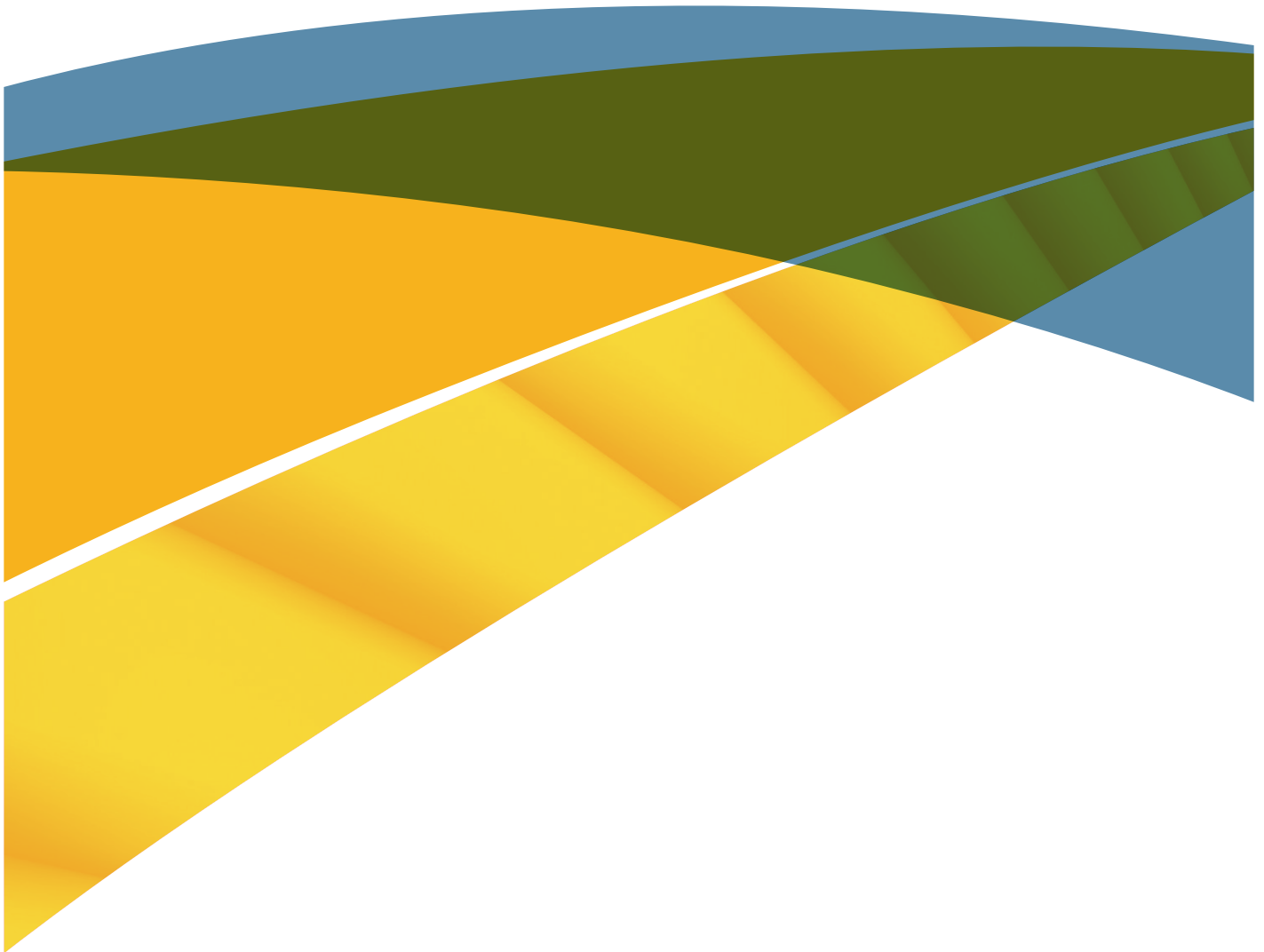




Intellectual
Property
Office

Collective rights management in the Digital Single Market

Consultation on the implementation of the EU Directive on the collective management of copyright and multi-territorial licensing of online music rights in the internal market: Government response



Ministerial Foreword

The UK already benefits from a strong, well-established collective licensing system. Our collective management organisations are a vital link between rightholders who want efficient access to markets for their work, and users who need simple, cost-effective access to large volumes of copyright material. They're part of the infrastructure that supports our great creative industries. As such, it's important that they operate with high standards of transparency, governance and customer service.

The Directive should provide real benefits for the UK. By driving higher standards in collective management organisations across the EU, it will give rightholders more choice about how their rights are managed, more confidence that they will be properly remunerated for the use of their work, and better protection where something goes wrong. UK collective management organisations will be able to work more effectively with their counterparts in other Member States, supporting the development of the Digital Single Market.

The Directive will also make it easier for collective management organisations to offer multi-territorial licences for the use of music online; this could make it easier for new innovative services to develop, supporting new revenue streams. That's good news for the businesses who develop these services, the consumers who use them, and the rightholders who stand to benefit from innovative uses of their work.

I welcome the positive responses to this consultation. Respondents have told us that they want Government to implement the Directive in a way that's simple and coherent, and supported the view that the IPO is best placed to deliver the regulatory functions the Directive requires. We intend to copy out the Directive into UK law as far as possible, and will look to minimise burdens on business by avoiding any unnecessary 'gold-plating' of the Directive's new requirements.

At the same time, responses also asked us to look at maintaining some important protections in the existing domestic regulations, and to give careful thought to how to encourage timely exchange of information between collective management organisations and users. We will continue to reflect on these views as we develop the regulations needed to bring the Directive into UK law.

This response does not mark the end of our engagement with stakeholders. We will continue to seek your views through the remaining stages of the process, including by making draft regulations available for technical review later in the year. In the meantime, I hope this response helps you understand the Government's current approach to transposition, and supports individuals and organisations as they get ready to exercise their new rights and meet their new obligations.



Lucy Neville-Rolfe

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Minister for Intellectual Property



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1. Introduction

The EU Directive on the collective management of copyright and multi-territorial licensing of online music (“the Directive”¹), published on 26 February 2014, entered into force on 10 April 2014 and must be transposed into national law by 10 April 2016.

The policy underpinning the Directive is part of the European Commission’s ‘Digital Agenda for Europe’² and the ‘Europe 2020 Strategy’³ for smart, sustainable and inclusive growth’. It is one of a set of measures aimed at improving the licensing of rights and the access to digital content. These are intended to facilitate the development of legal offers across EU borders of online products and services, thereby strengthening the Digital Single Market.

Policy aims of the Directive

The Directive’s main objective is to ensure that collective management organisations (“CMOs”) act in the best interests of the rightholders they represent. Its overarching policy aims are to:

- Modernise and improve standards of governance, financial management and transparency of all EU CMOs, thereby ensuring, amongst other things, that rightholders have more say in the decision making process and receive accurate and timely royalty payments.
- Promote a level playing field for the multi-territorial licensing of online music.
- Create innovative and dynamic cross border licensing structures to encourage further provision and take up of legitimate online music services.

The Directive sets out the standards that CMOs must meet to ensure that they act in the best interests of the rightholders they represent. It establishes some fundamental protections for rightholders, including those who are not members of CMOs. These include detailed requirements for the way in which rights revenues are collected and paid, how the monies are handled, and how deductions are made.

The Directive provides a framework for best practice in licensing, including obligations on licensees around data provision. It also creates scope for the voluntary aggregation of music repertoire and rights with the aim of reducing the number of licences needed to operate a multi-territorial, multi-repertoire service.

All these measures are underpinned by detailed requirements to ensure effective monitoring and compliance, overseen by a National Competent Authority (NCA). Those requirements include ensuring that proper arrangements are in place for handling complaints and resolving disputes.

¹ <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2014:084:0072:0098:EN:PDF>

² <http://ec.europa.eu/digital-agenda/>

³ http://ec.europa.eu/europe2020/index_en.htm

Structure of the Directive

The Directive is in four parts. Title I outlines its scope and definitions. Title II focuses on the rights of and protections for rightholders, underpinned by minimum standards of governance and transparency that are required of all EU CMOs. Title III sets out the standards that EU CMOs which choose to engage in multi-territorial licensing of online musical rights must meet. Title IV covers the requirements for enforcement of all the measures in the Directive, including the procedures for handling complaints and settling disputes.

Domestic regulation

The Directive's provisions for improved transparency and governance complement existing domestic legislation for the regulation of CMOs. The Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014⁴ (the "2014 Regulations") require UK CMOs to adhere to codes of practice that comply with minimum standards of governance and transparency under those Regulations. There is also provision for regular, independent reviews of compliance and access to an Ombudsman who acts as the final arbiter in disputes between a CMO and its members or licensees. UK CMOs self-regulate in the first instance, but Government has a reserve power to remedy any problems in self-regulation and to impose sanctions where appropriate.

The 2014 Regulations were developed and implemented against the backdrop of the Directive. When the Directive was announced in 2012, work on the 2014 Regulations was well underway.⁵ The question of whether to continue was carefully considered, and Government decided to carry on with the domestic work, given that there was no guarantee that the Directive would be agreed. Even if it were, it would be a number of years before transposition during which time rightholders and licensees would be without the protections they had been promised.

Scope of the Directive

The scope of the 2014 Regulations does not currently extend to those organisations that also collectively manage rights but which have a different legal form to CMOs. The Directive calls these organisations "independent management entities" (IMEs).

In general terms, UK CMOs tend to be constituted as companies limited by guarantee (a form usually adopted by most incorporated charities, public benefit bodies, clubs, and membership organisations). They typically describe themselves as "not for profit" organisations and are owned and controlled by their members, the rightholders. IMEs, by contrast, are for-profit commercial entities that are not owned or controlled by rightholders. Under the Directive they will have to comply with certain provisions; broadly summarised, these oblige them to provide information to the rightholders they represent, CMOs, users and the public.

⁴ <http://www.legislation.gov.uk/uksi/2014/898/contents/made>

⁵ In fact, the Government had already consulted on codes of practice for collecting societies in its Copyright Consultation of 2011, and had published minimum standards at the end of 2012.

Online music

There is no specific provision in UK law for the regulation of the multi-territorial licensing of online musical works. The Directive introduces new provisions in Title III to ensure that cross border services meet certain standards, including transparency of repertoire and accuracy of financial flows related to the use of the rights.

2. Consultation response and next steps

The Government received 29 responses to the consultation, including responses from CMOs, IME's, rightholders and their representatives, and users. Two responses were confidential, and some respondents submitted joint responses. Subsequently, we have conducted a number of follow-up meetings to explore issues raised in the responses, and will continue to engage with stakeholders throughout the transposition process.

This document summarises the responses received, and sets out the Government's response and current intended approach to transposition of the Directive. Using the evidence gathered through this process, the Government will develop draft regulations for technical review, and will update the Impact Assessment before the final regulations for transposition of the Directive are published⁶. Transposition is subject to final agreement both of the implementing regulations and the accompanying final Impact Assessment. Therefore, the policy direction set out in this document should be considered as provisional.

The Government thanks all those who responded to the consultation, and those who have taken part in consequent discussions regarding its contents and their responses.

The response follows the same format as the original consultation document for ease of reference. Each section describes the impact of the relevant part of the Directive, followed by a summary of responses and the Government response.

3. Proposals for Implementation

The Directive will be transposed in accordance with the UK Government's principles for the transposition of Directives⁷. This means that, where feasible, copying out the Directive and alternatives to regulations should be considered so that UK businesses are not put at a competitive disadvantage to their European counterparts. As such, the Government consulted on two options for implementation:

Option 1: Adapt the existing regulatory framework, including the 2014 Regulations, to comply with the Directive's requirements.

Option 2: Replace the existing regulatory framework, including the 2014 Regulations, with new Regulations. This would involve copying out the Directive as far as possible, but drawing on existing infrastructure (e.g. the Ombudsman) where feasible.

⁶ The initial IA BISIPO007, rated "Green" by the Regulatory Policy Committee, outlines the potential costs and benefits to UK businesses and was published alongside the consultation.

⁷ Guiding Principles for Transposition of EU Directives: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229763/bis-13-775-transposition-guidance-how-to-implement-european-directives-effectively-revised.pdf

Questions

1. *Please say whether and why you would prefer to implement using Option 1 or 2?*
2. *How important is it to retain those aspects of the 2014 Regulations that go beyond the scope of the Directive?*
3. *What is your best estimate for the overall cost of (a) implementation and (b) ongoing compliance with this Directive?*
4. *If Option 2 was the preferred option, as a CMO would you consider retaining a revised code of practice as a means of making the new rules accessible to members and users?*

Responses

A large majority of responses supported Option 2 – revoking the 2014 Regulations and replacing them with bespoke regulations that copied out the Directive as far as possible, including reference to existing infrastructure and processes. It was felt this option would provide greater clarity, and be consistent with the UK's general approach to implementing EU regulation.

However, respondents were also generally positive about the impact of the 2014 Regulations, and there was significant support for maintaining aspects of this framework where they provided meaningful additional protections for rightholders and licensees. In particular, it was noted that the 2014 Regulations provided for more stringent requirements on CMOs with regards to their dealings with licensees. Most CMOs who responded indicated that they would retain or consider retaining Codes of Practice if Option 2 was selected.

Government response

Given the responses, the Government is minded to proceed with the preferred option set out in the consultation – Option 2. The Government will give further consideration to how existing elements of the 2014 Regulations (such as the sanctions regime and the role of the Ombudsman in dispute resolution) can be integrated into transposition of the Directive and the guidance that will accompany it.

The Government also notes the level of support for maintaining some of the additional protections contained in the 2014 Regulations, but which are not within the scope of the Directive. As UK CMOs are already complying with these protections, and they appear to provide a clear benefit to businesses, the Government is minded to use the transposition process to maintain some equivalent provisions within UK law, including a requirement for CMOs to have a complaints process in place for licensees. This assumption informed the development of Option 2 in the consultation stage Impact Assessment. As the majority of CMOs are already complying with these requirements as part of their own Codes of Practice (and expressed their support for maintaining these Codes), this should not generate additional burdens in most cases.

The Directive and the Extended Collective Licensing Regulations

Extended Collective Licensing (ECL) is a form of licensing that allows a CMO to apply for an authorisation from the Secretary of State to license the works of all rightholders in an ECL scheme, except those rightholders that exercise their right to opt out.

Recital 12 of the Directive states that it “does not interfere with arrangements concerning the management of rights in 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”. However, some of its provisions for “rightholders” (a definition that covers both members of a CMO and non-members in an ECL scheme⁸) overlap, exceed, or are absent from those that apply to the same rightholders in the Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014⁹ (the “ECL regulations”).

Broadly speaking, the overlap can be divided into the following categories:

- Stronger, more detailed, or additional protections in the Directive than in the ECL regulations
- Stronger, more detailed, or additional protections in the ECL regulations than in the Directive
- Similar protections in the Directive and the ECL Regulations

The Government’s intended approach for each of these categories is as follows:

Where there are stronger, more detailed or additional provisions in the Directive, these will necessarily take precedence over the ECL Regulations.

In cases where the Directive is silent on something that is available in the ECL Regulations or where the ECL Regulations go further than the Directive, the Government is minded to maintain existing protections where possible, subject to alignment with the Directive and overall regulatory policy. This is because the Government legislated to include those protections based on in-depth consultation and evidence from stakeholders and consultations.

Where there are very similar protections we intend that these will be looked at on a case by case basis.

⁸ There is further discussion of the “rightholder” definition later on in this consultation document

⁹ <http://www.legislation.gov.uk/ukxi/2014/2588/contents/made>

Responses

Although there were no specific ECL questions, several respondents made observations on the overlap between the ECL Regulations and the Directive.

In relation to measures CMOs must take to identify and locate rightholders, two CMO respondents highlighted as a concern the Directive's requirement that "all necessary" measures needed to be taken. One of those respondents contrasted this with both Recital 29, which states that measures must be "reasonable and diligent", and the ECL guidance document, which says that they need only be proportionate.

On the subject of implementation, another CMO respondent said that CMOs should only have codes of practice, as a matter of law, if they are to make an ECL application.

Rightholder respondents made several points, including the need for rightholders to be able to withdraw rights, categories of rights and types of work from ECLs (which might require amendments to the 'opt out' procedures required by the UK Regulations), and that definitions in the ECL regulations had to be made consistent with those in the Directive.

Government response

The Government welcomes the recognition from respondents that certain additional protections remain appropriate for rightholders represented via ECL schemes. The Government will make amendments to the ECL regulations in order to align them with the overall implementation of the Directive, and will make a draft available for technical review later in the year alongside the draft regulations for transposition of the remainder of the Directive. In doing so, the Government is minded to follow the broad principles set out above.

The practicalities of implementation will require Government to develop solutions which match the proposed approach to the Directive. Given the intention to revoke the 2014 codes of practice regulations, this will include consideration of how best to maintain the effect of the current safe-guard which requires a CMO applying to operate an ECL scheme to have, and be complying with, a suitable code of practice.

4. The Directive's Requirements

Title I: General provisions: Scope and definitions

Distinction between collective management organisations and independent management entities.

The Directive brings into scope those bodies defined as “collective management organisations” and “independent management entities”; the latter are not in scope of the 2014 Regulations. Only some of the Directive’s provisions apply to IMEs.¹⁰

The 2014 Regulations do not apply to relevant licensing bodies¹¹ that are micro-businesses.¹² There is no such exemption in the Directive. The Government is currently aware of one CMO that is exempt from the 2014 Regulations and which is likely therefore to incur higher costs as result of the Directive’s implementation.

Questions

5. *Given the definitions of “collective management organisation” and “independent management entity”, would you consider your organisation to be caught by the relevant provisions of the Directive? Which type of organisation do you think you are and why? Please also say whether you are a micro-business.*
6. *If you are a right holder or a licensee, do you either have your rights managed or obtain your licences from an organisation which you think is an IME? If so, could you please identify the organisation, and explain why it is an IME.*

Responses

UK collecting societies who responded to the consultation agreed that they would be within the scope of the Directive’s definition of CMO. Some licensing bodies felt that as a result of their legal structure, they may not be captured either by the definition of CMO or IME. However, they noted that they intended to comply with the Directive as far as was possible.

Some responses from rightholders noted the important role played by third party service providers who manage relationships with CMOs on behalf of rightholders. These responses emphasised that the UK’s implementation of the Directive should recognise the complexity of rights management practices in different sectors.

¹⁰ Articles 16(1), 18, 20 and 21 (a)(b)(c)(e) and (f).

¹¹ A “relevant licensing body” is the equivalent definition of a CMO in the 2014 Regulations

¹² A business with fewer than ten employees and which has a turnover or balance sheet of less than 2 million Euros per annum

Government response

The UK is minded to copy out the Directive as far as possible. We will continue to work with licensing bodies to assist them in determining their relationship to the Directive and any consequent obligations, noting the statement in the Recitals that member states should seek to prevent the circumvention of the Directive through the adoption of a specific legal form. We also note the points raised regarding the role of third party service providers, and will engage further with stakeholders to clarify the relationship between the Directive's provisions and any third party service providers.

Subsidiaries

The scope of some of the Directive's provisions extend to "entities directly or indirectly owned or controlled, wholly or in part, by a collective management organisation" but only insofar as they undertake regulated activities that a CMO otherwise would (Article 2(3)). The objective of this Article is to guard against circumvention of the Directive. The Directive does not specify (as is the case for IMEs), which Articles would always apply to subsidiaries as the circumstances may vary according to the nature of the activities concerned. For example, in relation to the management of rights revenues, a subsidiary involved in the investment of rights revenues (Article 11(4)) would have to comply with only some of the Directive's requirements.

Questions

7. *Do you have subsidiaries? Which of the Directive's provisions do you think would apply to them, and why? Please set out your structure clearly.*

Responses

Some CMOs and other bodies noted that they either had a total or partial stake in subsidiary companies, or were members of other CMOs. One response proposed that compliance with the CRM Directive by a subsidiary should be assessed at that level, rather than by assessing compliance of the parent company (which in this instance would not be a CMO). However, another response from a CMO with subsidiaries argued that compliance should be assessed at the level of the parent CMO.

Government response

The UK is minded to copy out the Directive as far as possible. We are minded to use guidance to clarify our interpretation of how the Directive applies to different company structures. This work will be led by the principles underpinning the Directive: to protect the interests of the members of CMOs, rightholders, and users. We agree that CMOs should be prevented from circumventing their responsibilities to comply with the Directive by delegating functions to subsidiaries, and are minded to place an obligation on CMOs to this effect.

Rightholder

Article 3(c) defines “rightholder” as “any person or entity, other than a collective management organisation, that holds a copyright or related right or, under an agreement for the exploitation of rights by law, is entitled to a share of rights revenue.” This would appear to include both members of a CMO and certain rightholders who are not members. The latter category should include non-members in ECL schemes and mandating rightholders who are not members.¹³

Questions

8. *Who do you understand the “rightholders” in Article 3(c) to be?*
9. *If you are a CMO, what are the practical effects of a relatively broad definition of “rightholder” for you?*

Responses

Both CMOs and rightholders pointed to several other “types” of copyright holders who might be considered rightholders for the purposes of the Directive. These included heirs, agents, sister CMOs, and any other third party entitled to a share of the rights revenue.

On the practical effects of a broad rightholder definition, there was an observation that the definition of rightholder should not necessarily entitle those with a share of rights revenue to become members or seek some other form of representation. Other responses suggested that CMOs did not always update their databases when rightholders withdrew their rights; that the Article 18 information requirements would cause difficulty for one licensing body that made payments to rightholders only after they’d become members; and that CMOs will have a legal responsibility to rightholders both inside and outside the EU. One rightholder organisation commented that CMOs should be able to define which rights they control for the purposes of Article 5(2).

Government response

The Government is minded to copy out this section of the Directive. We are grateful for clarity on the types of rightholders who might fall under the definition in the Directive, and will look to reflect this in guidance. We note that the Directive requires that rightholders should be able to directly enforce their rights under Article 5 and intend to create provisions to enable this. CMOs will need to be ready to comply with these obligations from day one.

¹³ Mandating rightholders who are not members could be defined as those rightholders who have given a CMO a mandate to manage their rights and collect on their behalf, but who choose not to be members of the CMO. The Government is aware of one CMO set up in this way. There may be CMOs who dissuade or prevent mandating rightholders from becoming members but the Government is not aware of any such CMO.

Title II: Collective management organisations

Title II sets out the standards of governance, financial management, transparency and reporting that CMOs must meet to ensure that they act in the best interests of the rightholders they represent.

Chapter 1: Representation of rightholders and membership and organisation of a collective management organisation.

Representation of rightholders

Articles 5 and 6 establish some fundamental rightholder protections. These include being able to authorise their chosen CMO to manage some or all of their rights; to decide in which territory(ies) those rights should be managed; to withdraw all or some of those rights; and to be fairly represented in the decision-making process.

The Directive also requires that CMOs grant certain rights to rightholders for which there is no equivalent provision in the specified criteria under the 2014 Regulations. These include the right to grant licences for non-commercial use (Article 5(3)); to give consent for specific rights or category of right (Article 5(7)); and the right to choose to withdraw certain rights (Article 5(5)).

Questions

10. *What do you consider falls in the scope of “non-commercial”?*
11. *If you are a CMO, to what extent do you already allow members scope for non-commercial licensing? Please explain how you do so?*
12. *What will be the impact of allowing rightholders to remove rights or works from the repertoire?*
13. *Under what circumstances would it be appropriate for a CMO to refuse membership to a rightholder i.e. what constitutes “objective, transparent and non-discriminatory behaviour”?*
14. *What should “fair and balanced” representation in Article 6(3) look like in practice?*
15. *What do you consider to be an appropriate “regular” timeframe for updating members’ records?*

Commercial and non-commercial use

Responses

Most responses to this question focussed on the complexities of defining ‘non-commercial’ use, and some noted that, given the lack of a definition in the Directive itself, the UK should not go further. Examples cited included decisions by individual rightholders to waive royalties for charitable purposes in what would otherwise be

considered a commercial use (where a rigid definition of ‘non-commercial’ could negatively impact the ability to license). CMOs often noted the non-exclusive nature of their agreements with members, and the space this created to allow non-commercial use. One respondent noted the successful use of the Creative Commons licences in conjunction with collective licensing in some countries.

Some responses also noted a potential conflict with section 35 of the Copyright, Designs and Patents Act 1988, which allows for licensing schemes to apply for certain educational uses. Respondents argued that rightholders could already rely on the relevant exception if they did not wish to license these rights.

Government response

The Government recognises that the boundary between commercial and non-commercial use may not always be easy to define. We are minded to copy out this provision, and use guidance to make clear that individual CMOs should agree with their members on definitions of ‘non-commercial’ use in the context of particular rights and uses of rights. In giving effect to this requirement, CMOs will need to be aware that the Directive will enable a rightholder to seek to directly enforce their rights under Article 5. The implementing regulations will provide a mechanism for this.

We do not believe that the Directive’s provisions on non-commercial use create a conflict with licensing schemes which operate under Section 35 of the CDPA. If a member of a CMO operating a scheme under section 35 wishes to withdraw their mandate for non-commercial use, they should be able to do so. However, they will need to discuss with the relevant CMO how this impacts their eligibility for the relevant licensing scheme(s), and consider whether the use of their work would be covered by the relevant exception.

Withdrawal of repertoire

Respondents noted the value to rightholders of increased control over their repertoire. However, this was qualified by a concern from a range of respondents that increased fluctuation in CMOs repertoire could negatively impact on the value of the collective licences they offer. This risk was deemed to be exacerbated where either:

- a) high-value repertoire was withdrawn in order to exploit other commercial opportunities
- b) withdrawal took place at short notice

For users, fluctuation in the repertoire could restrict ability to make use of a wide range of copyright works, increase the costs of right clearance, and could create a risk of inadvertent infringement. For rightholders whose repertoire remained within the scope of a blanket licence, there was a risk of loss of income owing to a reduction in the value of the licence, and increased administrative costs to CMOs.

Government response

The Government recognises the significant benefits that could accrue to rightholders from more flexibility regarding the use of their works. At the same time, we support the important role that collective licensing plays for rightholders and users alike. We are minded to copy out this element of the Directive, and will look to CMOs to determine appropriate notice periods for the withdrawal of works within the framework set out by the Directive. In giving effect to this requirement, CMOs will again need to be aware that the Directive requires that a rights holder is able to seek to directly enforce their rights under Article 5. The implementing regulations will set out the mechanism by which they are able to do so.

Membership criteria and representation

Responses

Most respondents agreed that CMOs should be expected to offer membership to relevant rightholders unless there was a strong justification for refusal. Suggestions of situations where refusal could be justified included cases where there was doubt over the authenticity of the prospective member's claim to rights, or where granting membership would be against the collective interest of other members. Some responses cited Recitals 18 and 19, noting that the limitations on the ability of CMOs to refuse membership which they set out are appropriate.

One rightholder noted what they saw as current discriminatory practices in relation to membership and representation. These included limitation of membership to other CMOs, refusal of membership to those rightholders in works 'embedded' in other types of copyright works represented by a CMO, and restrictions on board representation. One respondent stated that membership should not be refused to a rightholder who wished to make use of permissive non-commercial licences.

There were differing perspectives on what constituted 'fair and balanced' representation. However some principles that seemed to emerge were:

- Representation mechanisms should take account of the diversity of members within CMOs – for example considering different classes of rightholder, or the representation of SME rightholders. Responses from rightholders tended to support the view that each category of rights holder should have adequate representation within the CMO
- An expectation that representation included rights to involvement in key decision-making processes, such as voting at the General Assembly, and having the right to stand for election to relevant boards
- Mechanisms should acknowledge that some decisions will only be relevant to certain categories of rightholder

Government response

The Government is minded to copy out this element of the Directive. Article 6 is clear that the statute of a CMO should both set out membership requirements for the organisation, and provide for appropriate and effective mechanisms for representation. It will be the responsibility of the NCA to monitor compliance with this requirement. However, we do not believe it would be appropriate to seek to further define either criteria for membership, or principles for fair and balanced legislation. This should be a matter for each CMO and its members to determine in the first instance, with members and other interested parties having a right of complaint to the NCA if they believe that a CMO's behaviour has not complied with the implementing provisions.

Rights of rightholders who are not members of CMOs

In Article 7(1) of the Directive, Member States are required to ensure there is at least a basic level of protection for rightholders who have a direct legal relationship or other contractual arrangement with a CMO but who are not their members.

Article 7(2) gives Member States the discretion as to whether to apply other provisions in the Directive to rightholders who are not members of the CMO.

Questions

16. *Is there a case for extending any additional provisions in the Directive to rightholders who are not members of the CMO? If so, which are these, why would you extend them and to whom (i.e. non-members in ECL schemes, mandating rightholders who are not members, or any other category of rightholder you have identified in answer to question 7)? What would be the likely costs involved? What would be the impact on existing members?*

Responses

CMOs were almost unanimous that the additional provisions need not be extended to non-member rightholders. There were various arguments for this position:

- if rightholders had many of the same privileges as members, it might act as a disincentive to becoming a member (which could ultimately damage the value of a collective licence);
- that only non-members in ECL schemes should be entitled to certain extra safeguards, and these were already provided for in the ECL Regulations; and
- there was a potential that a broad extension of provisions could extend benefits to rightholders who, having chosen not to avail themselves of a licensing scheme, were covered by an exception.

Most rightholders were in agreement with the CMOs, and often for very similar reasons. Where they disagreed, this was on the basis that as a matter of principle, non-member rightholders should enjoy the same benefits as members, or that member protections should be extended to rightholders represented via ECL schemes. One licensee thought the provisions should be extended in order to facilitate licences that covered the broadest possible repertoire.

Government response

The Government is not minded to exercise the discretion to apply additional protections to cover non-member rightholders. This is both because it would be more than the minimum required to implement the Directive, and because the benefits of doing so are not clear. Rightholders should always have the opportunity to become members provided they fulfil the membership criteria (Articles 5(2) and 6(2)). If a rightholder is denied membership, and if the membership criteria are not “objective, transparent and non-discriminatory”, then the rightholder would be able to make a complaint. This mechanism should ensure that rightholders are able to enjoy the benefits of membership should they choose to do so, without creating disincentives.

The Government is of the view that protections for non-member rightholders represented via ECL schemes are adequately covered in the ECL Regulations; these Regulations also contain protections not covered by the Directive. When non-member rightholders find out they are being licensed in an ECL scheme, the CMO should offer them membership, provided they qualify. The Government will make amendments to the ECL regulations in order to align them with the Directive, and will make a draft available for technical review later in the year alongside the draft regulations for transposition of the remainder of the Directive.

The General Assembly of Members

The protections around governance and supervision required under the Directive will be applied taking into account the requirements of UK company law. Several of the provisions around the functioning of the General Assembly (Article 8) allow CMOs some discretion around their implementation. These may be broadly summarised as:

- delegation of certain powers to the supervisory body, a delegates’ assembly and/or rightholders;
- conditions for the use and investment of rights revenue;
- arrangements for the appointment or removal of the auditor;
- restrictions on voting rights;
- appointment of proxy vote holders.

The consultation suggested that it may be appropriate to allow for some flexibility around the functioning and powers of the General Assembly to accommodate the different corporate structures amongst UK CMOs and/or to take account of existing practice.

Questions

17. *Which of the discretionary provisions of Article 8 do you think should be adopted?*
18. *Do you have an existing supervisory function that complies with the requirements in Article 9? If not, can you give an estimate of the likely costs of compliance?*
19. *Which of the Directive's provisions are existing requirements under UK company law?*

Responses

Responses from CMOs tended to support a degree of flexibility in the UK's implementation of this section, primarily in order to reflect existing structures and to minimise burdens on CMOs. For example, some CMOs took the view that it would be impractical to exercise the discretion in 8 (7) requiring the general assembly to set more detailed conditions for the use of rights revenue and related income. However, CMOs did not seek particular flexibility where this would be misaligned with existing good practice. Another group of licensing bodies which did not believe they were within the scope of 'CMO' as defined in the Directive indicated their intent to comply with the Directive to the extent made possible by their company structure.

Some responses from rightholders took a different approach. One response called for use of the discretion in 8 (7) in order to ensure greater transparency around rights and investment revenue. However, there were other responses that supported existing good practice in UK CMOs.

In relation to the costs of compliance, most CMOs felt that their existing board structures could provide a supervisory function which satisfied the requirements of Article 9 (as non-executive Board members could carry out the supervisory function).

Respondents generally did not wish to provide an opinion on the alignment of the Directive with UK company law, viewing this as a matter for Government.

Government response

The UK's approach to transposition is to avoid imposing additional costs on business above those specifically required by the text of the Directive unless there is an exceptional reason for doing so. We are also minded to maintain alignment with existing domestic legislation wherever possible. On this basis, we are not minded to exercise the discretions in Article 8 (7), or 8 (10). In relation to 8 (7), not exercising the discretion will not prevent CMOs and their members from deciding on more stringent provisions should they wish to do so. While we agree that transparency around the use of rights revenue and investments is important, other provisions in the Directive should drive good practice in this regard.

With regards to Article 8 (10), UK company law prevents companies from placing restrictions on the right of their members to appoint a proxy. Therefore, we do not intend to allow scope for any restrictions on this right beyond those specifically required in the Article. We are minded to implement Article 8 (10) by including a provision in the transposing regulations which states that a member of a CMO may not appoint a proxy where that appointment would lead to a conflict of interest.

We intend to exercise the discretion in Article 8 (8) to allow CMOs to use alternative methods of appointing the auditor. While there were not specific calls for flexibility in this area, we believe that discretion is required to maintain compatibility with UK company law, namely the provisions in section 485 and 489 of the Companies Act 2006.

We are minded to allow some flexibility in relation to Article 8 (9), reflecting the different categories of membership that currently exist in UK CMOs. As any criteria used to restrict voting rights are required to appear in the statute or membership terms of the CMO, we believe members will have the opportunity to exercise control over how this discretion is used.

The Government is continuing to consider whether there is a need to make use of the discretions in Article 8 (11), 8 (12) and 8 (13). These discretions could allow CMOs with different legal forms or membership structures to comply with the Directive. Any use of these discretions would need to be on the basis that the rights of members, rightholders and users would be adequately protected.

Chapter 2 - Management of rights revenue

In the 2014 Regulations, the obligations on CMOs around the collection and distribution of rights revenues are limited to high level information and transparency and reporting requirements. The Directive has detailed provisions (Articles 11 and 12) that will govern the way rights revenues are collected, how the monies are handled and how deductions are made.

Article 13 prescribes how and when rightholders are to be paid; the arrangements a CMO must put in place to try and locate absent rightholders; and what must happen if they are unknown or cannot be found. Whilst in the first instance the General Assembly is responsible for deciding what happens to non-distributable amounts, the Member State has a discretion to “limit or determine the permitted uses of non-distributable amounts” (Article 13(6)).

Questions

17. *If you do not already have a distribution system that complies with the provisions of Article 13, can you say what the cost of implementing the requirements will be?*
18. *What are your organisation's current levels of undistributed and non-distributable funds, as defined in Article 13?*
19. *What is your estimate of the current size and scale of non-distributable amounts that are used to fund social, cultural and educational activities in the UK and elsewhere in the EU?*

20. *Do you collect for rightholders who are not members of your CMO? If so, how much of that rights revenue is undistributed and/or non-distributable? If you collect for mandating rightholders who are not members of your CMO, to what extent do those rightholders have a say in the distribution of non-distributable amounts, and what do you think of the Government exercising its discretion in relation to those amounts?*
21. *What should be the criteria for determining whether deductions are ‘unreasonable’?*
22. *Are there any pros and cons to be particularly aware of in case the Government exercises the discretion?*

Distribution systems and undistributed funds

Responses

Most responses from CMOs indicated that they were substantially or fully compliant with Article 13. Where additional costs were identified, these most often related to searching for unidentified rightholders (where it was noted that an expansive definition of ‘necessary measures’ could lead to a major increase in costs). Other identified costs included staff training, IT costs, and potential costs associated with the requirement to distribute revenue within nine months. CMOs also noted some of the objective reasons which they felt sometimes prevented payment within the prescribed deadline.

CMOs provided details on their own assessment of levels of non-distributable and undistributable revenue. However, some noted that the definitions provided in the Directive were ambiguous.

CMOs were not generally able to provide estimates of the use of non-distributable amounts for social and other purposes in the UK and EU. Those who commented on this issue noted that information on such deductions was generally extremely limited, and referenced some existing research and data held by some international bodies like IFPI. Several CMOs stated that they made no such deductions. Others noted charitable deductions, but sometimes distinguished these from what they viewed as a wider interpretation of “social/cultural/educational” deductions made by CMOs in other member states.

Some CMOs did say that they collected for rightholders who were not members, but the involvement of those rightholders in the uses to which non-distributable rights revenue could be put varied. CMOs stated that they did seek to provide transparency about what happened to those amounts, for example through the publication of information about distribution policy and rules.

In relation to whether deductions are reasonable, rightholder and IME respondents thought that CMOs needed to be transparent about deductions and costs, and having bands of permitted deductions was suggested as one solution. Improved transparency would allow interested parties to make useful comparisons about the performance of CMOs. CMOs said that the deductions should be reasonable and proportionate, in line

with market rates, and justified to serve members interests. Several responses said that the reasonableness of deductions was something that only members should decide, in line with the Article 8 provisions.

Most rightholders and CMOs strongly objected to the Government exercising its discretion to take non-distributable monies whilst accepting that this should be possible for non-members represented via ECL schemes. However, one respondent claimed that CMOs have large amounts of non-distributable monies, and that therefore the Government should exercise the discretion.

Government response

The Government is minded to copy out the Directive as far as possible, and agrees that CMOs should take appropriate measures to regularly, diligently and accurately pay rightholders. Based on the evidence from this consultation, the Government is satisfied that most CMOs appear to have robust, transparent distribution systems in place.

However, as rightholders will be able to make a complaint to the NCA in relation to any failure to meet this obligation, it will be important that CMOs are able to objectively and clearly justify any delay in payment. The guidance that accompanies the regulations will provide additional information on how CMOs can meet this requirement in practice, as well as how to determine what ‘necessary measures’ should be taken to identify or locate ‘missing’ rightholders entitled to payment.

As far as non-distributable monies are concerned, rightholders can be said to fall into three categories: members; other rightholders whose works are exploited by a CMO; and non-member rightholders in ECL schemes.

With the exception of non-members represented via ECL schemes, the Government can think of few circumstances where exercise of the discretion might be justified. If there are large amounts of non-distributable monies – which CMOs will have to declare as part of the annual transparency report – there is likely to be an issue with diligent and accurate distribution, or adequate information from users, and any Government action may need to concentrate on those areas. However, the principle that members of a CMO are best placed to determine the uses of non-distributable income appears a sensible one.

In relation to those rightholders represented via ECL schemes, the Government currently has a power in domestic regulations to claim income which remains non-distributable under bona vacantia principles after eight years, and intends to maintain similar provisions (restricted to this limited circumstance). The Government will make amendments to the ECL regulations in order to align them with the Directive, and will make a draft available for technical review later in the year alongside the draft regulations for transposition of the remainder of the Directive.

Chapter 3 – Management of rights on behalf of other CMOs

Articles 14 and 15 establish the principle of parity of rightholders whose rights are managed under a representation agreement with those managed directly by the CMO. This applies to tariffs, management fees, and collection of revenues and distribution of amounts due to rightholders.

Questions

23. *Is there currently a problem with discrimination in relation to rights managed under representation agreements? If so, what measures should be in place to guard against this?*

Responses

Some responses from CMOs and rightholders cited what they saw as examples of discriminatory practice. These included late payment, additional deductions, or distribution procedures that favoured member rightholders over those represented via a reciprocal agreement. There was support for Article 14 as a tool to allow CMOs to challenge these practices, whether directly or via NCA.

One rightholder group used their response to this question to raise a number of points about discriminatory practices in relation to direct membership. These are covered in the response to question 13.

Government response

The Government notes that Article 37 creates a right for a NCA to request that its counterpart in another Member State investigate a potential breach of the Directive by a CMO based in that Member State. During the process of developing the NCA functions for the UK, the Government will consider how and when the NCA should use this option in relation to representations regarding any relevant issue, including representation agreements.

Chapter 4 – Relations with users

Articles 16 and 17 set out a framework designed to ensure that licensing negotiations are conducted in good faith, on the basis of objective and non-discriminatory criteria. It also provides for CMOs to be more agile and flexible when licensing new online services, an area in which there continues to be rapid changes in the types of business model used to launch them.

The new obligations on licensees in relation to the provision of data (Article 17) have been welcomed by CMOs as a key measure to ensure they are able to comply with the Directive, thereby improving the efficiency of the collective management process.

From a licensee's perspective, it is essential to find the right balance between repertoire transparency and contractual freedoms and data requirements that are realistic fair and appropriate. The requirements should therefore be read in conjunction with Recital 33, which limits the information CMOs may request from licensees to what is "reasonable, necessary and at the users' disposal... taking into account the specific situation of small and medium sized enterprises (SMEs)".

Questions

24. *What do you consider should be the "necessary information" CMOs and users respectively should provide for in licensing negotiations (Article 16(1))?*
25. *What format do you think the user obligation should take and how might it be enforced? What is "relevant information" for the purpose of user reporting?*
26. *What is the scale of costs incurred in administering data returns that are incomplete and/or not in a suitable format?*

Necessary Information

Responses

It was clear from responses that 'necessary information' would need to be defined on a case-by-case basis; it was dependent on the type of work, category of right, and both the type and scale of the use under discussion. CMOs tended to define 'necessary information' as that required to determine the appropriate type and price of licence, and the information that would be required on usage. In practice, this could involve:

- For trade associations, evidence of their mandate to negotiate on behalf of their members and details of their membership
- Information on the usage of copyright works, including type of use, volume of use, and the audience for the use
- Information about the licensee's business

Users felt that the types of information that CMOs should provide would include details on the repertoire and types of use covered by the licence, and the principles or methods they use to calculate licence fees.

User obligation

Responses

Responses from CMOs emphasised the importance of data collection from users in the context of the Directive. They argued that without timely and accurate flows of data from users, distribution of income becomes difficult and increasingly expensive and several cited additional direct costs. CMOs cited examples where information exchange presented specific challenges, including:

- variable data flow from ostensibly similar online service providers, with issues including incomplete identifying data, and delayed or missing returns
- provision of information about use of copyright works at the point of negotiation or renewal of a licence
- provision of data about use of works from users who did not have a licence (in order to determine whether a licence was required).

In this context, CMOs argued that the provisions in Article 17 were a necessary part of the Directive, and should be implemented in a way that allowed for some form of enforcement. These responses noted the qualifications set out in Recital 33 (such as, for example, the need to take account of the particular situation of SMEs) but tended to take the view that these should not be interpreted in a way that removed any obligation on users.

In follow-up meetings with CMOs, we have questioned them on their ability to enforce existing provisions regarding information supply that form part of licensee contracts (having seen extensive evidence from CMOs of the types of requests they currently make of users). CMOs argued that while these contractual provisions were important, there was a reluctance to use the courts to enforce them (both because of the costs involved, and because they did not wish to take action that would damage their relationships with licensees).

Most responses agreed that the format of information provision should be determined between users and CMOs, and should take advantage of agreed industry standards where possible. Several responses cited examples of existing industry standards that had had a positive effect in particular sectors.

Responses from users agreed that there was a need to provide information, but were more cautious about how Article 17 should be implemented. Proportionality was a key concern here, for example in relation to the costs incurred by SMEs in providing data to CMOs (particularly for those businesses where use of copyright works was relatively incidental). One response argued that SMEs should be excluded from this requirement.

There was also a view that any obligation placed on users should be complemented by a similar requirement on CMOs to provide information on their repertoire, mandate and tariff calculation. Some users reported particular difficulty in procuring information on works within a CMOs' repertoire at a given point, and argued that this was a precursor to them being able to provide information on relevant usage.

Government response

The Government is minded to copy out the Directive as far as possible. In relation to Article 16, we recognise that ‘necessary information’ for the purposes of a negotiation will inevitably be context-dependent. As such, we are not minded to seek to define this any further in transposition. We intend to use guidance to give some high-level principles about the types of information that the obligation might cover.

Article 17 clearly places a broad obligation on Member States to ensure that users provide information within the terms of the Article, but does not prescribe what this information should include, or the timing and format of information exchange. The Government is not minded to go any further in this regard, viewing these details as for negotiation between the parties to a licence (and the development of voluntary standards at a sectoral level).

We are aware that contracts between CMOs and users will generally contain detailed requirements on the information provision, and consider that this is appropriate. Guidance accompanying the regulations will reiterate that this provision should generally be enforceable through contract law. We also believe it’s important that information requirements are proportionate (particularly where the end user is an SME), and should reflect the type and value of use made of copyright works.

The Government is minded to agree that to comply with the Directive, it will need to retain the ability to take enforcement measures against users who fail to comply with the obligation in Article 17. However we envisage that this would only be used in very particular circumstances, where this is a general public interest in doing so. We intend that guidance will give more information on this matter.

We recognise that some CMOs can have difficulty in establishing whether a business requires a licence. However, Article 17 does not apply to users where a licence is not already in place, and so such cases will be outside the scope of the NCA’s powers. We will continue to work with CMOs and trade associations to support the properly licensed use of works.

We welcome the proposal by some respondents for Government to encourage further discussion between users and CMOs, with a view to developing agreed standards for information provision to support the licensing process. We will consider how to take this forward prior to the implementation of the Directive.

Chapter 5 – Transparency and reporting

This Chapter sets out requirements for the provision of information by a CMO to rightholders (both routinely and upon request), to CMOs with whom it has reciprocal agreements and to the public. As with other areas of the Directive, the provisions in the 2014 Regulations are broadly in line with those in Chapter 5 of the Directive, but they are much less prescriptive.

The Directive requires, for example, that CMOs “make available” individualised information to rightholders on the management of their rights at least annually. All CMOs will be required to publish an extremely detailed annual transparency report (the

“ATR”); and in some circumstances a special report on the uses of amounts deducted for social, cultural and educational services. There are also detailed requirements for the timing of publication of the ATR (no later than eight months following the end of that financial year) and that the accounting information must be audited.

Questions

27. *Which of the Transparency and Reporting obligations differ from current practice, and what will be the cost of complying with them?*
28. *What do you think qualifies as a “duly justified” request for the purposes of Article 20?*

Responses

Responses from CMOs tended to show that UK CMOs already had a high level of compliance with the transparency and reporting requirements, but noted that some of the Directive’s provisions would require additional work. However, the cost of compliance appears to be relatively modest. CMOs argued that requests for information for the purposes of Article 20 should be made in good faith on the basis of a legitimate need (for example, by a potential licensee who is seeking more information on the repertoire). They also noted that in many cases, they make information relevant to Article 20 available on websites as a matter of course. Some responses expressed concern about spurious or vexatious requests generating additional costs.

From the rightholders who responded, there was a view that requests from users seeking information about a licence, and rightholders wanting to provide a mandate or apply for membership, would qualify as duly justified requests. Another view was that a CMO should respond to queries involving rights that were being used without a mandate, in disputes between CMOs which impacted on rightholders, or in connection with termination of mandates.

We have also received various queries from CMOs about how they can ensure compliance with the transparency and reporting requirements in the Directive and Annex, including the level of granularity expected in relation to the reporting of revenue and costs by categories of rights and types of use.

Government response

The Government agrees that high standards of transparency by CMOs will benefit their members and licensees, and welcomes the evidence from UK CMOs about their existing work in this area. We agree that whether a request is duly justified should be decided on a case-by-case basis: however, there should be an objective and clearly justified rationale for refusing a request. This requirement should apply equally to requests from users, as well as those from members. We agree that to the extent CMOs make relevant information available via the other transparency and reporting requirements in the Directive, this should lead to a reduction in the likely number of requests via the provisions in Article 20.

In relation to the requirement to report on revenues and costs in relation to categories of rights and types of use, the Government understands that the intent of the Directive is to provide a measure of comparability between CMOs across Member States where possible, in order to improve transparency. Therefore we will use guidance and other means to encourage the use of international standards where available.

Title III: Multi-territorial licensing of online rights in musical works by collective management organisations

One of the key objectives of the Directive is to create conditions that are conducive to the effective provision of multi-territorial collective licensing of authors' rights in musical works for online use, including lyrics. The new provisions should ensure cross border services provided by CMOs adhere to minimum quality standards, notably in terms of transparency of repertoire represented, and accuracy of financial flows.

The Title III provisions also set out a framework for facilitating the voluntary aggregation of music repertoire and rights, with the aim of reducing the number of licences needed to operate a multi-territorial, multi-repertoire service. Unlike the Title II provisions, which in some places allow for Member States to impose more stringent standards if they wish,¹⁴ Title III requirements are harmonising provisions.

A comprehensive list of the criteria that a CMO has to fulfil in order to demonstrate it has the capacity to process multi-territorial licences is set out in Article 24. In addition, CMOs must respond to requests for up-to-date information about their online repertoire, except where there may be a need to protect the data. Whilst licensees have welcomed the potential for improved standards of reporting, there is some concern that some CMOs may use the discretion in Article 24(2) to circumvent the repertoire transparency requirements.

In general terms, there are many similarities between the information requirements for CMOs in Title II and Title III of the Directive. These include provisions for CMOs to provide licensees with at least one method of electronic reporting (Articles 17(4) and Articles 27(2)); and give rightholders a detailed breakdown of the amounts paid for the use of their rights by category and type (Articles 18 and 28)). Some CMOs have expressed concern that these requirements could increase their costs and that their ability to comply depends on licensees adhering to a suitable reporting format.

There are also some important differences, for example in relation to the timing of payments to rightholders. There is no specified time period for distributing revenues for multi-territorial licences, save that payments must be made "without undue delay after the actual use of the work is reported" (Article 28). The aim is to speed up online payments, ideally so that they operate in real time. In Title II CMOs must distribute monies "no later than nine months after the end of the financial year in which they were collected" (Article 13).

¹⁴ See Recital 9

Article 32 provides a derogation for online music rights required for radio and television programmes. This is so that broadcasters can receive such licences from CMOs that do not necessarily have the capacity to process multi-territorial licences under the Title III requirements. The derogation applies to CMOs, not broadcasters. It is limited to those instances where there is a clear and subordinate relationship between the music and the original broadcast (i.e. it does not apply to offers of individual audiovisual works). This is to avoid potential distortion of the competitive market.

Questions

29. *What factors help determine whether a CMO is able to identify musical works, rights and rightholders accurately (Article 24(2))?*
30. *What standards are currently used for unique identifiers to identify rightholders and musical works? Which of these are voluntary industry standards?*
31. *What would you consider to be a “duly justified request for information” (Article 25(1))? What is not?*
32. *What would you consider to be “reasonable measures” for a CMO to take to protect data (Article 25(2))? What would be an unreasonable ground to withhold information on repertoires?*
33. *What period of time would you consider would constitute “without undue delay” for the purposes of correcting data in Article 26(1) and for invoicing in Article 27(4)?*

Responses

Some respondents highlighted identifiers, but also raised the need for an overarching system or industry standards. PRS said that industry standards were in place, and under the terms of their licences they required users to follow those standards. The most commonly mentioned standards were the ISRC (International Standard Recording Code) and ISWC (International Standard Musical Work Code). This reflected a general sense from the responses that the music sector currently made more use of industry standards for identification.

On the issue of what represents a duly justified request, some respondents felt this was something that needed to be decided on a case-by-case basis, whilst another said that a request could be justified where there was reasonable doubt regarding authorisation or ownership.

In relation to data protection, one representative of users felt there were no circumstances in which CMOs should withhold data, given their monopoly status. Responses from other users and IMEs agreed that there needed to be rightholder and end user access to data. Responses around reasonable limitations tended to refer to existing legal or contractual requirements, for example referring to confidentiality, data protection, and competition law obligations.

One respondent thought that data or information should be corrected in less than 60 days from the date of the rightholders' request; this was something they said they'd already embedded in their membership agreement. Another response hoped that the Directive would harmonise high standards across Europe.

Government response

The Government is grateful for this evidence. We are minded to copy out Title III of the Directive as far as possible. The Government intends to use guidance to encourage the use of international standards, and to set out a view on what types of requests should be considered 'duly justified' for the purposes of Article 25 (2). However, we are minded to agree that such requests will need to be considered on a case by case basis.

Title IV: Enforcement measures

Article 33 of the Directive requires Member States to ensure that CMOs have effective complaints procedures.

Article 34(1) gives Member States the discretion to provide for rapid, independent and impartial alternative dispute resolution ("ADR") procedures for disputes between CMOs, members, rightholders or users, except in the case of multi-territorial disputes, where the provision of ADR is mandatory. Article 34(2) includes very detailed requirements around the resolution of Title III disputes and specifies the individual aspects of the Directive to which the provision should apply.

During informal consultation, several CMOs expressed a preference for having access to a range of mediation and ADR processes to resolve different types and levels of disputes. Rightholders on the other hand, felt this could cause confusion. Licensees wanted fair ADR systems, of different gradations according to the type of dispute or possibly considering having a centralised ADR system.

Government stated in the consultation that, subject to responses, it would appear logical to build on the service provided by the existing independent Ombudsman scheme. An alternative could be mediation. For example, the IPO's accredited, flexible fee, mediation service helps businesses and individuals resolve IP disputes quickly and effectively, including by telephone in some cases¹⁵.

Article 35 requires Member States to ensure that disputes between CMOs and licensees about existing and proposed licensing conditions or a breach of contract can be submitted to a court. Alternatively, but only if appropriate, disputes may be referred to another independent and impartial dispute resolution body, which has expertise in intellectual property law.

One option could be that disputes about licensing terms and conditions should continue to be referred to the Copyright Tribunal, as provided for in Sections 118 and 119 of the Copyright, Designs and Patents Act 1988 ('CDPA'). At present, disputes may only be referred to the Tribunal by the licensee or their representative body, depending on the circumstances. This rule was designed to redress the imbalance of

¹⁵ <https://www.gov.uk/intellectual-property-mediation>

power that can often be found at the negotiating table, because most CMOs are effectively monopoly suppliers. While the Government recognises that the balance can sometimes work in favour of the licensee, as a general rule it seeks to maintain equilibrium in negotiations.

Disputes about breaches of contract are civil matters, which would be dealt with in the usual way as with other contractual disputes.

The scope of the complaints and dispute resolution provisions do not extend to IMEs. Nevertheless, as Member States are required to monitor and enforce IME compliance, one possibility could be to do so by monitoring complaints, prompting an investigation where necessary.

Questions

34. *How many licensees do you have in total? Of these, are you able to say how many are small and medium enterprises and how many have a bigger turnover than you do?*
35. *What do you think are the most appropriate complaints procedures for handling disputes and complaints between CMOs, users and licensees, including for multi-territorial disputes? Please say why.*

Responses

The majority of responses to the consultation on enforcement measures came from UK CMOs. In relation to question 34, CMOs provided details about the substantial number of individual licensees and representative bodies that they license. Additionally, a small number of collecting societies provided some limited information representing the turnover and size of enterprises they license. The four responses received by licensees or trade bodies representing licensees, naturally focused on question 35 regarding the most appropriate complaints procedure.

Responses to question 35 from licensees, representative bodies of licensees and CMOs generally indicated that the existing mechanisms currently available continue to be appropriate to deal with complaints and handling of disputes in most cases. This also included the Copyright Tribunal continuing to be the most suitable body with expertise to resolve disputes that arise around proposed or existing licensing conditions.

In addition, some responses from CMOs argued the UK should change the law to allow CMOs to refer cases to the Copyright Tribunal in all cases where a licensee could currently make such a reference. These responses argued that:

- The original policy rationale for restricting the right of referral to licensees (as a counter-balance to the negotiating power of monopoly CMOs) had changed – CMOs stated that they now often negotiated with large national and multinational organisations with significant negotiating resource.
- Article 35 should be interpreted as requiring that both parties should have access to dispute procedures

Government response

The Government welcomes the evidence provided regarding the number and size of licensees. We also note that CMOs offer a range of procedures for resolving disputes, including their own complaints procedures as well as the option to use alternative dispute resolution (ADR) in many cases. We believe that the steps taken in this regard in the past few years have had a positive effect in relations between UK CMOs, their members, and users.

The Government is minded to require CMOs to maintain complaints procedures with access to independent dispute resolution procedures for users and rightholders, as well as for members (the Directive requires a complaints procedure for members, but is silent on requirements for complaints for users and rightholders). This will maintain the current level of protection afforded under Codes of Practice and the 2014 Regulations, and was reflected in the description of the Government's preferred option in the original Impact Assessment. The draft regulations will set out in more detail how this could be achieved, including the extent of its application (noting that some CMOs are excluded from the requirements of the 2014 Regulations).

The Government notes that a range of ADR options are used in different circumstances and have different benefits. For example, some CMOs argued that a dispute over multi-territorial licensing might not be best suited to resolution through an ADR process which usually deals with consumer or SME disputes, such as the current Ombudsman service. We will explore options to give some flexibility to CMOs in this regard, subject to them meeting the requirements to offer independent, impartial ADR.

The Government is not minded to make any changes to the rules of access surrounding the Copyright Tribunal. While we agree that there needs to be an effective dispute resolution system in place, we believe that the current process works well for this purpose and provides for disputes to be submitted to a suitable body. The asymmetric right of referral granted to licensees is designed to balance the monopoly status of CMOs as suppliers of blanket licences; this remains the case in most circumstances, and the right of referral is an important safeguard for SMEs and their representatives.

In the event that a licensee refuses to accept the terms offered by a CMO, the CMO has other options available. It can refuse to offer a licence, and may be able to make a complaint to the NCA if it feels the licensee has failed to negotiate in line with article 16 of the Directive. Conversely, the licensee will often have no other means to secure the ability to use the relevant works lawfully.

The Government's overall approach in this area is to support an effective licensing framework that delivers benefits to rightholders and users alike. We will continue to work with all interested parties to consider how this can best be achieved. This will include consideration of how the requirements regarding licensing and negotiating practice in Article 16 should be implemented in practice.

Monitoring and compliance

The Directive places an obligation on Member States to ensure that CMOs comply with its provisions by establishing an NCA to monitor compliance and impose sanctions where necessary. Several specific tasks and responsibilities are listed: these include reporting mechanisms for members, rightholders, licensees, CMOs and other interested parties with concerns; notification and reporting requirements; and participation in an expert group as required. The NCA must also ensure there is provision for monitoring implementation of the requirements for multi-territorial licensing, with mechanisms for co-operating with NCAs in other Member States. The Directive does not restrict Member States in their choice of NCA nor does it prescribe the way in which the Directive's requirements are monitored and enforced; only that the NCA should be in a position to address any concerns in an effective and timely manner and that any sanctions should be "effective, proportionate and dissuasive."

Options for a National Competent Authority

The Government has been exploring different options for the creation of a NCA: (a) creating a new regulatory body; (b) persuading an existing regulatory body to take on the role; and (c) having a dedicated team within the Intellectual Property Office (IPO).

Early signals from existing regulatory bodies suggested little appetite for taking on this work, while the relatively narrow scope of the Directive would make it difficult to justify the high cost of creating a new body. As such, the Government's favoured option at consultation stage was for a dedicated team within the IPO to take on the role. Although the IPO is not a regulatory body, its responsibilities in relation to the 2014 Regulations mean that it acts in a quasi-regulatory capacity. It would therefore appear reasonable to take advantage of synergies with its existing functions and expertise in collective rights management. To create a separate body or to expand the scope of an alternative economic regulator is likely to be a more expensive, more difficult way of proceeding and would likely take longer to set up. This is an important consideration as either the Government will need to absorb those costs (as the price of becoming a regulator), or pass them on to CMOs as compliance costs.

Questions

36. *What is your preferred option for the national competent authority? Please give reasons why.*
37. *Bearing in mind the scope of its ongoing responsibilities, what would you consider to be an appropriate level of staffing and resources needed? Please give an upper and lower estimate.*
38. *How should the costs of the NCA be met?*

Responses

Respondents generally agreed that the NCA should be hosted within the IPO. Given the existing expertise in the IPO and the obvious crossover with its policy responsibilities, there was felt to be no rationale for establishing a separate regulatory body, or hosting the NCA's functions within another existing body. Some respondents suggested that if the IPO took on the functions of the NCA, those functions should operate separately from the IPO's policy functions in relation to collective rights management.

Respondents who expressed views on staffing either felt that the estimate of 3-4 staff provided in the original impact assessment was a) appropriate, or b) too high. Some respondents suggested that 2 staff would be adequate. It was felt that the NCA would benefit from having access to legal expertise and expertise in copyright law, regardless of where it was hosted.

The majority of responses on costs felt that the Government should meet the costs of the NCA. This was felt to be appropriate both because it would prevent additional costs being passed onto rightholders, and because it would help ensure the independence of the NCA.

Government response

The Government notes these views, and welcomes the support for our preferred option of hosting the NCA functions within the IPO. Based on these responses, we do not believe there is a strong argument either for establishing a new body to perform these functions, or to host the functions within another existing body. We will reflect on staffing requirements and the relationship of the NCA team to other functions within the IPO (noting that there could be efficiency gains in allowing the NCA team to draw on expertise elsewhere in the IPO, and across Government).

We will provide updated figures on cost in the final Impact Assessment, which will reflect our updated view of workload for the NCA based on the compliance provisions that will form part of the transposing regulations. At present, we are minded to agree that the costs of the NCA should be borne by Government, but will consider whether the transposing regulations should retain a power to recover costs should these significantly exceed current estimates.

With regards to compliance, the Government will continue to consider options for the powers the NCA might need to ensure compliance with relevant provisions in the Directive. As a starting point, we will consider whether the sanctions provided for by the 2014 Regulations should be re-created in regulations implementing the Directive.

ANNEX A – List of respondents

Association of Independent Music	Federation of Small Businesses
Authors' Licensing and Collecting Society Limited	Independent Music Publishers European Licensing
Association of Learned and Professional Society Publishers	Libraries and Archives Copyright Alliance
British Association of Picture Libraries and Agencies	Mechanical Copyright Protection Society
British Academy of Songwriters, Composers & Authors	Music Managers Forum
British Copyright Council	Music Publishers Association
British Equity Collecting Society	NLA Media Access
British Phonographic Industry	Ombudsman Service Ltd
Creative Commons UK	Performing Right Society for Music
Copyright Licensing Agency Limited	Phonographic Performance Ltd
Publishers Licensing Society	Printed Music Licensing Limited
Design and Artists Copyright Society	Publishers Association
Directors UK	Sky UK Limited
Educational Recording Agency Limited	Soundreef
Entertainment Retailers Association	UK Music
Featured Artists Coalition	Universities UK

(N.B. Some respondents provided joint responses to the consultation. Two respondents provided confidential responses, and some other responses were part confidential.)

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