

REMARKS CONCERNING THE PROPOSAL FOR A DIRECTIVE ON SERVICES IN THE INTERNAL MARKET [SEC(2004) 21]

AEPO–ARTIS, which represents most of performers' collecting societies in Europe, would like to express its concerns about the proposal for a Directive on Services and draw the attention on the consequences of this directive on the activities of collective management societies.

Collective management is an economic, social and cultural necessity for the administration of certain rights. All Member States have well established legislation dealing with collective management of rights, because of the monopoly position of collective management societies, guarantying the sound, efficient and transparent administration of copyright and neighbouring rights benefiting both right holders and users.

The effective application of this legislation is put at risk by the draft Directive on Services and could create important difficulties with regard to the collective management of rights at different levels.

1. Authorisation schemes applicable to services activities (Articles 9 and 10)

The proposed Directive provides that authorisation schemes of Member States applicable to services activities must be non-discriminatory, objectively justified by an overriding reason related to the public interest and proportionate to that interest.

No definition is given of an "overriding reason relating to the public interest". There is no certainty that the protection of copyright and neighbouring right will be considered as such.

Member States will have to demonstrate that the provisions of their domestic legislation on the status and the establishment of collective management societies satisfy the conditions laid down in the Directive. If not, they will have to eliminate them. This is a major source of insecurity for collective management of rights in Europe.

Other provisions with regard to the free establishment of service providers (Articles 12, 14.5, 15.2.a., 15.2.b., 15.2.c. and 15.2.j.) are incompatible with the national requirements for access to and exercising the activities of collective management of rights put in place and justified by the specific nature of collective management societies.

2. Country of origin principle (Article 16)

When, according to the country of origin principle, the proposed Directive provides that service providers will only be subject to the law of the country in which they are established with respect to conditions of access to a service and its exercise, and this independently from the country of destination of their services, it challenges the effective application of domestic legislation of a Member State to foreign collective management societies operating in its territory.

A collective management society established in one Member State will thus be allowed to exercise its activities in another Member State without having to respect the provisions contained in the domestic legislation of that Member State with regard to its status, functioning, accountability and supervision.

The important differences between national legislation on the wording of economic rights of right holders and on collective rights management (aggravated by the enlargement of the European Union) mean that the country of origin principle is completely inadequate and could disrupt the long-established balance in relationships between collective management societies at European level.

This principle also means that the Member State of origin is responsible for the effective supervision of service providers established in its territory even if they provide services into other Member States. It is totally unrealistic to believe that the national authorities of the country of origin of a collective management society, even with the mutual assistance and cooperation of the national authorities of the Member State in which this collective management society operates, will have the sufficient legal and practical knowledge in order to exercise an effective supervision of the services activities of that collective management society in the latter Member State and of their compliance with its legislation.. However, this control guaranties the good governance of collective management societies and the respect of specific provisions included in domestic law. It is hard to imagine how a collective management society acting on the territory of one Member State would be exempted from such control for the only reason that it is established in another Member State without causing an important inequality of treatment and without causing prejudice to the guarantees granted by domestic legislation to right holders and users.

Collective management societies are at the service of their members to defend their rights and negotiate the best remunerations for the diffusion of their works. Several of them have by law also a cultural mission of promoting the works and a social mission in favour their members. Would it be conceivable that a foreign collective management society perceiving remunerations on the territory of a Member State, could be exempted from the legal obligation to allocate part of the remuneration it perceives in that Member State to actions of aid to creation for the only reason that it is established abroad?

The European Parliament's resolution of 15 January 2004 insisted on the necessity to take due account, in the frame of the proposal for a Directive on Services, of the functions of the collective management societies as trustees and their particular responsibility for cultural and social aspects as such (paragraph 10). These functions are indispensable to the survival of creation and would be put in jeopardy by a pure competitive logic.

3. Derogation to the country of origin principle (Article 17)

Under Article 17 of the draft directive, copyright and neighbouring rights are subject to a general derogation from the country of origin principle. This derogation, identical to that included in the Directive on Electronic Commerce, is indispensable to ensure the respect for the territorial nature of intellectual property, recognized by the Community legislator and confirmed by the Court of Justice.

However, under the current wording of the derogation, nothing allows to think that the derogation also covers collective management of rights. Only the explicit mention of collective management of rights in the wording of the derogation would allow the non-application of the country of origin principle to these activities.

Even if the collective management of rights could, in application of Article 17 of the draft directive, not see Article 16 applied to it, this derogation would only concern the country of origin principle and would thus only have a limited scope. The other provisions of the directive, under which the chapter on the rights of the recipients of services (see below), would continue to apply to collective management societies as to other service providers without taking account of their specificities. The derogation of Article 17 is not precise enough to secure the activities of collective management societies, which must be expressly excluded from the scope of the Directive.

4. Rights of recipients of services (Article 21)

Finally, section 2 of Chapter III of the proposal of Directive grants numerous rights to the recipients of services. Article 21 of the proposal prohibits service providers to make recipients subject to discriminatory requirements based on their nationality or place of residence with regard to the access to their services.

The principle of non-discrimination towards recipients of services could be interpreted as an obligation for a collective management society to grant a license to a user independently from his place of establishment. When in fact collective management societies carry out their activities on the basis of the principle of territoriality of the author and neighbouring rights and generally grant licenses for the principal exploitation of their repertoire to users established on their territory. By the working of reciprocal agreements, they also represent the repertoire of their sister societies and offer in this way a one-stop-shop to users. The principle of territoriality and the reciprocal agreements aim to avoid in this way additional costs which in the end would be supported by the members of the collective management societies and not by users. This practice which has been considered licit by case-law can be jeopardised by the principles included in the draft Directive.

For these reasons, collective management of copyright and neighbouring rights should be excluded from the Directive on services, all the more so since the Commission is preparing a specific directive on collective management of rights.

5. Amendments proposed by the Committee on Culture and Education and by Mrs Gebhardt, rapporteur

We fully support the opinion and amendments proposed by the Committee on Culture and Education of 22 April 2004. The Committee proposes to exclude from the scope of the Directive on Services the “services of intellectual property rights collecting services”, taking into account the specific nature of collective management societies which the Directive on Services being of horizontal nature can not regulate properly.

The amendments proposed by Mrs Gebhardt on this issue in her draft report of 25 May 2005 are less satisfactory to us.

From the wording of the proposed amendments of Articles 1 and 2 regarding the scope of the Directive, we can not conclude with certainty that the Directive on Services will not be applied at all to collective management societies.

Under Mrs Gebhardt’s proposed amendment to Article 17 of the Directive (amendment 115), collective management societies will be submitted to the country of destination principle, that is to say that the services provided by a collective management society in another Member State will be submitted to the legislation of the latter. However, this amendment does not solve all the problems raised by the application of the Directive on Services. Article 17 concerns only the free movement of services but other articles of the Directive raising problems for collective management societies (like Articles 9, 10, 12, 14, 15 and 21) will continue to apply.