intermediation market, or in any event the granting of licences to users, solely to entities which can be classified, according to the definition in that directive, as collective management organisations, to the exclusion of those which can be classified as independent management entities incorporated in that Member State or in other Member States?

The CJEU did not have to deal with this preliminary question; the lawsuit, following the settlement between the parties, has been terminated. Now the CJEU will have the opportunity to adopt a preliminary ruling on the question because, in the *LEA v Jamendo* case, the Tribunal of Rome has submitted verbatim the same question to the CJEU.

Advocate General Szpunar has prepared an opinion[[70]](#footnote-70) in which he has described briefly the facts of the procedure as follows:

23.      Liberi editori e autori (‘LEA’) is a collective management organisation governed by Italian law and authorised to operate in the field of copyright intermediation in Italy. […]

24.      Jamendo SA is a company incorporated under Luxembourg law. Its activity is twofold. First, under the name Jamendo Music, it communicates to the public, on its website, musical works which artists have published on that site under Creative Commons licences. […] Secondly, under the name Jamendo Licensing, it manages the copyright in musical works entrusted to it for that purpose by artists, issuing authorisations for only two methods of exploitation, namely as background music in shops and other establishments open to the public and as background music for audiovisual works, in particular those subsequently distributed on the internet. With respect to the second part of its activity, Jamendo may therefore be regarded as an independent management entity within the meaning of Article 3(b) of Directive 2014/26. That activity covers, inter alia, Italian territory. It is that second aspect which is the subject matter of the dispute in the main proceedings and of the present case. According to the information provided by Jamendo, its management activity, both as regards the transfer of rights by artists and the issuing of licences for use, is carried out entirely online, via its website. Moreover, the contracts which Jamendo concludes with artists require them to be independent, that is to say, inter alia, that they not be affiliated to any collective management organisation or linked to such an organisation in a way which would prevent them from using Jamendo’s management services throughout the world.

25.      LEA brought an action for an injunction against Jamendo before the Tribunale ordinario di Roma (District Court, Rome, Italy), the referring court, seeking an order that Jamendo cease itsactivity of copyright intermediation in Italy. In support of that application, LEA claims that Jamendo is unlawfully carrying out that activity in Italy on the grounds, first, that it is not registered on the list of organisations authorised to operate in the field of copyright intermediation in Italy, secondly, that it does not satisfy the specific requirements laid down by Legislative Decree No 35/2017 and, thirdly, that it did not inform the Ministero delle comunicazioni (Ministry of Telecommunications, Italy) before starting to exercise its activity, in breach of Article 8 thereof.

26.      Before the referring court, Jamendo submits that directive 2014/26 was incorrectly transposed into Italian law, arguing that the Italian legislature failed to confer on independent management entities the rights provided for by that directive. In that regard, Jamendo states that, under Article 180 of the Law on the protection of copyright, only the SIAE and the other collective management organisations referred to therein may carry out intermediation activities in Italy, the effect of which is to prevent independent management entities from operating in the field of copyright intermediation and to compel them to enter into representation arrangements with the SIAE or other authorised collective management organisations.

27.      The Tribunale ordinario di Roma (District Court, Rome) essentially agrees with the interpretation of Italian law put forward by the parties to the main proceedings. In those circumstances, it decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Must Directive [2014/26] be interpreted as precluding national legislation that reserves access to the copyright intermediation market, or in any event the granting of licences to users, solely to entities which can be classified, according to the definition in that directive, as collective management organisations, to the exclusion of those which can be classified as independent management entities incorporated in that Member State or in other Member States?’

***4.2. Brief overview of the AG’s arguments on the basis of which he suggests that the CJEU rule in favor of Jamendo, and the reasons for which his arguments are not well-founded***

The AG expresses the view that the CJEU has erred in *OSA* by finding that neither the Services Directive nor Article 56 of the TFEU on the freedom of providing services apply to collective management, but he states that he only refers to this only as a secondary justification why Jamendo has the right to carry out collective management activities freely in any EU Member State. The AG is of the view that, even if the CJEU might not have erred in *OSA*, in *LEA v Jamendo*, that ruling is not valid because the facts are different; Jamendo licenses the use of musical works through the Internet; therefore it qualifies as a “internet service provider” under the Electronic Commerce Directive, and as such may carry out its activities freely in any EU Member State.

In the paper below, first, it is pointed out that – as already discussed above – *OSA* has remained good law also after the entry into force of the CRM Directive concerning the kinds of cases to which it relates and that in *LEA v Jamendo* – at least, as regards licensing of musical works for public performance as background – such a case is involved. Then it is discussed and proved that Jamendo, in its IME quality, does not qualify as “information society provider” and that, even if it had such a quality, the provisions on the free access of such providers to the entire internal market do not apply to services in the field of copyright and related rights.

The AG also argues that, because Italy has eliminated SIAE’s *de iure* monopoly and also allows to other CMOs to manage the rights listed in Article 180 of the Copyright Law, for competition reasons, it must allow the same to IMEs to manage the same right. In the paper, it is pointed out that the impact of opening the market also to the IMEs would have different consequences that justify their different status.

The AG’s related remark according to which, otherwise, under the CRM Directive, the obligations of IMEs are similar to those of CMOs is rebutted in detail in a separate section by referring to big and unjustified competition advantages enjoyed by IMEs to the detriment of CMOs.

Finally, in the last section before the Conclusions, it is noted that the AG has not fulfilled his obligation under Article 167(4) to take into account the cultural aspects of the case, although there are some that are significant from the viewpoint of the protection of cultural diversity, which could be seriously menaced by the closed and narrow repertoires of profit-driven IMEs coupled with their unjustified advantages in the cultural market. It is pointed out that, therefore, Italy had appropriate reasons under the EU law and the UNESCO Cultural Diversity Convention to apply measures against this; and the solution chosen in Article 180 of the Copyright Law is in accordance with this.

***4.3. Licensing of the public performance of musical works as background music by Jamendo is the same kind as about which the CJEU has found in OSA that granting de iure monopoly is justified***

The AG, notes that in being “[a]ware of the impending change in the legal environment for copyright management […], the Court was careful to state that its analysis related to “European Law [as it] stands at present.”[[71]](#footnote-71) It is analyzed above on the basis of what kind of legal analysis the CJEU has found that, in the given case (*de facto* in a natural monopoly situation), it was not in conflict with the EU law to provide for *de iure* monopoly; namely that the monopoly status of a CMO was necessary for effective management of the right involved. It is pointed out there too that, in respect of the right of public performance which was at issue in *OSA*, the factual situation has not changed and that the CRM Directive cannot be interpreted in a way that it obligates the Member States to undermine the efficiency of their collective management systems.

Jamendo, as described by the AG and as quoted above, licenses the use of musical works in two forms: namely as background music in shops and other establishments open to the public and as “background music” for (embodied in) for audiovisual works, in particular those subsequently distributed on the Internet.

As pointed out above, in the case of public performance of musical works – and specifically in the form of background music which was at issue in *OSA* – *OSA* has remained valid also after the entry into force of the CRM Directive. Therefore, it would have been possible for Italy to maintain SIAE’s *de iure* monopoly for such natural monopoly situations and only allow management activities to CMOs other than SIAE in other cases.

***4.4. Licensing of “synchronization” of musical works by Jamendo requires more thorough consideration***

Licensing of musical works to be “synchronized” in (included into the soundtrack of) audiovisual works is another matter. It is also covered by Article 180 of the Italian Copyright Act in which the following rights are listed among which also the right of cinematographic reproduction is mentioned: “*the rights* *of* performance, recitation, broadcasting, including communication to the public by satellite, and mechanical and *cinematographic reproduction of protected work”.* The circumstances and conditions of collective management of this right do differ from those that are present in the case of the right of public performance. It seems that, in this case, collective management is not necessary in the same form; the licensing may take place through collective licensing but rightholders may also choose individual licensing.[[72]](#footnote-72) That is, in this case, there is no natural monopoly situation; the reasons on which *OSA* is based do not apply. This does not mean, however, that when the question is posed whether, therefore, it should be made possible to IMEs to compete with CMOs in this field of licensing, the answer should be in the affirmative. Still the huge unfair competition advantages granted to the IMEs in the CRM Directive may be a reason against it, as well as the need to protect cultural diversity (see section 4.9 below).

***4.5. Jamendo, in its IME function, is not an “information service provider”, and even if it were such a provider, the provision of Article 3(2) of the Electronic Commerce Directive prohibiting the restriction of the freedom to provide such services from another Member State is not applicable to collective management of copyright and related rights***

As quoted above, the AG describes the activities of Jamendo in this way:

Jamendo SA is a company incorporated under Luxembourg law. Its activity is twofold. First, under the name Jamendo Music, it communicates to the public, on its website, musical works which artists have published on that site under Creative Commons licences.  Secondly, under the name Jamendo Licensing, it manages the copyright in musical works entrusted to it for that purpose by artists, issuing authorisations for only two methods of exploitation, namely as background music in shops and other establishments open to the public and as background music for audiovisual works, in particular those subsequently distributed on the internet. With respect to the second part of its activity, Jamendo may therefore be regarded as an independent management entity within the meaning of Article 3(b) of Directive 2014/26.[[73]](#footnote-73)

The AG rightly points out that only the second kind of activity of Jamendo is relevant in the *LEA v Jamendno* case. When Jamendo directly communicates works to the public, it performs an act covered by copyright and related rights (therefore, it is not a service provider but content provider). The second kind of activity is licensing of certain uses of musical works; namely, first of all, public performance as background music and, second, for “synchronization” in audiovisual works (the latter normally is also off-line use, even if then the audiovisual work may be used later online).

Then the AG express the opinion – although it seems that he is not sure that the Court will agree with it[[74]](#footnote-74) – that, in respect of the latter activity, Jamendo is an “information service provider” under Article 2(a) of the Electronic Commerce Directive (Directive 2000/31/EC), and as such, Article 3(2) of the Directive applies to it. He argues as follows:

[As] regards providers established in other Member States, Article 3(2) of that directive prohibits Member States from restricting the freedom to provide services from those other Member States. […]  Since Jamendo is established in Luxembourg, it is in Italy in the situation of a service provider established in another Member State. The restriction on its activity which arises from the reservation under Italian law of the provision of copyright intermediation services solely to collective management organisations clearly falls, in my view, within the coordinated field as a requirement relating to access to the service activity. That restriction therefore falls under the prohibition in Article 3(2) of Directive 2000/31 and is contrary to that provision.[[75]](#footnote-75)

Consequently, according to the AG’s opinion, any IME may begin collective management activities in Italy (as in any other Member States) and the government is not allowed to restrict its activities. It follows from this that the government would not have a right to intervene no matter how many foreign IMEs licensed public performance in Italy just because it grants the license through the Internet.

It is understandable that the AG, as mentioned above, has doubts whether the Court will be ready to adopt this theory, because there are, at least, three weighty reasons for which it is not well-founded.

*The first* *reason* – which may be even alone decisive – is of the same kind as for which the CJEU in *OSA* excluded the applicability of the Services Directive to collective management of copyright and related rights; namely that, similarly to that Directive, the Electronic Commerce Directive itself excludes it. It does since it states that the provisions of the Directive are not applicable in the field of copyright and related rights. The “services” of collective management organizations, at least in certain cases – as the one at issue in *OSA* – are indispensable for the effective application of copyright and related rights. The regulation of their establishment and operation is an essential part of copyright and related rights legislation, which shows that the exclusion of the application of copyright and related rights from the application of the Services Directive, by definition, is supposed to also mean the exclusion of such “services” from the application of the Directive.

The Electronic Commerce Directive contains a provision that excludes the application of the provisions on “information society services” to copyright and related rights, as the AG himself recognize it: “It is also true that Article 3(3) of Directive 2000/31, read together with the annex thereto, excludes the combined application of Article 3(1) and (2) of that directive, in particular, ‘in the case of copyright and related rights’”.[[76]](#footnote-76)

However, the AG – in accordance with his view that the CJEU has erred in *OSA* when it interpreted a similar provision in the Services Directive as excluding its application to collective management of copyright and related rights – has added: “However, I see no reason relating to the wording or purpose of that provision of the annex to Directive 2000/31 for interpreting it as excluding services for the management of copyright or related rights from the scope of Article 3 of Directive 2000/31. The reservation of access to such services to the collective management organisations set out in Italian law is therefore not covered by that derogation from the principle of mutual recognition.”[[77]](#footnote-77) His statement – “*I see no reason* […] for interpreting it as excluding services for the management of copyright or related rights […]; [t]he reservation of access to such services to collective management organizations set out in the Italian law is *therefore* *not covered by the derogation*” – sounds somewhat strange because it seems to suggest that the Italian law is not in accordance with the EU law simply because the AG can see no reason to interpret it in that way.

In fact, however, the AG presents an argument just in the preceding paragraph, trying to support his position – which is practically the same as for which he is of the view that the CJEU has erred in *OSA* by interpreting the similar provision in the Services Directive as excluding its application to collective management services:

However, the point at issue is the substantive law governing copyright and related rights, in accordance with the principle of territoriality of those rights. Thus, where an information society service consists in the use of works protected by copyright or related rights (for example the dissemination of works online) or requires such use, the provisions of Directive 2000/31 do not release the service provider from the obligation to obtain an authorisation for use for the territories of all Member States in which its service is provided, not only for the Member State of establishment of that service provider.[[78]](#footnote-78)

The provisions of Article 3 (1) to (3) and the annex of the Electronic Commerce Directive contradict this understanding. They provide as follows:

1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

3. Paragraphs 1 and 2 shall not apply to the fields referred to in the Annex [*comment:* *and the Annex excludes the application of Article 3(1) and (2) to copyright and related rights as the very first item*].

As discussed above, the regulation of the establishment and operation of CMOs is an inseparable part of copyright and related rights legislation. It is to be noted that in Article 3(3) it is not provided simply that the Directive does not apply *to copyright and related rights* prescribed in the copyright law of a Member State, but that it provisions of Article 3(1) and (2) – that is, also Article 3(2) under which the freedom of providing services from another Member States cannot be limited – is not applicable *in the fields* referred to in the Annex. This means that – where, *in the field* of copyright and related rights, services are offered (including the CMOs “services”) – Article 3(1) and] (2) is not applicable.

*The second reason* for which the AG would not be right – even if the application of the Services Directive were not excluded specifically in the field of copyright and related rights (as it is) – in alleging that, due to Article 3(2) of the Electronic Commerce Directive, Italy would not be allowed to restrict the freedom of foreign IMEs is that, even if it were the case, Italy would be allowed to apply such a restriction under Article 3(4) of the Directive:

4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:

(a) the measures shall be:

(i) necessary for one of the following reasons:

- public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,

- the protection of public health,

- public security, including the safeguarding of national security and defence,

- the protection of consumers, including investors;

(ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;

1. proportionate to those objectives;

It may emerge as a question whether or not concept of “public policy” is limited to the fields listed after this term, or it applies to public policy in general. It is submitted that clearly the latter is the case. The words “In particular” appearing at the beginning of a list does not suggest that the list is exhaustive; it suggests that the most typical cases are listed to which something applies specially more than to others not listed but to which the same applies.[[79]](#footnote-79)

The AG states that the “proper functioning of the system of management of copyright” – “in the interests of both rightholders and users, including the promotion of lesser-known authors” – “is certainly *not* a matter of public policy,” and he also answers in the negative to the question of whether or not consumers’ protection may justify the prohibition of parallel licensing by IMEs:

The justification for the restriction at issue is to ensure the proper functioning of the system of management of copyright, in the interests of both rightholders and users, including the promotion of lesser-known authors and works. *However, neither rightholders* who entrust the management of their copyright to a collective management organisation or an independent management entity *nor users* who seek authorisation for the public use of works *can be categorised as consumers*, since they perform those acts in the context of a professional and remunerated activity. Moreover, *the proper functioning of the system of management of copyright*, which includes the promotion of certain authors or works, seeks to secure private interests and *is certainly not a matter of public policy*.[[80]](#footnote-80) [Emphasis added.]

This position of the AG is in conflict not only with the ordinary meaning of the words “in particular”, but in multiple conflicts with the EU law, with the consistently represented position of the European Parliament, with the settled case law of the CJEU on this issue, and also with what is stated, in accordance with all this, in one of the first recitals – recital (3) – of the CRM Directive.

Let us begin with this recital:

Article 167 of the Treaty on the Functioning of the European Union (TFEU) requires the Union to take cultural diversity into account in its action and to contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore. Collective management organisations play, and should continue to play, an important role as promoters of the diversity of cultural expression, both by enabling the smallest and less popular repertoires to access the market and by providing social, cultural and educational services for the benefit of their rightholders and the public.

It could hardly be denied that the creation and availability of literary and artistic works and the productions of performing artists and of the copyright industries are core aspects of the cultural life of the Member States and the Union, that the protection of the rights of authors and owners of related rights is indispensable for “flowering of the cultures of the Member States,” that cultural diversity makes Europe richer; it is one of its definitional feature. It cannot be denied either that collective management plays a decisive role in all this not only because, at least in certain cases, it is necessary for the effective exercise of copyright and related rights, but also because genuine CMOs (such as societies of authors and organization of performers) function as communities of creators and – as the recital stresses it – they play an active role in the cultural life of their respective Member States.

In view of all these aspects, the proper operation of the collective management system – in order that all these functions may be duly fulfilled – is an important element of the cultural policy of the various Member States, about which it would be anachronistic to state that it is not an aspect of public policy. And it is not just an aspect of marginal importance of public policy but a key one in due accordance with the role of culture in human life. So much key that the TFEU, as the above-quoted recital refers to it in a narrative manner, as mentioned above, provides in Article 167(4) that “the Union shall take cultural aspects into account in its actions under other provisions of the Treaties.”

In this context, “the Union” means all organs of the Union – the Parliament, the Council, the Commission and any other – and any officials thereof. Furthermore, “other provisions of the Treaties” mean not only some specific other provisions but *all other provisions*, including those that serve the promotion of competition, or those applicable to the status and operation of “information society services” and services in general.

It is a matter of fulfilling this obligation that, as mentioned and quoted above in section 1.10, the European Parliament pointed out in its 2007 Resolution that forcing competition on CMOs that has functioned traditionally in the spirit of cooperation and solidarity would endanger their cultural role and the very cultural identity and diversity in the Member States and, thus, as discussed in section 1.8 above has rejected the application of the Services Directive to collective management of copyright and related rights. And although the CJEU has not specifically stated that it had done it in fulfilling its obligation under Article 167(4) of the TFEU, in fact it has acted in due accordance with that provision when it found in *OSA* that, at least in a case like the one at issue, it is even justified to provide for *de iure* monopoly of a domestic CMO in order to guarantee what the AG mentions as “the proper functioning of the system of management of copyright, in the interests of both rightholders and users, including the promotion of lesser-known authors and works.”

All this contradicts the AG’s allegation that “*the proper functioning of the system of management of copyright*, which includes the promotion of certain authors or works*, seeks to secure private interests and is certainly not a matter of public policy”*.[[81]](#footnote-81) [Emphasis added.] This theory is so obvious badly founded and it is so clearly refuted by the recital of the CRM Directive, the above-quoted statements in the Parliament’s Resolution and the findings of the CJEU in *OSA* that it hardly deserves substantive comments. What should still be pointed out is that, where it may still be true that an entity promotes only “certain authors or works” and “seeks to secure private interests”, it is definitely not true regarding the activities of CMOs like authors’ societies and performers’ organizations operating in the spirit of cooperation and solidarity, but it may just be true exactly in the case of IMEs with closed repertoires and serving sheer private interests (and primarily the interests of private entrepreneurs pursuing, first of, all their own profit).

And the *third reason* for which the AG’s position is badly founded – the mentioning of which may seem to be unnecessary in view of the other two decisive ones, but it shows that even the basic premise itself is mistaken – is that it is doubtful that an IME like Jamendo, regarding its collective management activities, is really an “information society service”.

Article 2(a) of the Electronic Commerce Directive, in fact, does not offer a substantive definition of “information society services.” It reads in this way: “’information society services’: services within the meaning of Article 1(2) of the Directive as amended by Directive 98/48/EC.” Thus, the definition can rather be found in Article 1(2) of the latter-mentioned Directive where its text, in the amended version, is this:

2. "service", any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

- "at a distance" means that the service is provided without the parties being simultaneously present,

- "by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,

- "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request.

An indicative list of services not covered by this definition is set out in Annex V.

This Directive shall not apply to:

- radio broadcasting services,

- television broadcasting services covered by point (a) of Article 1 of Directive.

It is important to stress that, as regards the IME function of Jamendo *what it licenses is* *not the act of* *transmitting* to the users of musical works to be used “at a distance,” but *their public performance in the presence of public or at places open to the public* (or to be included in audiovisual works).

***4.6. The CJEU did not err when it ruled in OSA that the Services Directive does not apply to collective management of copyrights and related rights – neither did the European Parliament when it declared the same and when it opposed to alleging its application in the CRM Directive***

As discussed above, the AG is of the view that Jamendo is free to perform collective management activities as an IME in any Member States, thus also in Italy, because it offers as “information society service” under the Electronic Commerce Directive; therefore, the Italian law which only permits such activities to CMOs and not to IMEs is in conflict with the EU law. According to him the consideration of the applicability of the Services Directive – as well as of Article 56 of the TFEU – might only be necessary if the Court did not adopt this position.[[82]](#footnote-82)

Then he discusses the question of applicability of the Services Directive, and reaches the opinion that the same position follows from it than from the Electronic Commerce Directive; namely, Italy infringes the EU law because it does not allow free operation of IMEs like Jamendo in its territory. He concludes that the CJEU has erred in *OSA* when, contrary to his opinion, it had excluded the application of the Services Directive to collective management.

Above, in section 1.8, it is discussed how the CJEU has ruled in *OSA* that the Services Directive is not applicable to collective management as well as how the European Parliament has stated the same in a resolution and how it rejected a statement in the draft DRM Directive about the applicability of the Services Directive.

AG Szpunar expresses the view that, in *OSA*, first AG Sharpston and then the CJEU, which agreed with her, did not interpret correctly the provision of Article 17(11) of the Services Directive according to which the Directive does not apply to copyright and related rights.[[83]](#footnote-83) As the AG refers to it, the Court has found that “since only services can be excluded from the application of Article 16 of Directive 2006/123, Article 17(11) of that directive must be interpreted as excluding the service relating to copyright referred to in paragraph 63 of the present judgment from the scope of Article 16.”[[84]](#footnote-84) In AG Szpunar’s opinion, contrary to this finding, the cited provisions of the Services Directive only means that a service provider should respect the provisions of the Member State on copyright and related rights where the service is offered; this however, according to him, does not apply to the provisions on the management of copyright and related rights. He points out that, if the intention of the drafters had been to exclude collective management as service, they would have stated this.

The AG, in support of thes opinion, first notes that

Directive 2006/123 provides for a number of both general and specific exclusions from its scope in Article 16 thereof. Where an exclusion concerns a category of services, this is expressly stated in that directive. This is the case, inter alia, with the exclusions listed in Article 2(2) of that directive, which uses the term “services” to refer to each activity concerned. This is also the case with some of the exclusions listed in Article 17 of that directive, inter alia in Article 17(1), which concerns “services of general economic interest”, and in Article 17(5), which concerns “the activity of judicial recovery of debts”.

Then he points out that ”[b]y contrast, some other exclusions clearly do not concern categories of services;” he lists certain exclusions that, in his view, falls into such categories,[[85]](#footnote-85) and he concludes in this way:

71.  The premise that the exclusions from the scope of Article 16 of Directive 2006/123 provided for in Article 17 thereof can concern only services is therefore not established and cannot serve as a basis for interpreting the exclusion provided for in Article 17(11), which concerns, I would repeat, ‘copyright [and] neighbouring rights’.

72.  As stated above, most of the exclusions provided for in Article 17 of Directive 2006/123 relate to measures in force in the Member States. Those exclusions must be understood as meaning that the freedom to provide services on a cross-border border basis, as set out in Article 16 thereof, does not prevent the application of those measures and that service providers cannot rely on that freedom to avoid the obligations which those measures impose on them.

73.  The exclusion provided for in Article 17(11) of Directive 2006/123 must, in my view, be interpreted in the same way. It follows from that provision only that Article 16 thereof does not preclude application of the substantive copyright law of the Member State of destination of the service or application of the service provider’s obligations, in particular as regards the authorisation required for the use of works. This interpretation is therefore similar to that of the analogous exclusion provided for by Directive 2000/31. ([*44*](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62022CC0010#Footnote44)) By contrast, if the EU legislature had intended to exclude management services for copyright and related rights from the scope of Article 16 of Directive 2006/123, it would have expressly provided for this.

74.   I am therefore of the view that Article 16 of Directive 2006/123 is fully applicable to independent management entities as defined in Directive 2014/26.

As it can be noted, in fact, the key elements on which AG Szpunar’s arguments are based do not really differ from what AG Sharptson’s opinion and the CJEU’s findings in *OSA* has been founded on*.* Namely that, if it comes to the question of exclusion of services from the application of the Services Directive, by definition, there must be services that may or may not be excluded. The Court has found that, in the case of copyright and related rights, collective licensing of rights is a service, and AG Szpunar does agree with this. Therefore, irrespective of whether or not some other items listed in Article 17 of the Directive may be understood in a way that no services are involved, where, in the list, there is an item in the field where services are offered – like, in the case of copyright and related rights, collective management service – it would be anachronistic to claim that just that aspect of the given field could not be excluded.

It is, however, at least as much important to stress that it is a badly founded theory that only those norms may be regarded to relate to copyright and related rights that determine what rights must be provided, for how long times, with what sorts of exceptions and limitations and that the provisions guaranteeing the enjoyment and exercise of the rights would not be part of copyright legislation. It is in this respect that it should be seen that the findings of the CJEU in *OSA* according to which, for appropriate and effective exercise of the right at issue in the given case, *de iure* monopoly may be provided and that the Services Directive is not applicable are inseparably linked with each other. This relationship is one of the reasons for which the exclusion of services concerning copyright and related rights from the application of the Services Directive is justified. There are, however, other reasons too; such as protecting the value of copyright and related rights against a sort of “competition” that might undermine the value of these rights through a race to the bottom regarding the remuneration of the rightholders. (It is to be noted, in this respect, as an example, that one of the main reasons for which the user in *OSA* insisted that it should be allowed to choose between various licensing sources was his hope that that, in that way, it might get a license for the same use of musical works from foreign sources that may be cheaper than OSA.[[86]](#footnote-86))

It should not be forgotten either that – as the European Parliament pointed out (see section 1.10) – the Member States have the right to apply measures, in accordance with their rights and obligations under the UNESCO Cultural Diversity Convention (and also with the relevant provisions of the TFEU) to protect their cultural identity and diversity. Not mentioning that, to fulfill their obligations to take the necessary measures to guarantee due and effective application of copyright and related rights, they must make this sure through adequate regulation and control of the activities of the CMOs in their territories. This is integral part of the legislation of copyright and related rights. It is to which Article 17(6) of the Directive seems to refer as “requirements in the Member State where the service is provided” to be taken into account whether foreign services (in this case, foreign IMEs) are allowed to carry out activities, and if they might, under what conditions, in a given Member State.

The AG, in addition to Article 17(11), also refers to Article 16(1) of the Services Directive where it is provided:

1.     Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.

The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.

*Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles*:[…]

(b)      necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment;

He notes – without further elaborating on this issue – that the restriction at issue cannot be justified for any of those reasons; that is, in his opinion there is no public policy reason. This statement is badly founded for the same reasons for which it is where it is made in connection with the similar provision in Article 3(4)(a)(i) of the Electronic Commerce Directive, as discussed above. Offering guarantees to ensure the integrity and due operation of the collective management system is necessary to fulfill the obligations to ensure effective exercise of copyright and related rights, and the application of related cultural policy aspects mentioned there are clearly public interests.

It may be remarked, however, that Article 17(11) which specifically excludes the services in the field of copyright and related rights from the application of the Services Directive is *lex specialis* in relation to the provisions of Article 16. The same is true in respect of the relationship of Article 17(11) with the provisions of Article 1(2) and (3) of the Directive which the AG also reviews in his opinion.

Article 1(2) and (3) of the Directive reads as follows:

(2) This Directive does not deal with the liberalisation of services of general economic interest, reserved to public or private entities, nor with the privatisation of public entities providing services.

(3) This Directive does not deal with the abolition of monopolies providing services nor with aids granted by Member States which are covered by Community rules on competition.

This Directive does not affect the freedom of Member States to define, in conformity with Community law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to.

Thus, the question is whether or not, if there were not a specific provision on the basis of which the application of the Services Directive may be excluded for collective management as “services” offered in the field of copyright and related rights, such exclusion might be possible by virtue of these provisions. The AG’ response to the question is in the negative concerning both paragraphs of Article 1.

As regards paragraph (2), the AG notes that “[t]he issue of whether services provided by collective management organisations are in the nature of services of general economic interest was raised by the Italian Government at the hearing.”[[87]](#footnote-87) He then states that “that provision does not exclude services of general economic interest from the scope of that directive.” It is difficult to understand what the AG means by this remark because ”that provision” states that the Directive “does not deal with the liberalization of services of general economic interest, reserved to public or private entities.” This might hardly be understood in a way other than that the provisions of the Directive on the liberalization of services do allow excluding services of general economic interests.

Thus, the AG’s arguments do not prove that the claim of the Italian government about the applicability of Article 1(2) was badly founded. About collective management of copyright and related rights, it cannot be said that it is not about economic interests (it may be only said about certain moral rights but normally they are not exercised collectively). The question is only whether or not *general* economic interests are involved. The AG points out that under “services of general interest” mainly such interests are considered “as postal services, the distribution of electricity, gas and water or the treatment of waste” and it is true that in Article 17(1) such services are specifically mentioned. But Article 2(2) and (3) contain general rules and the question is exactly whether what is not specifically excluded (more precisely what is not allowed specifically to be excluded) might, nevertheless, be excluded by virtue of the general rule provided in Article 1(2) and (3). Also paragraph (2) is referred to because, as quoted above, its second un-numbered subparagraph reads as follows:

This Directive does not affect the freedom of Member States to define, in conformity with Community law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to.

This means that there is broad flexibility for the Member States in this respect, and this does support the position of the Italian government.

The AG also presents the following arguments to refute the Italian interpretation of what may be of a general economic interest in a Member State:

Moreover, the restriction at issue consists not in the assignment of a general interest task to a specific organisation ([*47*](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62022CC0010#Footnote47)) but in the reservation of a certain economic activity, namely copyright intermediation, to a category of economic operators, that is to say collective management organisations. […]  While such organisations, on the basis of the provisions of Italian law and of Directive 2014/26, have certain obligations towards rightholders, those obligations are imposed not in the general interest, but in the interest of those rightholders, who constitute a specific professional group and should not be confused with the general population. Those obligations can be compared, for example, to those of a company towards its shareholders. However, they do not constitute a general interest task. ([*48*](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62022CC0010#Footnote48)) Unlike the Italian Government, I therefore see a clear difference between the role of collective management organisations handling copyright and the services of general economic interest excluded from the application of Article 16 of Directive 2006/123 by virtue of Article 17(1) thereof, such as postal services, the distribution of electricity, gas and water or the treatment of waste. ([*49*](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62022CC0010#Footnote49))[[88]](#footnote-88)

The endnotes appearing in the text are also relevant; therefore, it seems justified to review them to see how much they support – or do not support – the AG’s statement and to comment thereon:

Endnote 47: “As recital 70 of Directive 2006/123 seems to require for the purposes of interpreting the concept of ‘service of general economic interest”; that is to require the assignment of a general interest to a specific organization”. Recital (70) states as follows: “For the purposes of this Directive […] services may be considered to be services of general economic interest *only if they are* provided in application of a special task in the public interest *entrusted to the provider by the Member State concerned.* This assignment should be made by way of one or more acts, the form of which is determined by the Member State concerned, and should specify the precise nature of the special task.” [Emphasis added.] Although the recital does not use the expression “specific organization”, the word “provider” with the definite article “the” in front of it may truly be understood in that way. This, however, does not support the AG’s views; rather it – contrary to his opinion – further strengthens the validity of *OSA* about the justification of granting *de iure* monopoly if the effective applicability of copyright or related right requires so.

Endnote (48): “I do not exclude the possibility that collective management organisations may be entrusted with general interest tasks, such as contributing, financially or otherwise, to the development of culture. However, this activity is distinct from copyright management in the strict sense.” It is rare that a government “entrusts” CMOs with such specific tasks; normally at maximum they are encouraged or simply allowed to promote domestic cultural activities. However, irrespective of this, CMOs serve an important general economic interest; namely, ensuring the effective application of the economic rights of owners of copyright and related rights as a necessary basis of sustainable creation and production of cultural products and services. In countries where, due to the traditions and creative capacities, copyright and related rights activities significantly contribute to the economy (GDP, employment, international trade) – and this is certainly the case as regards Italy – it does not seem to be unjustified to find that a weighty general interest is at stake, which is, in addition to its cultural aspects, is also of clear economic significance.

Endnote (49): “Moreover, the Court had previously ruled that a collective management organisation handling copyright could not be classified a service of general economic interest in its judgment of 2 March 1983, *GVL* v *Commission* (7/82, EU:C:1983:52, paragraphs 29 to 32).” At least, four things should be said about this. First, the Court had not ruled that no CMO could be classified as service of economic interests, but that a CMO like GVL could not be. Second, in the case, it was not an issue whether or not a *de facto* monopoly position of a CMO was in order (and even less whether or not even a *de iure* status might be justified), but whether or not a CMO had abused its *de facto* monopoly position. Third, the judgement was adopted in 1983, much time before the adoption of the Electronic Commerce Directive, the Services Directive and the Collective Management Directive on the basis of which the *LEA v Jamendo* case is supposed to be judged. Fourth, if the question is what is the settled case law to take into account at present concerning the questions of monopoly positions of CMOs – and specifically about applicability of the Services Directive to collective management – it is not *GVL v Commission* but *OSA* where the answer may be found.

Reverting now to the AG’s remarks to which these endnotes have been added, it is true that, with the elimination of *de iure* monopoly of SIAE, “the restriction at issue consists not in the assignment of a general interest task to a specific organisation  […] but in the reservation of a certain economic activity, namely copyright intermediation, to a category of economic operators, that is to say collective management organisations.” However, this does not mean that it is not a general economic interest to maintain the restriction at least at that level in order to avoid undermining the integrity of the collective management system and the value of copyright and related rights. This is what is at issue and not to which the AG refers, namely the economic interest of individual rightholders or the relationship between them and the CMOs. This kind of general economic interest is truly different than the interests related to public services listed at the end of the AG’s remarks, but it is still a general economic interest and the second un-numbered subparagraph of Article 1(3) of the Directive grants “freedom of Member States to define, in conformity with Community law, what they consider to be services of general economic interest”; thus, Italy seems to have sufficient freedom in this case.

As regards the first un-numbered subparagraph of Article 1(3) of the Services Directives, the AG notes this:

Finally, with regard to Article 1(3) of Directive 2006/123, according to which that directive does not deal with the abolition of monopolies providing services, I have doubts, in the light of its enigmatic and abstract nature, as to whether that provision has any independent legislative force. In any event, however, it does not seem to me that there can be said to be a monopoly here.[[89]](#footnote-89)

The AG does not say less than that the first subparagraph is meaningless and ineffective. With this, he seems to disrespect the principle of effectiveness applied to the interpretation of legal provisions, according to which – as mentioned already above – a provision, if it is possible, should be effective rather than not (*ut res magis valeat quam pereat*). And in the case of this provision, there is a clear possibility to interpret it in an effective manner. The Directive does not intend to abolish monopoly when it is needed, and – in certain cases, it is; namely in the case of natural monopoly situations. The public interest services mentioned by the AG – postal services, the distribution of electricity, gas and water or the treatment of waste – are not only of general economic interests but they are also natural monopolies. In the context of *LEA v Jamendo*, it is decisive that, for the collective management of certain rights of copyright and related rights holders, there is also a natural monopoly situation as discussed above, where also *de iure* monopoly may be justified (as recognized in *OSA* in view of such a situation, even if the CJEU has not used this term of economic sciences).

Thus, the provisions of Article 1(2) and (3) also support rather than weaken the validity of *OSA* (and thus also the position of the Italian government). However, as it has been stressed at the beginning of the analysis of these provisions, they are of a *lex generalis* nature, while the provision of Article 17(11) of the Directive settles the question as *lex specialis*: the Services Directive is not applicable for services in the field of copyright and related rights; thus it does not apply in particular to collective management as “service”.

As regards the question of whether or not it is justified to take into account the general provision of Article 56 of the TFEU on the freedom of providing services in addition to the detailed specific provisions of the same issue in the Services Directive, the AG, first, gives the obvious answer: “According to settled case-law, a national measure in an area which has been the subject of exhaustive harmonisation in EU law must be assessed in the light of that harmonising measure and not the Treaty.” In endnote (50) he adds this:  “See, most recently, judgment of 11 June 2020, *KOB* (C‑206/19, EU:C:2020:463, paragraph 30 and the case-law cited). With particular reference to Directive 2006/123, see, to that effect, judgment of 16 June 2015, *Rina Services and Others* (C‑593/13, EU:C:2015:399, paragraph 23 et seq.).” To what the AG refers is a solid and consistently applied case law which corresponds to the age-old principle concerning the relationship of *lex generalis* and *lex specialis*, which – as the endnote refers to it – has been confirmed by the CJEU also concerning the relationship between Article 56 of the TFEU and the Services Directive.

The AG could have stopped here because, if the CJEU was right in the analysis of the issue of the possible impact of the principle of freedom of providing services on the basis of the detailed provisions of the Services Directive, the provision on the general principle cannot change the validity of the analysis. He, however, outlines the reasons for which the Court has found that Article 56 of the TFEU does not justify either the extension of the freedom of services to collective management of copyright and related rights,[[90]](#footnote-90) and continues by arguing that *OSA* is not valid anymore in Italy since competition has been allowed already also in such cases as to which *OSA* relates; and he concludes: “Only independent management entities are excluded from access to that activity. In those circumstances, such a difference in treatment cannot be justified by the arguments used by the Court in the judgment in *OSA*.”

In the next sections, it is mentioned that, in fact, Italy could have truly transposed the CRM Directive in a more nuances manner by maintaining *de iure* monopoly in cases where it would have been in accordance with *OSA,* and it is discussed why the AG’s thesis according to which the “liberalization” would have been justified also for IMEs is not well-founded.

***4.7. The AG’s argument according to which, since Italy has eliminated the de iure monopoly of SIAE by allowing other CMOs to manage the same rights, it must allow this also to IMEs is badly founded, since the CRM Directive provides IMEs huge unjustified advantages vis-à-vis CMOs which would gravely distort competition if it were allowed under such conditions***

The AG does not find the position of the Italian government acceptable also for the following reasons:

89.      […[ [A]s a result of both Directive 2014/26 and the liberalisation of Italian law, there no longer exists in Italy the monopoly in this field analogous to that analysed by the Court in the case which gave rise to the judgment in *OSA*, since copyright intermediation can be carried out by various collective management organisations, whether national ones or those established in other Member States. Only independent management entities are excluded from access to that activity. In those circumstances, such a difference in treatment cannot be justified by the arguments used by the Court in the judgment in *OSA*.

90.   The Italian Government relies, by way of justification, on the specific nature of collective management organisations, which are controlled by their members and are operated on a not-for-profit basis, on the obligations imposed on them towards rightholders and on the benefits of centralised copyright management for repertoires which are less popular with the public and, thus, for the development of culture.

First of all, it is worthwhile remarking that Italy could have carried out the “liberalization” constrained on it in a more nuanced way and still in accordance with the EU law; in particular, it could have maintained the *de iure* position of SIAE where there is a natural monopoly situation as in respect of which *OSA* has been adopted, or at least adopting provisions guaranteeing one-stop-shop licensing in such a situation.

The Italian Government’s justification for not allowing collective management activities to IMEs like Jamendo is valid. The nature of the activities of CMOs that are societies of creators and operate in the spirit of cooperation and solidarity – and which also contribute to national creativity and culture, fundamentally differs from that of IMEs which are driven by profit-making objectives of their managers without the rightholders’ control. This is manifested in their attitude in the market, in their business methods and in their competition behaviour, and also in their economic and cultural impact – which in turn fully justifies that the legislative norms applicable to them also differ.

The AG makes, in this connection, the following cursory – and unsubstantiated – statement: „However, it should be observed […] that, under Article 2(4) of Directive 2014/26, *many of the obligations* imposed on collective management organisations *also apply to independent management entities*. For example, as regards guarantees for rightholders, those entities are in a situation comparable to that of collective management organisations.”[[91]](#footnote-91) [Emphasis added.]

This statement suggests that, to CMOs and IMEs, more or less the same kinds of conditions apply in the market. The truth, however, is extremely far away from this. It is analyzed above in section 2.6 how drastic advantages are ensures for IMEs to the detriment of CMOs, although they – according to the definitions of the CRM Directive – carry out the same activities and in “competing” for the same customers.

The CJEU hopefully will note how serious procedural deficits of the preparatory work have led to the grave absence of level playing field to the detriment of CMOs (see sections 2.2 to 2.5 above) and will raise the questions of how and why it has found to be justified (although it is obviously not) that, just because the IMEs’ objectives is to produce profit for the business actors owning or controlling those entities while CMOs typically are functioning without such objectives and under the control and for the direct benefit of the community of creators. These unjustified differences are listed above, but due to their key importance in the case, it is justified to repeat them here even if in a somewhat condensed manner:

* for IMEs, contrary to CMOs, only Article 16(1) of the Directive applies according to which they are also „*conduct negotiations* *for the licensing of rights in good faith” and provide* with users each other “*all necessary information”*, but the rest of the provisions of Article 16 is not applicable (after all, in principle, there must have been some reasons for which there is no reference to those provisions);
* it is prescribed to CMOs that that their licensing terms must be based on *objective and non-discriminatory criteria* (paragraph (2) of Article 12); but it is not prescribed to IMEs (if it happens to be claimed that it follows from paragraph (1), then the next question is that, if it follows for IMEs, why it does not equally follows to CMOs);
* it is a requirement in the case of CMOs that *rightholders must receive appropriate remuneration* for the use of their rights (paragraph (2) of Article 16), but it does not apply to IMEs;
* the CMOs’ *tariffs must be reasonable* *in relation to*, inter alia, *the economic value* of the use of the rights in trade, taking into account the nature and scope of the use of the work and other subject-matter, as well as in relation to the economic value of the service provided by the collective management organization (paragraph (2) of Article 16), but IMEs are not bound by this obligation;;

* even Articles 33 on *complaints procedures*, Article 34 on *alternative dispute resolution procedures* and Article 35 on *dispute resolution do not apply* to IMEs but only CMOs (from which it follows that IMEs are not subject to the same *tariff control as CMOs*, which is also particularly difficult to explain why, if at all);
* if a user requests so, a CMO *must offer a license* without undue delay or a reasoned statement must be provided why license is not offered (paragraph (3) of Article 16), an IME is not bound by this rule;
* CMOs are, but IMEs are not, *obligated to accept rightholders* *as members* who fulfill the membership requirements (see Article 6(2)) *and to manage the rights of any rightholder within the scope of their activities* (Article 5(2)); that is, IMEs, in contrast with CMOs *are allowed to apply “cherry picking”* by only managing the rights of certain rightholders;
* *IMEs* *are allowed enjoying more stable repertoire than CMOs are;* they can ensure this by contracts, since they are not bound by the provisions of Article 5(3) and (4) of the Directive on the freedom of righholders to *withdraw* their *rights and repertoires*;

***-***  contrary to CMOs, IMEs are not bound *by the rules on the use of “rights revenues”, investment, deductions and distribution* (see Articles 11 to 15); all their income may be used to guarantee stronger competition position and to maximize profit; and even

**-** *Title III of the Directive* on multi-territorial licensing of online rights in musical works*does not apply to IMEs* at all; they are free to choose any methods to compete without any requirements that CMOs must respect.

It is hoped that the CJEU, in view of these unjustified advantages granted to IMEs to the detriment of CMOs, will not find it to be in conflict with the EU law if a Member State adopts provisions to try to restore somewhat the level playing field for CMOs. As Italy has done so by modifying Article180 to allow competition, but only for CMOs as those entities that have more or less equal chances and not for IMEs as those that would enjoy unjustified advantageous position.

As presented above, in contrast with the AG statement, in respect of the overwhelming majority of the obligations that are relevant from the viewpoint of whether or not there is equal chance of those who carry out the same activities, IMEs enjoy unjustified advantageous vis-à-vis CMOs. Therefore, where the AG remarks in his above-quoted statement that “[f]or example [that is example for the “many obligations” allegedly also applying to IMEs] as regards guarantees for rightholders, those entities are in a situation comparable to that of collective management organisations,” if there are truly such provisions, they are not only “examples”; they are the only aspects where the obligations may be characterized as comparable (even if the “comparison” does not necessarily shows equal treatment in those aspects either). The fact is that, with the exception of Article 16(1) mentioned above, all the other provisions that are also applicable to IMEs only relate to information obligations (but as discussed above, if not only paragraph (1) but the entire Article 16 is taken into account, it is also rather an example for a grave absence of level playing field).

The application of the information obligations, in principle may guarantee transparency and accountability. The value of these of guarantees are, however, diminished by the very nature of IMEs which, by definition, are not owned or controlled by rightholders, and which, contrary to CMOs, *are not bound by the key rules on membership, establishment and operation of governing bodies, control mechanisms, conflicts of interests and complaint procedures* (see Articles 6 to 10 of the CRM Directive) which truly offer substantive guarantees to rightholders rather than just some information.

Also, although the declared objective of Article 2(4) of the Directive was to extend the rules to ensure due transparency, from the relevant provisions, only the application of Article 20 and certain provisions of Article 21 are foreseen for IMEs; *they are not burdened* (as CMOs are) *with fulfilling the other transparency obligations* under the Chapter, *in particular not with the preparation of annual transparency reports* in accordance with Article 22 and the Annex, which does not only mean that they may function in a less transparent way, but also that they are freed from using money, time and energy for the preparation of such reports.

***4.8. The AG despite the obligation under Article 167(4) of the TFEU, has not taken into account the cultural aspects of the case***

As quoted above, Article 167(4) provides as follows: “The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.” As noted, this obligation of “the Union” means any organs and any officials of the Union; of course, also the obligation of the CJEU and of an Advocate General.

The most conspicuous manifestation AG’s disregarding this obligation is that he analyzes Article 1(2) and (3) of the Services Directive, but he – inexplicably – stops there and does not even refer to paragraph (4) in the same article:

1. This Directive does not affect measures taken at Community level or at national level, in conformity with Community law, to protect or promote cultural or linguistic diversity or media pluralism.

This is not just a general principle that must have been taken into account, but it has special relevance in the *LEA v Jamendo* case. It does confirm that Italy has a weighty reason under the EU law not to go further in the “liberalization” of its collective management system constrained on it (in which it seems that it has gone already further than under the EU law – also taking into account *OSA* – it would have been justified).

Cultural and linguistic diversity and pluralism is the fullest possible way promoted and ensured in the field of performing rights in musical works, which is at issue in the *LEA v Jamendo* case, through one-stop-shop systems (which may go along even with *de iure* monopoly in natural monopoly situations as clarified in *OSA*). Collective management organizations through their agreements between each other have recognized this; as described above, and this has happened also in the relationship between SIAE and LEA (see section 3.6 above). The business strategy, the objectives and the way of operation of IMEs like Jamendo are different. They license the use of closed and narrow repertoires and compete for users frequently through lower tariffs rather than what characterizes the “traditional” one-stop-shop systems developed by performing rights CMOs that guarantees the availability of the entire active domestic and international repertoire of which the users may choose freely at any time the most popular works, those what the members of the public like the most. This is an important guarantee for the protection and promotion of cultural and linguistic diversity and media pluralism.

Italy and any other Member State has good reason and full right to apply measures in order to grant such protection in their cultural markets by limiting the freedom of the collective management activities of IMEs to those fields where they would not have negative impact in these aspects (such as licensing of online uses – but not online licensing of off-line uses, in particular not in the case of performing rights in musical works). And this follows not only from the above-quoted provision of Article 1(3) of the Services Directive, but also from Article 167(1) of the TFEU also quoted above: “The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.” [Emphasis added.]

The AG has rightly pointed out that, in order to respond to the preliminary question submitted by the Italian court, not only the copyright norms and the Collective Management Directive should be taken into account, although he has not proved to be right with his opinion that CJEU erred in *OSA* and that the Court, on the basis of either the Electronic Commerce Directive or of the Services Directive, should find in favour of Jamendo. However, he has not fulfilled his obligation under Article 167(1) of the TFEU and has not only completely disregarded Article 3(4) of the Services Directive and has not duly taken into account the provisions of Article 167 of the TFEU, but equally has not considered at all what follows from the UNESCO Cultural Diversity Convention that may be relevant in the case, since it prescribes obligations and provides for rights to be applied for the protection of cultural diversity in the contracting parties including the E.U. and its Member States.

If the AG had taken into account the norms binding the E.U. and its Member States in those respects, as he was obligated, he would have seen that the contracting parties of the UNESCO Convention do not only have the right but also have the obligation to protect cultural diversity in their territories and apply appropriate measures to this end, including also measures to offer advantages to their domestic creators and copyright industries that are indispensable for the preservation of cultural identity and protection of cultural diversity and at the same time remaining open to other cultures and the common cultural heritage.

This further confirms that Italy – as any other EU Member State – may apply measures against that kind of “competition” that has the potential to endanger cultural identity and may act also against the common European cultural heritage by promoting closed and narrow repertoires with declared profit-making objective. Considering all this, Italy has the right under the EU law and the international treaties binding the Union not to extend the freedom of IMEs to that kind uncontrolled activity that would have the potential to endanger cultural identity and diversity.

To all this, it should be added that, as also discussed in section 1.10 above, the measures that are indispensable for the protection a cultural identity and diversity are matters for cultural policy which is the competence of the Member States under Article 6 of the TFEU, while the Union’s competence is only “to carry out actions to support, coordinate or supplement the actions of the Member States.”

***Conclusions***

The regulation of the status of IMEs in the CRM Directive has taken place without due preparatory procedure, without appropriate impact studies and without due involvement of the key stakeholders. The adopted rules are in conflict with the principle of equal chances in the market of those who carry act the same activities as well as with the international and EU provisions on the protection of cultural diversity, and have the potential to undermine the normal functioning of the collective management system.

In the *LEA v Jamendo* case, now in front of the CJEU for preliminary ruling, Jamendo, an IME claims that Italy violates the EU law because, although now it allows CMOs to compete with SIAE which previously enjoyed *de iure* monopoly, the same does not apply to IMEs.

The Advocate General proposes that the Court find in favor of Jamendo. In the paper, it is discussed why his arguments supporting his opinion are not well-founded. At least, certainly not concerning the right of public performance licensed by Jamendo for background music (while in respect of licensing the “synchronization” of music in audiovisual works, the answer requires more thorough considerations).

The paper points out that the AG wrongly claims that the CJEU erred in *OSA* where it confirmed that, in a situation like the one at issue in that case (which, at least concerning the licensing of background music, is the same in *LEA v Jamendo*), there is a need for a *de iure* monopoly position (by recognizing that natural monopoly is involved) and where it ruled that the Services Directive is not applicable to collective management. The AG’s claim that IMEs like Jamendo as presumed “information society providers” would have been free to license uses, such as those in the *LEA v Jamendo* case, is also rebutted.

The AG’s allegation, according to which it is against the EU’s competition norms that Italy allows the operation of CMOs but not IMEs, is not well founded either. IMEs, like Jamendo, with their huge but unjustified competition advantages granted them in the CRM Directive, tend to create disruptions in the collective management system, and may endanger cultural diversity. For these reasons, it justified that, Italy, at least where collective management is a necessary way of exercising copyright and related rights (in particular where there is a natural monopoly situation) does not allow IMEs to “compete” and to enter the cultural market.

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1. \* Member of the Hungarian Copyright Experts Council, former Assistant Director General of the World Intellectual Property Organization (WIPO). [↑](#footnote-ref-1)
2. The word is in quotation mark, because the author of this paper is of the view that it may have the misleading connotation that something that has been too rigid and overregulated is becoming free or at least much freer. However, what is happening is not necessarily this. The objective of some of those who have participated in the preparation and adoption of the Collective Management Directive really was to introduce unlimited competition between various organizations and entities – one of most the extreme manifestation of which was the idea to extend the application of the Services Directives to collective management – which would have undermined the collective management systems and would have seriously endangered cultural diversity. But, fortunately, this – mainly due to the resistance by the European Parliament and the way these issues have been addressed by the Court of Justice of the E.U. (CJEU) – has not taken place; at least, not such an extreme manner. Where there are really new norms to promote parallel management of rights – and in that respect rightly – is mainly for online digital uses. In spite of this, certain provisions have remained in the Directive that appear to be the remnants of the over-liberalization attempts; these, however, may be handled through appropriate interpretation by adapting them to the realities and basic requirements of collective management. [↑](#footnote-ref-2)
3. The references that are missing here may be found under the titles where the same issues are discussed more in detail. [↑](#footnote-ref-3)
4. Article 1(b): the establishment of the competition rules necessary for the functioning of the internal market. [↑](#footnote-ref-4)
5. Article 4(2)(a) internal market. [↑](#footnote-ref-5)
6. See Articles 105.1 and 116. [↑](#footnote-ref-6)
7. *See*, for example, Cambridge University online: „a group of people who work together in an organized way for a shared purpose” at <https://dictionary.cambridge.org/dictionary/english/organization> (this and all the other webpages referred to in the paper, last visited on July 5, 2023. [↑](#footnote-ref-7)
8. Still using the example of Cambridge University online, *see* at <https://dictionary.cambridge.org/dictionary/english/management>. [↑](#footnote-ref-8)
9. *See* <https://dictionary.cambridge.org/dictionary/english/collective>. [↑](#footnote-ref-9)
10. *See* <https://dictionary.cambridge.org/dictionary/english/collectivity>. [↑](#footnote-ref-10)
11. Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market /\* COM/2012/0372 final - 2012/0180 (COD) \*/. [↑](#footnote-ref-11)
12. Which, just before the Brexit, was still modified by transforming section 116(2) into 116(2)(a) and adding: „(b any other organisation which is a collective management organisation as defined by regulation 2 of the Collective Management of Copyright (EU Directive) Regulations 2016.”

    [↑](#footnote-ref-12)
13. At that time, CISAC was established by 18 societies. When this paper is completed (on July 5, 2023) CISAC's membership extended to 225 CMOs in 116 countries, spread over all geographic regions and covering artistic repertoires including music, audiovisual, drama, literature and visual arts; see <https://www.cisac.org/Our-Members>. [↑](#footnote-ref-13)
14. *See* at <https://stats.oecd.org/glossary/detail.asp?ID=3227>. [↑](#footnote-ref-14)
15. *See* economicsonline.co.uk/Business\_economy/Natural\_economics.html. [↑](#footnote-ref-15)
16. *See* dictionary.cambridge.org/dictionary/english/natural-monopoly. [↑](#footnote-ref-16)
17. At least as *petits droits* are concerned (*see WIPO Guide and Glossary* at p. 302). [↑](#footnote-ref-17)
18. Judgement of 27 February 2014, *OSA*(C-351/12, EU:C:2014:110) (hereinafter: *OSA*). [↑](#footnote-ref-18)
19. After all, according to point (11) of Article 17, Article 16 of the Services Directive on the freedom of providing services does not apply to service-type activities concerning copyright and related rights. [↑](#footnote-ref-19)
20. The judgment also dealt with other questions such the questions of applicability of the right of communication to the public and the protection against abuse of monopoly position. In the present context, only the finding in the question of applicability of *de iure* monopoly is quoted. [↑](#footnote-ref-20)
21. *Ibid*., summary of the findings at the end of the judgment. [↑](#footnote-ref-21)
22. *Ibid.,* para. 72. [↑](#footnote-ref-22)
23. It “was” because he died in 1945; thus, the 70 year *post mortem auctoris* protection of the rights in his works expired on December 31, 2016. [↑](#footnote-ref-23)
24. European Parliament resolution of 13 March 2007 on the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC) ([2006/2008(INI)](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2006/2008(INI))). [↑](#footnote-ref-24)
25. . See the minutes of the debate at www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20140204&secondRef=ITEM-003&language=EN&ring=A7-2013-0281. His statement in the original French version was recorded as follows: *„Je veux dire que la directive que vous allez adopter* *est neutre – j’insiste – par rapport à la directive sur les services. Le champ d’application de cette dernière directive ne changera donc pas.”* [↑](#footnote-ref-25)
26. . *See* <http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html>. [↑](#footnote-ref-26)
27. . *See* <http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html>. [↑](#footnote-ref-27)
28. . *See* https://pax.unesco.org/la/convention.asp?KO=31038&language=E&order=alpha [↑](#footnote-ref-28)
29. . The definition reads as follows: „Cultural policies and measures refer to those policies and measures relating to culture, whether at the local, national, regional or international level that are either focused on culture as such or are designed to have a direct effect on cultural expressions of individuals, groups or societies, including on the creation, production, dissemination, distribution of and access to cultural activities, goods and services.” [↑](#footnote-ref-29)
30. . Article 2.2 (and also Art. 5.1) of the UNESCO Convention. [↑](#footnote-ref-30)
31. European Parliament Resolution of 13 March 2007 on the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC) (2006/2008(INI)). [↑](#footnote-ref-31)
32. *See* points A and C of the Resolution:

    **“**the Commission failed to undertake a broad and thorough consultation process with interested parties and with Parliament before adopting the Recommendation; […] all categories of right-holders must be consulted on any future regulatory activities in this area so as to ensure a fair and balanced representation of interests,**“**

    **“**it is unacceptable that a ‘soft law’ approach was chosen without prior consultation and without the formal involvement of Parliament and the Council, thereby circumventing the democratic process, especially as the initiative taken has already influenced decisions in the market to the potential detriment of competition and cultural diversity**“.**  [↑](#footnote-ref-32)
33. . Quotation from the text of Art. 6(1) of the UNESCO Cultural Diversity Convention. [↑](#footnote-ref-33)
34. See, for example, point 3 of the ruling the CJEU in the *Amazon v. AustroMechanica*: “Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that the right to fair compensation under that provision or the private copying levy intended to finance that compensation cannot be excluded by reason of the fact that half of the funds received by way of such compensation or levy is paid, not directly to those entitled to such compensation, but to social and cultural institutions set up for the benefit of those entitled, provided that those social and cultural establishments actually benefit those entitled and the detailed arrangements for the operation of such establishments are not discriminatory, which it is for the national court to verify.” (Case c- 521/11; ECLI:EU:C:203:525). [↑](#footnote-ref-34)
35. |  |  |
    | --- | --- |
    | Apart from the non-substantive provision of Article 41 of the expert group set up to examine the impact of the transposition of the Directive. |  |

    [↑](#footnote-ref-35)
36. Gábor Faludi: “*The transposition of the Collective Management Directive (2016/26/EU) in Hungary*”, Medien und Recht, 2018, Heft 1 (hereinafter: Faludi), pp. 31-32.

    [↑](#footnote-ref-36)
37. *Commission staff working document - Impact Assessment; accompanying the document of the proposal of the CRM Directive* (document SWD(2012) 205 final) (hereinafter: Impact Assessment). p. 170, point 24.6.6. [↑](#footnote-ref-37)
38. Josef Drexl, Sylvie Nérisson, Felix Trumpke and Reto M. Hilty: *“Comments of the Max Planck Institute for Intellectual Property and Competition Law on the Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi‐territorial licensing of rights in musical works for online uses in the internal market COM (2012)372.”*,

    (available at <https://pure.mpg.de/pubman/faces/ViewItemOverviewPage.jsp?itemId=item_1720095>.) [↑](#footnote-ref-38)
39. *Ibid*., p. 9, para. (12). [↑](#footnote-ref-39)
40. *Ibid*., p. 14, para. (17). [↑](#footnote-ref-40)
41. *Ibid*., p. 28, para. (54). [↑](#footnote-ref-41)
42. *Ibid.*, p. 32, para. (64). [↑](#footnote-ref-42)
43. Julien Beaupain: “*Retour sur la directive européenne « gestion collective » et sa transposition en France*”

    (available at <https://www.lescpi.ca/articles/v29/n3/retour-sur-la-directive-europeenne-gestion-collective-et-sa-transposition-en-france/>) (hereinafter: Beaupain), p. 476. [↑](#footnote-ref-43)
44. In Romanian: “*nu are scop lucrativ*”; in Spanish „*carezca de ánimo de lucro*”. [↑](#footnote-ref-44)
45. See document No 5084/16 of The Council of the EU containing the corrigendum. [↑](#footnote-ref-45)
46. “Report on the proposal for a directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market ([COM(2012)0372](http://ec.europa.eu/prelex/liste_resultats.cfm?CL=en&ReqId=0&DocType=COM&DocYear=2012&DocNum=0372) – C7-0183/2012 – [2012/0180(COD)](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2012/0180(COD)))”; report prepared by Marielle Gallo, member of the European Parliament (available at https://www.europarl.europa.eu/doceo/document/A-7-2013-0281\_EN.html). [↑](#footnote-ref-46)
47. *Ibid.,* Amendment 4. [↑](#footnote-ref-47)
48. *Ibid.,* ninth unnumbered paragraph of the introduction to (“justification” of) the opinion of the Committee on Culture and Education. [↑](#footnote-ref-48)
49. *Ibid*.; Amendment 36 in the opinion of the Committee on Culture and Education. [↑](#footnote-ref-49)
50. The proposed text read as follows: Title I, Articles 10, 11(1), 12, 15, 16, 18, 19 and 20 of Title II, Title III and Articles 34, 35, 37 and 38 of Title IV shall also apply to independent rights management service providers established inside or outside the Union who act as agents for rightholders for the management of their rights and operate in the Union on a commercial basis. *Ibid.*, Amendment 18 of the opinion of the Committee on Industry, Research and Energy. [↑](#footnote-ref-50)
51. *Ibid*., Amendment 16 of the opinion of the Committee on International Trade. [↑](#footnote-ref-51)
52. *Ibid*. [↑](#footnote-ref-52)
53. *Beaupain*, pp. 489-490. [↑](#footnote-ref-53)
54. *Zhiqin Wu*, p. 77. [↑](#footnote-ref-54)
55. Cristian Handke: “Joint Copyrights Management by Collecting Societies and Online Platforms: An Economic Analysis,” (available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2616442p>), p. 28. [↑](#footnote-ref-55)
56. The expression “so-called market” refers to the fact that, although from the viewpoint of the for-profit IMEs, it is truly just another commercial market to invest on the basis of business calculations, for CMOs, for societies of authors and organizations performers, it is rather a matter of the protection of the authors’ rights as human rights for the benefit of creators in the spirit of solidarity and serving the promotion of national creativity and cultural diversity. [↑](#footnote-ref-56)
57. *See* “What is Royalty-Free Music” on the website of Epidemic Sound at https://www.epidemicsound.com/blog/what-is-royalty-free-music/. [↑](#footnote-ref-57)
58. *See* Gábor Faludi’s remark: “In the case of a final, irreversible and full assignment of economic rights one cannot speak any longer of the management of other rightholders’ right”; *Faludi*, p. 32. [↑](#footnote-ref-58)
59. *See,* for example, the information on the website of Shakespeare Music, an IME, on the conditions of including music in its repertoire to be made available to the public:

    I am artist/composer/songwriter. *How I can become a part of Shakespeare Music?* It is really easy. *Contact us and send us link (mp3 samples*) where we can listen you music. *Our chief music designer will listen to them and if it is compatible with our music policy we will contact you* making an offer to be a part of Shakespeare Music. *If you like our offer we will sign the contract and add your music tracks to our music data base.* When our clients will use your tracks it will be calculating regarding the price the client is paying. After all two times a year, according to the factual use of works, Shakespeare Music distributes collected monies for their rights holders. (*FAQ Shakespeare Music* at <http://www.shakespearemusic.com/faq/>). [Emphasis added.] [↑](#footnote-ref-59)
60. It depends on the concrete technological and legal model used. If the musical works may be downloaded or streamed by the users from the repertoire of an IME included in its “cloud” at the time chosen by them, this may be the case. [↑](#footnote-ref-60)
61. *Audiovalley, société anonyme (formerly MusicMatic) v Société des auteurs compositeurs et éditeurs de musique (SACEM), et al. Intellectual Property Code, Art. L. 214-1;* Case No. 18-21.211 of December 11, 2019. For detailed analysis of the case, *see* Oleksandre Bulayenko: “*MusicMatic – The French Supreme Court’s Decision on Creative Commons Plus (CC+) Commercial Licensing and Mandatory Collective Management of the Right to Remuneration for Communication to the Public of Commercial Phonograms*,” [IIC - International Review of Intellectual Property and Competition Law](https://link.springer.com/journal/40319) volume 51 (2020), pp. 668–679. [↑](#footnote-ref-61)
62. *See* at <https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/1021_11_44043.html>. [↑](#footnote-ref-62)
63. Licensing body on behalf of Audiovalley (MusicMatic) and Jamendo. [↑](#footnote-ref-63)
64. In the French original: “les sociétés Storever France, Audiovalley et Jamendo ont soutenu, dans leurs conclusions d'appel, que les artistes-interprètes, qui publiaient leurs phonogrammes sur la plate-forme Jamendo, pouvaient participer au programme commercial dénommé « In-Store » proposé par cette plate-forme, en choisissant le type de licence « creative commons » correspondant, que les professionnels avaient, quant à eux, la possibilité de souscrire au programme « In-Store » afin de sonoriser leurs locaux, et que cette exploitation commerciale générait des bénéfices, qui étaient partiellement reversés aux artistes concernés. ” [↑](#footnote-ref-64)
65. In the original French:

    Question 1 : « les articles 8§2 et/ou 10§2 et 3 de la Directive 2006/115 s'opposent-ils à une disposition nationale d'un État membre tel que l'article L 214-5 du Code de la propriété intellectuelle en ce qu'il prévoit le principe d'une collecte obligatoire et systématique par une société de gestion collective de la rémunération équitable même pour les artistes-interprètes et/ou producteurs qui ne sont pas membres de cette société de gestion collective ? »

    Question 2 : « les articles 8§2 et/ou 10§3 de la Directive 2005/115 s'opposent-ils à une disposition nationale telle que l'article L 214-5 du Code de la propriété intellectuelle ayant comme conséquences que les artistes-interprètes et les producteurs concernés qui ne sont pas membres des sociétés de gestion collective visées, mais dont le phonogramme, publié à des fins commerciales, ou une reproduction de ce phonogramme, est utilisé pour une radiodiffusion par le moyen des ondes radioélectriques ou pour une communication quelconque au public ne reçoivent pas de rémunération équitable car ne se voient pas redistribuer la rémunération pourtant prélevée de manière systématique et obligatoire aux utilisateurs ? »  
     [↑](#footnote-ref-65)
66. Article 5(2) of the Directive provides as follows: “Rightholders shall have the right to authorise *a collective management organisation* of their choice to manage the rights, categories of rights or types of works and other subject-matter of their choice, for the territories of their choice, irrespective of the Member State of nationality, residence or establishment of either the *collective management organisation* or the rightholder. [Emphasis added.] [↑](#footnote-ref-66)
67. Article 180 read as follows:

    *The right to act as an intermediary* in any manner whether by direct or indirect intervention, mediation, agency or representation, or by assignment *of the exercise of the rights of performance, recitation, broadcasting, including communication to the public by satellite, and mechanical and cinematographic reproduction of protected works, shall belong exclusively to the S.I.A.E*. It shall pursue the following activities: 1.the granting of licenses and authorizations for the exploitation utilization of protected works, for the account of and in the interests of the rightholders; 2.the collection of the revenues arising from the licenses and authorizations;3.the distribution of that revenue among the rightholders. [↑](#footnote-ref-67)
68. Order of the Tribunal of Rome of November 23, 2018, available

    at <https://www.pojaghi.com/wp-content/uploads/2018/12/Ordinanza-SIAE-Soundreef.pdf> [↑](#footnote-ref-68)
69. The users do complain about this requirement pointing out that, in many cases, it is unrealistic to expect a precise program before; much depends on the concrete circumstances and, in particular, on the demands by the members of the public present. *See* for example the complaint under the telling title of „*Guazzabuglio dei diritti a la questione LEA*” (“Confusion/mess of rights and the LEA question”) at https://www.silb.it/il-guazzabuglio-dei-diritti-e-la-questione-lea/, where the users point out that frequently the identification of the rightholders and thus the repertoires is difficult and even impossible, and that it should rather be a matter for the CMOs; for which, however, it would be necessary that one CMO collect the remuneration which then would distribute it, if there are different repertoires and try to identify and locate, for this purpose, the rightholders. [↑](#footnote-ref-69)
70. Opinion of Advocate General Szpunar delivered on 25 May 2023 [originally in French], Case C‑10/22 Liberi editori e autori (LEA) v Jamendo SA (hereinafter: the AG’s opinion). [↑](#footnote-ref-70)
71. *The AG’s opinion, para. 87.* [↑](#footnote-ref-71)
72. Rudolf Leska offers a clear description of this nature of licensing of "synchronization" of musical works is his chapter entitled "Sync That Tune! The Role of Collective Management of Rights in Film Production and Distribution" in Petr Szczepanik - Pavel Zahradka - Jakub Macek - Paul Stepan [Eds]: Digital Peripheries: The Online Circulation of Audiovisual Content from the Small Market Perspective, Springer Open, 2020: Even if there is a CMO representing the rights in the composition, there are traditional exceptions to collective administration of rights, such as the use of sheet music (print rights), theatrical rights known as grand rights (use in live theater) and the synchronization right. While the former two are out of our purview, the latter is important. Unless the rightsholder appoints a CMO to administer the synchronization right, which rarely happens, the producer needs to seek synchronization approval directly from the publisher or, if there is no publisher, the author, (p. 277). [↑](#footnote-ref-72)
73. The AG’s opinion, para. 24. [↑](#footnote-ref-73)
74. For example, in para. 47, he indicates that his analysis should be “subject to the verification of the national court” and in para. 57, he expresses the doubt that the court will not support his findings. [↑](#footnote-ref-74)
75. The AG’s opinion, paras 49-50. [↑](#footnote-ref-75)
76. *Ibid,,* para. 53 [↑](#footnote-ref-76)
77. *Ibid*., para. 55. [↑](#footnote-ref-77)
78. *Ibid*., para. 54. [↑](#footnote-ref-78)
79. As stated in the dictionary definition: „especially (used to show that a statement applies to one person or thing more than any other); ‘he socialized with the other young people, one boy in particular’ (*see* at https://www.google.com/search?client=firefox-b- d&q=%E2%80%9Eespecially+%28used+to+show+that +a+statement+applies+to+one+person+or+thing+more+than+any+other%29). To use the example of the illustrative sentence; in the way that “in particular” means that the basic statement is that somebody socializing in general and with one boy in particular, it also means that *the above quoted provision applies to public policy in genera*l just to what is listed in particular. [↑](#footnote-ref-79)
80. *Ibid*., para. 52. [↑](#footnote-ref-80)
81. *Ibid*., para 52. [↑](#footnote-ref-81)
82. See the AG’s opinion, para. 58. [↑](#footnote-ref-82)
83. *Ibid*., para. 67. [↑](#footnote-ref-83)
84. *Ibid*, ,para. 65. [↑](#footnote-ref-84)
85. Para. 70; the list of such exclusions, in the AG’s view, is provided as follows: “That is the case, for example, with Article 2(3) of Directive 2006/123, according to which that directive is not to apply in the field of taxation.However, the Court has already ruled that that exclusion concerns not services, but the fiscal rules of the Member States. […]. The same necessarily applies to the exclusions provided for in Article 17 thereof, in point (6) (which expressly refers to ‘requirements in the Member State where the service is provided’), in point (8) (‘administrative formalities concerning the free movement of persons and their residence’), in point (9) (‘the possibility for Member States to require visa or residence permits’), in point (12) (‘acts requiring by law the involvement of a notary’), in point (14) (‘the registration of vehicles’) and in point (15) (‘provisions regarding contractual and non-contractual obligations’), which clearly do not concern categories of services but measures in force in the Member States. Lastly, the exclusions provided for in Article 17(2), (3), (4), (10) and (13) of that directive, which concern ‘matters’ covered by various acts of EU law, seem to relate not to categories of services, but to legislation in areas already harmonised at the level of EU law.” [↑](#footnote-ref-85)
86. OSA, para 13. [↑](#footnote-ref-86)
87. The AG’s opinon, para. 77. [↑](#footnote-ref-87)
88. *Ibid*., paras 77 -78. [↑](#footnote-ref-88)
89. *Ibid*., para. 79. [↑](#footnote-ref-89)
90. This part of the opinion reads as follows:

    85. The court has already considered a situation similar to that at issue in the main proceedings in the case which gave rise to the judgment in *OSA.* In that judgment, the court concluded that the prohibition on the cross-border provision of copyright management services on account of a national collective management organisation’s monopoly in that field constitutes a restriction on the freedom to provide services that must be justified by one of the overriding reasons in the general interest, which include the protection of intellectual property rights. […]

    86. The Court next ruled that the monopoly on the management of rights relating to a category of protected subject matter entrusted to a collective management organisation, coupled with a system of reciprocal representation arrangements with analogous foreign organisations, arose in the context of the territorial protection of copyright and is appropriate and proportionate to the objective pursued. […]

    87. In particular, it found that there is no other method for protecting copyright as effectively and that allowing users to obtain authorisation for the use of works from any collective management organisation for any territory would create significant problems in monitoring the use of rights and the payment of fees.

    [↑](#footnote-ref-90)
91. The AG’s opinion, para. 91. [↑](#footnote-ref-91)