Collective Rights Management in the Digital Single Market:

Implementation of the EU Directive on the collective management of copyright and multi-territorial licensing of online music rights in the internal market: technical review of draft Regulations

Introduction

PRS is a collecting society with over 114,000 composer, songwriter and publisher members. We license, through our network of reciprocal agreements with other societies, the rights in over 14 million musical works by 2 million rightsholders. These rightsholders depend on copyright and our ability to license the use of their works to sustain their businesses and create new works which are so essential to the future success of the creative industries.

PRS has been supportive of the over-riding principles of transparency and accountability in the Directive through all stages of its development. We welcome the opportunity to comment on the technical review of the implementation of the Directive into UK law by the Government.

PRS is a 'collective management organisation' as defined by the Directive and the draft Regulations.

1. Do the draft Regulations correctly implement the Directive?

In so far as we understand the Government's intention was to 'copy out' the Directive, in the majority of instances, the draft Regulations achieve this objective. We note, however, the 'copy out' approach cannot always be followed precisely and as such this may have unintended consequences. As a specific instance the direct replacement of the term "Member States shall ensure" with "collective management organisations must ensure", has resulted in obligations on CMOs in areas where they have little or no power or control. Examples of these, and possible remedies, are set out in response to questions 4 and 11 below.

We have also noted some small but fundamental amendments to the text in the draft Regulations compared to the Directive. In many cases, it is unclear whether these differences are intentional, but in all cases they represent a material shift in the application of the Directive. As there are a number of these differences, we have set them out separately in the Annex A of this response.

2. Do you agree that the approach taken in the draft Regulations is consistent with that set out in the Government's response to the recent consultation?

We have identified a few new obligations in the draft Regulations which were not specifically considered in the IPO's consultation in February or the Government's

response to that consultation in July. These are addressed in our responses to the questions below.

3. Are there any additional consequences to this change that the Government should consider?

The Government's proposal to extend the definition of "licensing body" in section 116 of the Copyright, Designs and Patents Act 1988 ('CDPA') does not directly impact PRS or its activities as we already fall within the definition of "licensing body" in the CDPA.

4. Do you believe that Regulation 7 accurately and appropriately captures the Government's stated intentions in the consultation response?

We agree that Regulation 7 accurately and appropriately applies the Government's stated intentions in so far as Regulation 7 is applicable to PRS.

However, Regulation 7(1)(h)(iii) places an obligation on CMOs which they unable to satisfy because this is not within their power or control. This is due to the direct transfer of the obligation on Member States to CMOs. In respect of Regulation 7(1)(h)(iii), this has resulted in CMOs being required to ensure that proxy votes are cast by the proxy in accordance with the direction of the member appointing the proxy. In practice, CMOs have no involvement in the relationship between members and their appointed proxies beyond providing the mechanism through which proxies are appointed and can vote. We suggest, therefore, that Regulation 7(1)(h)(iii) be amended to reflect the role which CMOs play in the proxy process and be limited to the "mechanism which allows the proxy holder to casts votes in accordance with the instructions issued by the appointing member".

5. If you consider that you are a CMO or may be a CMO in the future, would you consider making use of the discretionary provisions in Regulation 7(5-11)?

PRS is a private limited company and is required under company law to have a general assembly of members, not a delegate assembly, which is required to make certain decisions about its activities, including the obligations set out in Regulation 7 of the draft Regulations. In addition, PRS does not only have members who are representatives of rightsholders. As a result we will not make use of the discretionary provisions in Regulations 7(5) to (11).

6. If you are a rightholder, do you have any concerns about the discretionary provisions in Regulation 7(5-11)?

We have no comments on this question.

7. Does regulation 9(4) provide appropriate protection to those dealing with CMOs, including by comparison to the equivalent provision of the 2014 Regulations?

Regulation 9(4) would place a new obligation on CMOs which is not a requirement in the Directive, and was not subject to consultation in February or the Government's response to that consultation in July.

Once implemented, the Regulations will move CMOs in the UK from a self-regulatory to a statutory regulatory model; voluntary commitments are replaced with legal obligations. Therefore, the mechanism in the 2014 Regulations, which was intended by the Government to provide reassurances to users and members that CMOs were implementing and adhering to their voluntary commitments, represents an unnecessary regulatory and cost burden on CMOs in a statutory regulatory environment. Not least because the "appropriate protections" which we understand the Government is seeking to achieve will already be enshrined in the rights established through the Regulations and underpinned by the comprehensive dispute resolution and enforcement processes in Part 4 of the draft Regulations.

8. Is this the most appropriate way to achieve the desired objective?

We do not believe the proposed draft Regulation 9 (4) is the most appropriate way to achieve, what we understand is the Government's objective, greater reassurance for users in their interactions with CMOs.

As currently drafted, draft Regulation 9(4) places on obligation on CMOs to train staff on all applicable obligations set out within the Regulations. This is an incredibly wide and disproportionate obligation as it would, for example, require all employees, consultants, and agents in the membership team to be trained on the legal obligations relevant to licensing, in which they have no day-to-day involvement.

We also believe such a staff training obligation is without precedent in other comparable regulatory frameworks, for example, retailers are not required to train their staff on their requirements under the Consumer Rights Act 2015.

Despite our concerns about the principle of including a staff training requirement in a statutory regulatory regime, if the Government can justify such a policy, any such obligation must be at the very least targeted and proportionate. We believe this could be achieved by integrating draft Regulation 9(4) into Regulation 37, so as to give the Secretary of State the power, through the compliance notice, to require a CMO to conduct staff training in the relevant section(s) of the Regulations which have been deemed to be non-compliant. This type of enforcement mechanism does have precedent, such as in the Consumer Rights Act 2015. We believe this would be a more appropriate way to achieve the desired approach.

9. Does Regulation 15(5)(d) provide an effective mechanism to oblige CMOs to maintain good standards of behaviour in their relations with users, such as those usually found in their existing codes of practice?

We understand the intention of Regulation 15(5)(d) is to ensure CMOs act in 'good faith' in our interactions with users. We have already made such a commitment in our voluntary Code of Conduct and behave in accordance with the relevant competition law principles; both of which we consider to prove effective mechanisms to maintain high standards of behaviour towards users.

We, therefore, do not think it is necessary to enshrine the obligation in Regulation 15(5)(d) in UK law, particularly as it is not a specific requirement in the Directive and was not subject to consultation in February or the Government's response to that consultation in July.

10. What do you understand by 'good faith' in this context?

Notwithstanding our reply to question 9 above, we refer the Government to our Code of Conduct[1] which states that we shall "deal with licensees fairly, honestly, impartially, courteously and in accordance with the terms of our licences, licensing schemes, tariffs and codes" and "transparently, by clearly understanding and explaining music licensing requirements". We believe this would represent a fair and reasonable interpretation of 'good faith'.

We would also caution against the importation of any 'good faith' meanings in existing law, since this is not a settled area and we consider that the obligations we owe in our Code of Conduct are most directly relevant to the Regulations.

11. Are there any important standards in this area which are not covered either by regulation 15, or other regulations in the implementing Regulations?

No, we do not consider that it is necessary or desirable to introduce any statutory requirement on CMOs in respect of the relationship between rightsholders and users. PRS and other CMOs have built and maintained many trusted and respectful relationships with users without the direct intervention of regulatory requirements. As such, we see no reason to go over and above the minimum standards which are guaranteed to users in the Directive.

In respect of Regulations 15(2) and (4)(b), we again note that the obligations being placed on CMOs are not matters over which they have full control or power. CMOs may enter into contractual discussions with users on the basis of both "fair and objective criteria" and "fair remuneration", although inevitably the negotiations are equally influenced by users' commercial objectives. Therefore, guidance in this area will need to reflect the extent which such CMOs can themselves determine the licensing terms and tariffs (i.e. that this cannot be determined unilaterally).

12. Do you agree that regulations 31-32 of the draft Regulations provide for a suitable complaint process for members, users, and other parties dealing with CMOs?

We agree that Regulations 31-32 provide a suitable complaints process for members, rightsholders, and affiliate CMOs, as required by the Directive; and users, as reflected in the Government's response to its consultation in July.

13. Do you have any concerns about the proposal to allow CMOs to make their own arrangements in relation to Alternative Dispute Resolution?

On the basis of the current systems available, we believe it is clear that CMOs can freely, fairly and objectively set out the arrangements for the provision of alternative dispute resolution.

14. Do you agree that the draft Regulations provide for an effective, proportionate and dissuasive sanctions regime?

In so far as the draft Regulations transfer the existing sanctions regime in the 2014 Regulations, we agree they provide a logical enforcement mechanism.

[1] http://www.prsformusic.com/codeofconduct/Documents/prs-for-music-code-of-conduct.pdf

We request the Government confirm, perhaps in the appropriate guidance, that remedies for non-compliance with the Regulations (including in respect of Regulation 33) are solely limited to the enforcement mechanisms contained in the Regulations (namely, in Part 4), rather than inadvertently providing any other causes of action that exist in law outside of the statutory remedies in the Regulations.

15. Do you agree that the Government should retain an exemption for micro-businesses for those provisions which are not explicitly required by the Directive?

PRS accepts the Government's approach for micro-businesses in so far as these businesses are not currently subject to the 2014 Regulations.

16. Based on the mechanisms for dispute resolution, complaints and enforcement set out in the draft Regulations, has your assessment of the likely workload of the NCA changed since the publication of the original consultation and Impact Assessment?

No.

17. Do the suggested amendments to the ECL Regulations capture the Government's stated intentions in its consultation response?

The suggested amendments appear to capture the Government's stated intentions.

18. Do the suggested amendments leave any misalignments between the draft Directive Regulations and the ECL Regulations, particularly with regard to protections for non-member rightholders?

The suggested amendments appear to be aligned with the ECL Regulations.

If you have any question about any of the issues raised in this response please contact us – policy@prsformusic.com

Annex A – Small Amendments with significant implications

Key Differences	**Comment**
Regulation 8(2)(c)(i) does not currently refer to Regulation 7(12), whereas Article 9(4)(a) specifically refers to Article 8(4).	We believe the Government may be deemed to be non-compliant in respect of Article 9(4) as the draft Regulation 8 does not currently allow the AGM to delegate director appointments and salaries to the Supervisory Board.
Regulation 15(5) makes reference to "*in particular*" whereas Article 16(3) refers to "*inter alia*".	We believe these two terms have fundamentally different meanings and the use of "*in particular*" unjustifiably places emphasis on the types of objective reasons that may be acceptable rather than illustrating that the list of objective reasons is non-exhaustive as would be the case by using "*inter alia*".
Regulation 15(5)(a) makes reference to "*without delay",* whereas Article 16(3) refers to "*without* ***undue*** *delay*" (our emphasis added).	We are not aware of any reason why the UK legislation should preclude the possibility there may be entirely reasonable and justifiable reasons why an immediate response is not possible.
Regulation 19 only applies in a limited way to IMEs – i.e. see Regulations 19(1)(b), 19(2)(b) and 19(4)(b) - whereas Article 2(4) refers to the whole of Article 20.	There seems no justifiable reason why an IME would not need to comply with Regulation 19 in respect of the rights it manages in the same way as CMOs.
We are unclear the extent to which Regulation 21(4)(i)(ii)(bb) is necessary in so far as it duplicates Regulation 21(4)(i)(ii)(cc), which better reflects the Annex, para 2(b)(ii), of the Directive.	We note this may be a possible unnecessary duplication.
Regulation 21(4)(j)(i) makes reference to "*total amount due"* whereas Annex, para. 2(c)(i), of the Directive refers to "*amount* ***attributed***" (our emphasis added).	There are many instances where we may have collected royalties but have yet to allocate them to the relevant rightsholder(s). In such instances these may be amounts "due" to a member, but as they had yet to be "attributed" we would be unable to report it. Therefore, we believe it is necessary to amend Regulation 21(4)(j)(i) to "amount attributed".
Regulation 25(2) refers to "*information without delay"* whereas Article 26 (1) refers to "***data or the*** *information…without* ***undue*** *delay"* (our emphasis added).	We accept it may be arguable that information and data are in this context likely to be materially the same. However, we see no reason why the UK legislation should appear to be more limited. We also see no reason why the UK legislation should preclude the possibility there may be entirely reasonable and justifiable reasons why an immediate response is not possible (see same point above).