

Free access to information and culture: between freedom of expression and commercial interest

Copyright law
Access to public events



Institut für Europäisches Medienrecht

Institute of European Media Law

Institut du droit européen des médias

27 May 2014, Bucharest
Prof. Dr. Stephan Ory



There is no
European
copyright law
... until now

Content



Functioning of the EU – Part 1

Directives concerning copyright and access

Functioning of the EU – Part 2

Ruling of the European Court of Justice

Do we need a European copyright law?

What about the new directive on collective management?

Functioning of the EU

Art. 288 TFEU



- A **regulation** shall have general application. It shall be binding in its entirety and directly applicable in all Member States
 - There is no regulation on copyright
 - Other than: Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark
- A **directive** shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods

Content



Functioning of the EU – Part 1

Directives concerning copyright and access

Functioning of the EU – Part 2

Ruling of the European Court of Justice

Do we need a European copyright law?

What about the new directive on collective management?

Software Directive 1991



- Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, renewed by the Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs
 - *A computer program shall be protected if it is **original in the sense that it is the author's own intellectual creation**. No other criteria shall be applied to determine its eligibility for protection.*

Directive on rental right and lending right 1992



- Renewed 2006
(see below)

Satellite Broadcasting and Cable Retransmission 1993



- Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.
 - The country of origin principle:
The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programmes-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.
 - [Other than Art. 8 Rom II-Regulation 2007](#)
The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.

Database Directive 1996



- Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases
 - *In accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the **author's own intellectual creation** shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection*

Copyright Directive 2001 (Referred to as *InfoSoc* - I)



- Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of **copyright and related rights** in the information society
 - *A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors.*

InfoSoc Directive 2001 (II)



- Art 2: Right of reproduction
 - for authors, of their works
 - for performers, of fixations of their performances
 - for phonogram producers, of their phonograms
 - for the producers of the first fixations of films, in respect of the original and copies of their films
 - for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite
- Art 3 I: Right of communication to the public
 - for authors

InfoSoc Directive 2001 (III)



- Art 3 I/II: Right of making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them
 - for authors
 - for performers, of fixations of their performances
 - for phonogram producers, of their phonograms
 - for the producers of the first fixations of films, of the original and copies of their films
 - for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite

InfoSoc Directive 2001 (IV)



- Art 4: Distribution right
 - for authors
- Art 5: Exceptions and limitations
 - Recitals 33: *This Directive provides for an **exhaustive enumeration of exceptions and limitations** to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future*

InfoSoc Directive 2001 (V)



- Not mentioned:
Moral rights

Enforcement Directive 2004



- Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights
 - *The directive aims to ensure an equivalent level of protection of intellectual property rights in the Member States of the EU. The Directive applies to all intellectual property rights, which can be purchased by the European or the national law. The copyright of the author is one example for an intellectual property right ...*

Directive on rental right and lending right (new) 2006 (I)



- Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property
- Art 3: Exclusive right of rental and lending:
 - the author in respect of the original and copies of his work
 - the performer in respect of fixations of his performance
 - the phonogram producer in respect of his phonograms
 - the producer of the first fixation of a film ...

Directive on rental right and lending right 2006 (II)



- Art 5: Right to obtain an **equitable remuneration** for rental
 - cannot be waived **by authors or performers**
 - **may be entrusted to collecting societies** representing authors or performers
 - Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed, as well as the question **from whom this remuneration may be claimed or collected**

more than *reasonable* remuneration?

Directive on rental right and lending right 2006 (III)



■ Related rights

- Art 7: Exclusive right to authorise or prohibit the **fixation**
 - performers of their performances,
 - broadcasting organisations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite (not cable distributor)
 - Art. 9: **Distribution right** of the fixation
- Art 8: Performer's exclusive right to authorise or prohibit the **broadcasting by wireless means and the communication to the public** of their performances,
 - except ... is made from a fixation
 - ensure that a single **equitable remuneration** is paid by the ... *Broadcaster*

Directive on rental right and lending right 2006 (IV)



- Related rights (continued)
 - Art 8: broadcasting organisation's exclusive right to authorise or prohibit the **rebroadcasting** of their broadcasts by wireless means, as well as the **communication to the public of their broadcasts** if such communication is made in places accessible to the public against payment of an entrance fee.
 - Art 10: Corresponding limitations
- Art 12: Protection of copyright-related rights **under this Directive** shall leave intact and shall in no way affect the protection of copyright

Directive on the term of protection 2006



- Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights
 - *The rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention shall run for the life of the author and for 70 years after his death, irrespective of the date when the work is lawfully made available to the public*

Directive on audiovisual media services (AVMS) 2010



- Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain legal and administrative rules/aspects of the member states relating to the provision of audiovisual media services
 - ... a regulatory framework ... should ensure optimal conditions of competitiveness and legal certainty for Europe's information technologies and its media industries and services, as well as respect for cultural and linguistic diversity

AVMS Directive 2010 (II)



- Chapter V: Provisions concerning exclusive rights and short news reports in television broadcasting.
 - Broadcasters ... do **not** broadcast on an exclusive basis events which are regarded by that Member State as being of **major importance for society** in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events by live coverage or deferred coverage on free television
 - For the purpose of short news reports, any broadcaster established in the Union has access on a fair, reasonable and non-discriminatory basis to **events of high interest to the public** which are transmitted on an exclusive basis

Directive on orphan works 2012



- Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works
 - Creating a legal framework to facilitate the digitisation and dissemination of works and other subject-matter which are protected by copyright or related rights and for which no rightholder is identified or for which the rightholder, even if identified, is not located — so-called orphan works — is a [key action of the Digital Agenda for Europe](#) ...

Content



Functioning of the EU – Part 1

Directives concerning copyright and access

Functioning of the EU – Part 2

Ruling of the European Court of Justice

Do we need a European copyright law?

What about the new directive on collective management?

„A directive shall be binding“ Art. 288 TFEU



- What is the „result to be achieved“?
 - Only regulation **under this Directive** are binding
 - Regulation of nearby areas – if equal regulation is required in national law
- What kind of harmonization by a specific directive?
 - Minimum of harmonization?
Can a Member State have a stronger regulation?
Can a Member State invent new rights (as of the publisher)?
 - Fully harmonization?
Must a Member State take the directive „as it is“
 - Does the directive provide „a menu of rights“?
See limitations in the InfoSoc Directive

What exactly shall be binding?



- What mean the terms used in the directive?
 - Same meaning throughout the Union
 - Same meaning as in international treaties
 - Bern Convention
 - TRIPS (WIPO)
 - National Courts must use the terms in accordance with the directive
- European Court of Justice (ECJ)
 - „Binding“ interpretation of terms and content of directives
 - Balancing of conflicting constitutional rights

Content



Functioning of the EU – Part 1

Directives concerning copyright and access

Functioning of the EU – Part 2

Ruling of the European Court of Justice

Do we need a European copyright law?

What about the new directive on collective management?

ECJ: Term of „protected work“ (I)



- „A forthcoming sale of the telecommunications group TDC which is expected to be bought“
 - Are these words from an article a “protected work”?
 - Yes: ECJ, judgment, 16 July 2009, C-5/08 – Infopaq
- ECJ argues:
 - It is, moreover, apparent from the general scheme of the Berne Convention, in particular Article 2(5) and (8), that the protection of certain subject-matters as artistic or literary works presupposes that they are **intellectual creations**
 - Similarly ... **works such as computer programs, databases or photographs** are protected by copyright only if they **are original in the sense** that they are their **author’s own intellectual creation**

ECJ: Term of „protected work“ (II)



- ECJ sees the same meaning in all Directives
 - ECJ, judgment, 1 March 2012, C-604/10 – Dacato/Yahoo
 - *As regards the setting up of a **database**, that **criterion of originality** is satisfied when, through the selection or arrangement of the data which it contains, its author expresses his creative ability in an original manner by **making free and creative choices** ... and thus stamps his **“personal touch”***
- Other interpretation as German BGH
 - **Personal** creation – more than the average creation
 - More than just a personal touch
- **Consequence: Less criteria – more protection**

ECJ: Concept of exploitation rights (I)



- ECJ: patients of a dentist ... are not „persons in general“
 - ECJ, judgment, 15 March 2012, C-135/10 – SCF
 - *It is thus understood that the public which is the subject of the communication is both targeted by the user and receptive, in one way or another, to that communication, and not merely „caught“ by chance*
- Concept of relevant exploitation
 - BGH again with a different concept

Question



Do we protect more
but only
in relevant situations?

(or shall we protect less but more effectively
and do we need a European copyright law)

Content



Functioning of the EU – Part 1

Directives concerning copyright and access

Functioning of the EU – Part 2

Ruling of the European Court of Justice

Do we need a European copyright law?

What about the new directive on collective management?

Online distribution of audiovisual works 2011 (I)



- Green paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital [single market](#)
- For example VoD – problem:
 - *It appears that rights clearance may nevertheless be laborious and expensive for some VoD operators. Firstly, as part of pre-financing arrangements, producers may have split the exploitation rights across territories, with a different distribution partner having been appointed to manage marketing and distribution in each territory. Secondly, lack of clarity with respect to the relevant rights which need to be cleared for works and other subject matter incorporated in the audiovisual fixation is sometimes seen as an issue.*

Online distribution of audiovisual works 2011 (II)



- For example VoD – one of different options:
 - *One is to extend the "country of origin" principle that underpins acts of broadcasting by satellite (as set out in the Satellite and Cable Directive) to the delivery of programming online, in particular for the delivery of services made available on demand that are ancillary to broadcast activities (e.g. catch up TV).*
- Different rightholders of films
 - *As a result of this harmonisation, all Member States consider the principal director of the film as one of its authors now. However, Community legislation has not resulted in complete harmonisation of the notion of authorship in cinematographic and audiovisual works. Differences in detail still exist with respect to the question of who, among the group of persons involved in the making of the film, are to be considered as co-authors besides the principal director.*

Online distribution of audiovisual works 2011 (III)



- Authors'/Performers' remuneration for online exploitation?
 - *It could be argued that performers should equally be entitled, on a harmonised basis, to an **unwaivable right to remuneration** from which they would benefit even after they have transferred their exclusive right of making available. This right could also be compulsorily **collected by collective management societies**. Again, other means to ensure that performers can individually or collectively negotiate adequate remuneration should be considered.*
 - *With regard to authors' and performers' remuneration, it could be argued that the creation of another layer of remuneration rights might **increase uncertainties as to where and from whom licences need to be cleared** (particularly in the absence of harmonised rules on authorship in the EU) and require users to administer and reconcile multiple remuneration claims for each audiovisual work.*

Content



Functioning of the EU – Part 1

Directives concerning copyright and access

Functioning of the EU – Part 2

Ruling of the European Court of Justice

Do we need a European copyright law?

What about the new directive on collective management?

Directive on collective management 2014 (I)



- Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market
 - *The dissemination of content which is protected by copyright and related rights ... requires the licensing of rights by different holders It is normally for the rightholder to choose between the individual or collective management of his rights ...*
 - *There are significant differences in the national rules governing the functioning of collective management organisations ...*

Directive on collective management 2014 (II)



- Art 4: Member States shall ensure that collective management organisations act **in the best interests of the rightholders** whose rights they represent and that they do not impose on them any obligations which are not objectively necessary for the protection of their rights and interests or for the effective management of their rights.
 - **And the interests of the users and the public?**
- Art 5: Rights of rightholders
- Art 6-8: Membership rules of CMO's

Directive on collective management 2014 (III)



- Art 9 - 10: Supervisory function/Management
 - Internal
- Art 11 – 15: Management of rights revenue
- Art 16, 17: Relations with users
 - CMO's and users conduct negotiations for the licensing of rights in **good faith**
 - Licensing terms shall be based on objective and non-discriminatory criteria

Directive on collective management 2014 (IV)



- Art 16, 17: Relations with users (continued)
 - Tariffs for exclusive rights and rights to remuneration **shall 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 organisation
 - Collective management organisations shall **reply without undue delay to requests** from users
 - **Users' obligations:** ... provide a CMO, within an agreed or pre-established time and in an agreed or pre-established format, with such relevant information at their disposal on the use of the rights represented by the collective management organisation as is necessary for the collection of rights revenue and for the distribution and payment of amounts due to rightholders

Directive on collective management 2014 (V)



- Art 18 - 22: Transparency and reporting
- Art 23 - 32: Multi-territorial licensing in the internal market
 - Online rights in musical works
 - CMO must have sufficient capacity to process electronically, in an efficient and transparent manner, data needed for the administration of such licences, including for the purposes of identifying the repertoire and monitoring its use, invoicing users, collecting rights revenue and distributing amounts due to rightholders
 - Representation agreement between CMO's
 - [Derogation](#) for online music rights required for [radio and television programmes](#)

Directive on collective management 2014 (VI)



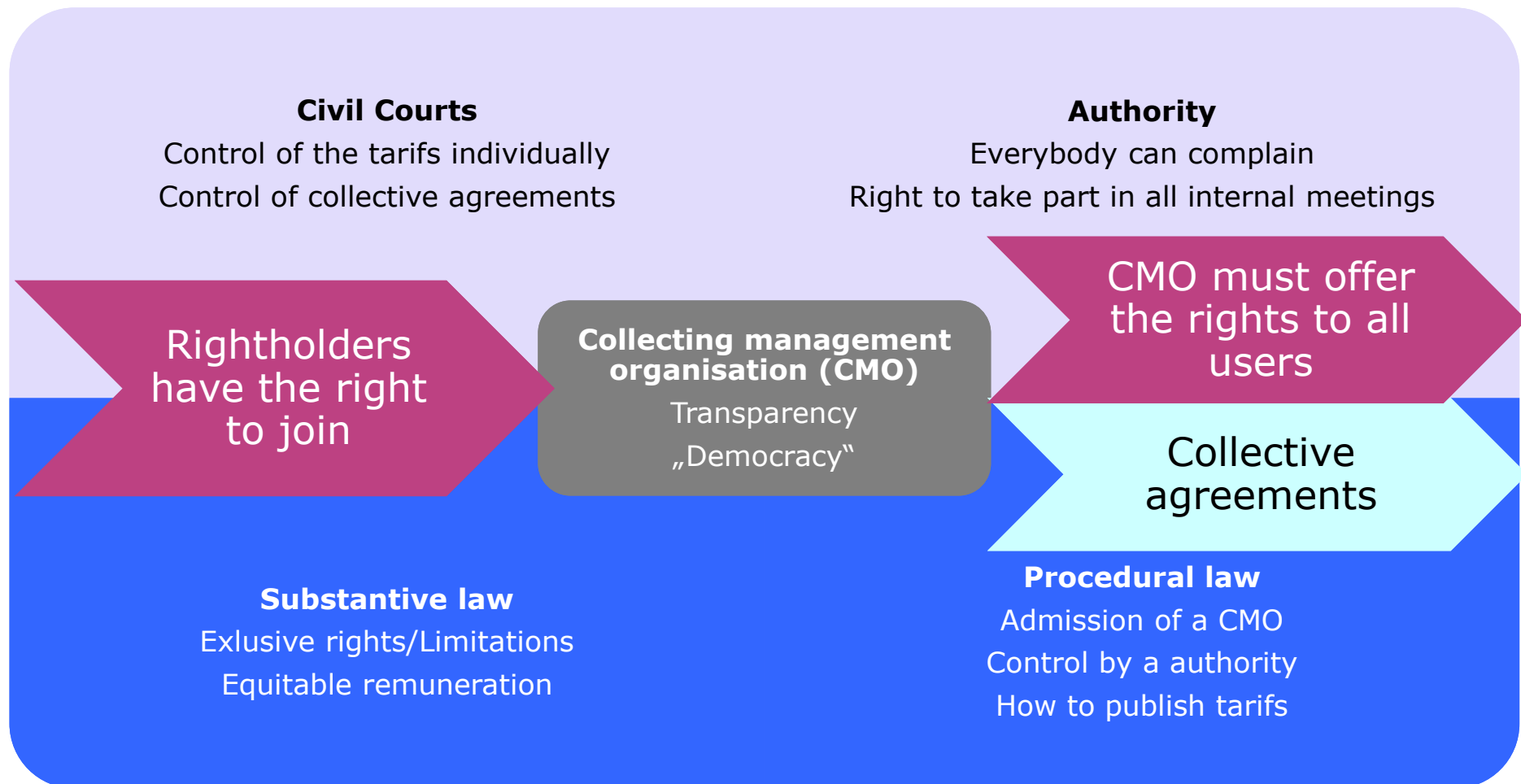
- Art 33 - 38: Enforcement measures
 - CMO's shall respond in writing to **complaints by members or by CMO's** on whose behalf they manage rights under a representation agreement
 - **They do not have respond to users**

Directive on collective management 2014 (VII)

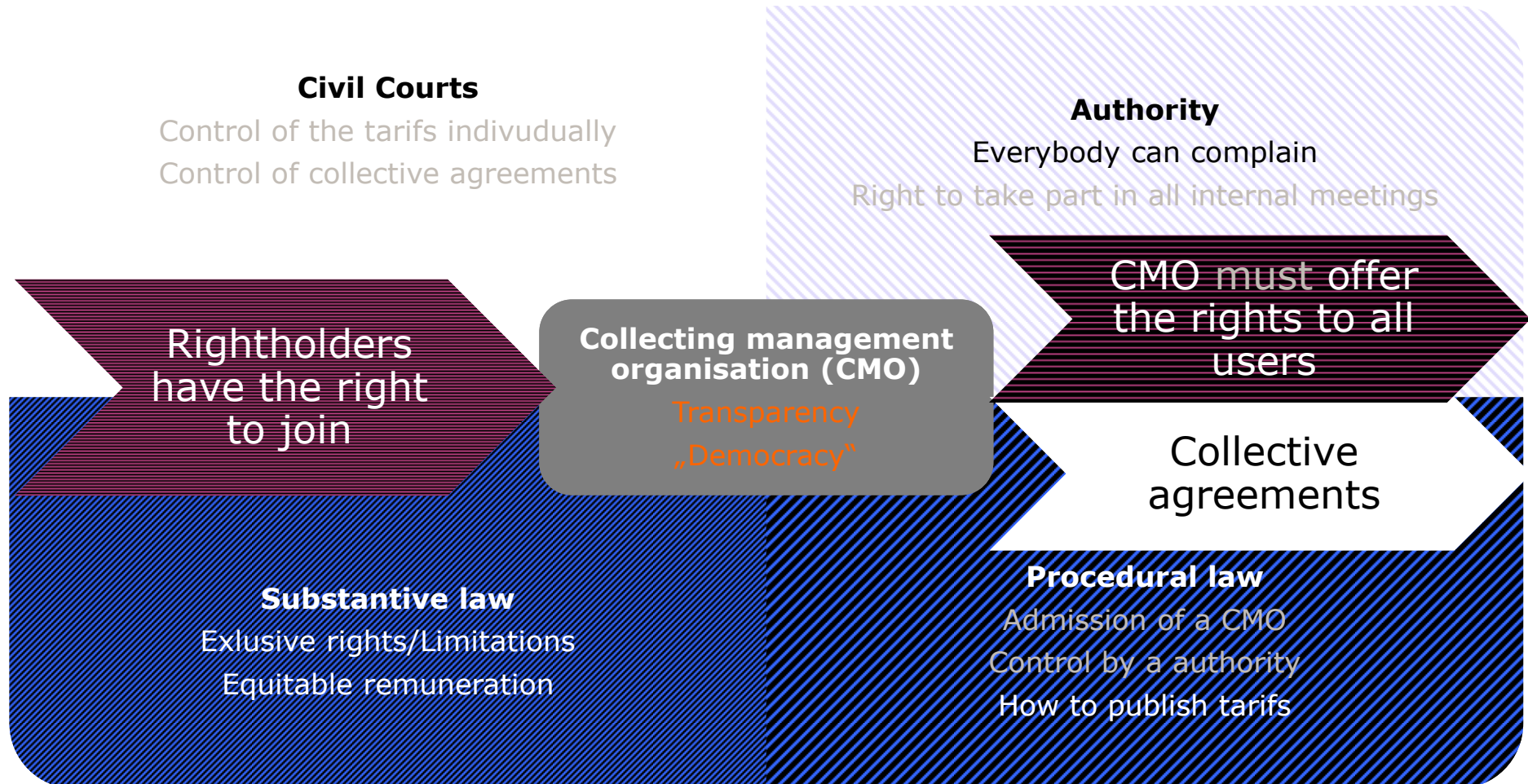


- Recitals 50:
 - Everybody should be able to **notify a competent authority**
 - Competent authorities should have the **power to impose sanctions or measures** where provisions of national law implementing this Directive are not complied with
 - Directive **does not provide for specific types** of sanctions or measures
 - May include orders to dismiss directors who have acted negligently, inspections at the premises of a CMO or, in cases where an **authorisation is issued for an organisation to operate**, the withdrawal of such authorisation
 - Directive **remains neutral as regards the prior authorisation** and supervision regimes in the Member States

Abstract view on CMO's



CMO's under European law



That's enough!

Franz-Mai-Straße 6
D-66121 Saarbrücken
Germany

Phone +49/681/99275-11
Fax +49/681/99275-12



Institut für Europäisches Medienrecht

Institute of European Media Law

Institut du droit européen des médias

www.emr-sb.de

Question



What does that mean in a pan European market?

(The product is the same - rights to users?

The rules are different!

What about the price? Or the remuneration?)