Response from: **British Equity Collecting Society Limited (BECS)**

To: **Technical Review of draft Regulations to implement 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

BECS welcomes the opportunity to comment on specific impacts of particular drafting choices included in the draft Regulations and on areas within the CRM Directive on which the Government has yet to finalise its approach.

BECS is a collective management organisation which has been established as a company limited by guarantee under the laws of England and Wales to represent rights of the performers who are its members.

BECS is controlled by its members and is organised on a not for profit basis.

Guidance notes will be important to assist interpretation

BECS does not itself operate any licensing schemes within the United Kingdom.

As such, BECS is particularly concerned to see that the list of objective reasons referred to in Regulation 12 (3) (which may prevent a CMO from distributing or paying amounts to members within prescribed timescales) is not seen as exhaustive.
One of the most practical reasons why a payment to an identified performer may be delayed is because the contact details and/or bank details for making a payment have not been confirmed or have changed without the individual concerned informing BECS of a change. It would be helpful if Guidance notes could recognise this practical scenario.

Likewise, under Regulation 13 it must be recognised that not all overseas CMOs describe rights which they manage in the same way as others.

Whilst BECS can pass on the description of sources of collected revenues to members when payments are made, it must rely upon the descriptions applied by the CMO which collects the monies. Different descriptions applied to monies paid out will not be "discriminatory", merely repetition of information supplied to BECS.

Different levels of commission and management fees are applied by different CMOs reporting to BECS in this context.

Reconciling the proposed Regulations with reporting requirements applicable under company law will be important in terms of delivering the transparency aims of the CRM Directive provisions. This is seen as particularly important when addressing the role of performers who volunteer to take up the unpaid roles of non-executive directors on the Board of CMOs such as BECS.

It would be damaging to smaller CMOs if volunteers for board positions were dissuaded from taking up positions on a Board due to the Regulations requiring publication of levels of detail about their private affairs which go beyond usual corporate governance requirements. This is particularly true of the detail of individual payments which a member of BECS may be paid as a result of proper application of approved distribution rules in line with normal activity of the CMO. It is to be hoped that Guidance will recognise where reasonable commercial confidence, data protection and privacy laws may continue to be observed in this context.

Draft Regulations

Questions

1. Do the draft Regulations correctly implement the Directive?

It is helpful that many of the provisions within the draft Regulations repeat the wording of the CRM Directive.

However, because the draft Regulations also address a number of issues that have their origins in the way in which the Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014 were implemented within the UK, it is not always easy to see the elements of the Regulations that flow purely from the Directive and those which flow from current UK practice.

If these two sources within the Regulations could be highlighted clearly within any Guidance issued, this would be helpful.

A distinction in terms of the origin of a specific Regulation is believed to be particularly important when addressing the relevance of compliance notices and sanctions which should properly be related only to provisions originating from the CRM Directive itself.

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?

Yes although, as is identified in the technical review, a number of choices over potential options still have to be taken.

There are some instances where it is believed that repetition of the provisions within the Directive has translated into a potential obligation for a CMO to "ensure" certain results that are beyond any practical steps which a CMO might put in place.

For example, under draft Regulation, 7 (1) (h) the wording suggests that a CMO must **ensure** that a proxy holder casts votes in accordance with instructions issued by an appointing member. A CMO cannot dictate what a proxy member does. It can ensure that a proxy holder enjoys the same rights in the general assembly of members as those to which the appointing member would be entitled. Thereafter, the CMO can only enable and support the proxy holder being able to cast votes as the proxy holder has been asked or empowered to do.

Definition of 'licensing body'

The draft Regulations (regulation 44) make an amendment to section 116 of the Copyright, Designs and Patents Act 1988 ("the CDPA"), extending the definition of 'licensing body' in that section to include any organisation which meets the definition of 'collective management organisation' in Article 3 of the Directive. This amendment does not affect the ability of a licensee or prospective licensee to bring a dispute in relation to a proposed licensing scheme to the Copyright Tribunal. Amending the CDPA ensures that such a case can be brought to the Tribunal in a scenario where the party proposing the licence was a CMO for the purposes of the Directive, but not a licensing body for the purposes of the 1988 Act (because its main purpose was not the issuing of copyright licences, or was the issuing of licences on behalf of an entity other than the owner of copyright).

Questions

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

If a CMO does not currently operate as a licensing body for the purposes of the current CDPA, it is important that the new provisions do not "assume" roles and responsibilities for such organisations as "licensing bodies" above and beyond actual functions of the CMO in question.

This is particularly relevant to BECS, due to the way in which it has been established to enable statutory non-contractual payments collectively administered under the laws of countries outside the UK to be collected and administered by BECS for the benefit of the performers who make up the membership of BECS.

The General Assembly of members of collective management organisations (regulation 7) Regulation 7 of the draft Regulations is designed to implement Article 8 of the Directive, which sets out rules regarding the general assembly of members of a CMO.

In the response to the consultation, the Government set out its approach to the discretionary provisions in that Article:
• Not to implement the provision requiring the general assembly of members to set more detailed conditions on the use of rights revenue (Article 8(7)).
• To use the discretion allowing CMOs to choose alternative methods of appointing an auditor, insofar as this aligned with UK company law (Article 8 (8)).
• To use the discretion allowing CMOs to restrict the voting rights of members at the general assembly of members based on certain criteria (Article 8 (9)).
• Not to use the discretionary provision allowing for additional restrictions on the right of members to appoint a proxy (Article 8 (10)).
• To give further consideration to whether to use the discretionary provisions allowing for the powers of the general assembly of members to be exercised through other bodies, for example where a CMO does not have a general assembly of members owing to its legal form (Article 8 (11-13)).

Regulation 7 reflects these positions.

In relation to the discretionary provisions in Article 8 (11-13), the Government indicated that it would consider whether there was a need to use these provisions to ensure that CMOs could successfully comply with the Directive. This is because, for example, we recognise that the differing legal forms and structures of UK CMO's may mean that they do not have a general assembly of members that can meet the requirements of the Directive.

In the draft Regulations, provision is made in regulation 7 (5) and (6) to require the exercise of the general assembly of members' powers through the CMO's supervisory Board in such circumstances. This is designed to allow a CMO to comply with the obligations under the Directive without having to alter its legal structure.

Regulation 7(7) and (8) create provision to allow the general assembly of members' powers to be exercised through an assembly of delegates elected by members if the CMO decides this would be appropriate. The use of this provision would be dependent on the CMO ensuring fair and balanced representation of members in the assembly. Provision is also made in regulation 7(9) to (11) to allow a CMO whose only members are entities representing right holders (rather than right holders themselves) to comply with Article 8 by holding an assembly of the represented right holders. This may be a

valuable option where a CMO's membership is composed of representative bodies such as other CMOs (by allowing right holders to exercise decision-making power even where they are not direct members of the CMO in question).
The Government will make a final decision on whether these provisions are required following this review process.

Questions

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

Yes. It is particularly helpful that the Regulations have been prepared with a view to CMO's that are currently established as companies limited by guarantee under company laws applied within the UK, will not have to alter their legal structure purely for the purposes of compliance with the new rules.

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)?

No.

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

N/a

Maintaining current protections: staff training

The Government's response to the consultation set out the intention to retain certain protections which were not covered by the Directive, but which form part of the current domestic regulatory framework. One of the specified criteria Paragraph 4(a) in the Schedule to the 2014 Regulations places requirements on collecting societies in relation to staff training.

Regulation 9(4) of the draft Regulations is designed to create an equivalent provision. It requires CMOs to ensure that staff training includes training about compliant conduct.

Questions

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

Please see comments already made in response to question 1 (Guidance to distinguish the source of provisions that are above or beyond provisions required by the CRM Directive).

BECS believes that, as drafted, the Regulation goes beyond the relevant and proportionate provisions that lay behind the origins of recognising the importance of training within CMOs, recognised within publication of voluntary Codes of Practice developed by UK CMOs.

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

As currently drafted, Regulation 9 (4) might be argued as applying training obligations across staff within a CMO whose work is not really touched by the Regulations themselves.

It would be helpful if Regulation 9 (4) referred to the provision of "relevant and proportionate training about conduct".

If this is not considered acceptable, at the very least, Guidance should be published to allow for sensible lines over levels of training to be recognised.

Maintaining current protections:
'Good faith obligations'

The 2014 Regulations include several obligations regarding relationships between a collecting society and its licensees or potential licensees. For example, Paragraph 2 (h) and (i) of the specified criteria contains provisions requiring CMOs to treat licensees "fairly, honestly, impartially, courteously and in accordance with its rules and any licence agreement", and to consult and negotiate on the terms of any new or significantly amended licensing scheme.

The Government's view is that these provisions are most closely aligned with Article 16 of the Directive, which requires CMOs to negotiate in good faith with users on licensing schemes. However, the Directive only applies to the negotiation process, and does not directly address standards of behaviour in relation to ongoing relationships with users.

To address this, and to maintain an equivalent level of protection to that offered by the 2014 Regulations, Regulation 15(5)(d) of the draft implementing Regulations requires CMOs to treat users in good faith (in addition to the good faith requirement in relation to negotiations with users and potential users in regulation 15 (1)(a)). We will use guidance to set out our interpretation of what "good faith" requires in practice.
Our current view is that this requirement should provide an equivalent level of protection to that provided by Paragraph 2 of the specified criteria in the 2014 Regulations, as it can be said to cover the relevant elements of the specified criteria (such as fairness, honesty and impartiality).

Some other elements of the specified criteria can be linked to existing elements of the Directive (for example in relation to plain English: it should not be possible for a CMO to have complied with an obligation to provide information to a user unless that information is sufficiently clear). In these cases, we do not consider that discrete provisions such as those used in the specified criteria are required.

Questions

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?

BECS has concerns that the approach taken is rather too "broad brush" in terms of opening up options to challenge whether or not "good faith" has been applied in a wide range of circumstances.

As previously indicated, there are concerns about the importance of distinguishing where provisions in the Regulations originate as between the CRM Directive and other sources.

Guidance notes should make this clear.

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

Practical application of voluntary Codes of Practice is a means of reflecting understanding of good faith procedures, without the need for statutory provisions that might be held to imply terms within contractual negotiations before the scope has been identified.

This approach should be recognised as much as is possible.

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

BECS is concerned that the drafting of Regulation 15 (4) implies a potential obligation for reasonableness as a test which cannot be objectively justified.

How can a CMO "ensure" that tariffs proposed are reasonable as an absolute provision? There are many safeguards in place to test both the negotiation and application of published tariffs. These systems should be permitted to operate with any regulation recognising the commercial issues that lie behind proposals without a statutory requirement to "ensure" reasonableness.

Likewise, if BECS receives payments from other CMOs under representation agreements the "appropriate" nature of the payments made is decided by the distribution rules of the CMO that collects the payments from users.

Maintaining current protections: Complaints process and Alternative Dispute Resolution ("ADR")

The Government's response to the consultation set out that it was minded to require CMOs to maintain complaints procedures with access to an independent dispute resolution procedure for users and right holders, as well as for members. Regulation 31 makes provision for this, and section 31 (2) provides a non-exhaustive list of the types of matters that such a complaints procedure will be required to cover. It is intended that guidance will give further details on the matters to be covered by such a procedure, and the features of a compliant procedure.

This requirement will apply to all bodies which are CMOs for the purposes of the Directive (with the exception of a partial exemption for micro-businesses), and the Government anticipates that this will continue to be the primary mechanism for resolving complaints from individual members or licensees, or other parties.

As part of their existing obligations, CMOs with codes of practice which meet the specified criteria offer access to an independent ombudsman service for the arbitration of disputes.
The Government believes this is an important element of a CMO's responsibilities to its users, members and other parties.

Regulation 32 of the Implementing Regulations is designed to maintain this requirement. It would require CMOs to offer access to suitable ADR processes in relation to disputes regarding compliance with the Regulations. This provision also implements the requirement in Article 33 (2) of the Directive with regard to disputes regarding multi-territorial licensing.

We anticipate that in most cases, CMOs will choose to retain their current arrangements for dispute resolution – primarily, access to an ombudsman service in relation to complaints as prescribed by the British Copyright Council Principles

However, the Government does not intend to prescribe how these processes should be delivered, and intends to allow CMOs the ability to select suitable ADR offerings for different types of disputes. There will be a requirement for ADR systems to be independent and impartial, and failure by a CMO to provide access to such a system will be grounds for a complaint to the NCA under the Regulations.

Questions

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?

BECS believes that in considering Regulations 31 and 32 it is particularly important for those interpreting the Regulations to understand the origin of provisions and the instances where they do not link to express provisions within the CRM Directive.

In particular, Guidance is needed to help ensure that the concept of how right holders who are not members of a CMO might be deemed to have a "direct" legal relationship with it is clear and generally understood.

BECS operates through a number of representation agreements in place with CMOs who are based and operate under the laws of other EU Member States and elsewhere in the world. It would be helpful if it was clear from the Guidance that "direct" representation does not interfere with or contradict the principle that a performer expects their individual direct relationship to be with the CMO which they mandate to represent their rights (and not another CMO with which the appointed CMO has representation agreements in place).

There is also a concern over the way in which the drafting might be held to suggest that availability of information that is really only relevant to the relationship between a CMO and its members might be demanded by users as a means of raising complaints about membership terms of a CMO (which are in practice not relevant to users).

Some reassurance over the making available of only relevant and appropriate information (with an eye to compliance on other legal obligations such as data protection laws and observance of commercial confidentiality provisions) should be linked to the Regulation.

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

The voluntary background behind the preparation and publication of most of the UK CMOs Codes of Practice should not be forgotten.

Whilst founded upon common principles the different sizes and styles of CMOs are important when considering the practical application of good conduct models.

In this context, the ability for CMOs to set up and apply appropriate and proportionate ADR procedures to different circumstances (taking into account reasonable cost provisions) will be important going forwards.

BECS believes it is important that draft Regulation 32 (1) acknowledges that, whilst the option for submission of disputes to independent and impartial disputes resolution procedures can be recognised, this should not be to the exclusion of use of alternative

internal or other legal dispute resolution processes being applied and used in line with agreed costs allocation rules.

Sanctions and Enforcement

Article 36 of the Directive requires that member states designate a National Competent Authority ("NCA"), with the ability to take 'effective, proportionate and dissuasive' measures against a party who breaches their obligations under the Directive.
The draft
Regulations designate the Secretary of State as the NCA. In practice, this means that the IPO will carry out the monitoring role.
The 2014 Regulations established a process to deal with failure to adopt or comply with a suitable Code of Practice. Under this system, the Government had the power to impose a suitable code on a licensing body that failed to introduce one itself. Continued breach of such a code could then result in sanctions including a financial penalty. Given that this system has been subject to recent consultation, we propose to transpose large elements of it to create a sanctions regime for the Directive.
In the event of an alleged breach of the Regulations implementing the Directive by a collective management organisation, the process will generally work as follows:

• Complainant contacts the NCA with details of the alleged breach

• NCA investigates the breach, and may seek further information from relevant parties (including whether, if appropriate, the complainant has sought redress through the CMO's internal complaints procedure and the outcome of that process).

• If NCA considers that enforcement action is required (for example, following a breach causing substantial harm, or following evidence of systemic or repeated breach), the Regulations allow it to either:

a. Issue a compliance notice which may require the CMO, amongst other things, to end the breach.
b. Issue a financial penalty to the CMO or a senior figure within the CMO of up to £50,000.

In the large majority of cases, we anticipate that this would be a two-stage process: i.e. that a financial penalty would only be applied following a repeated or continued breach after the issuance of a compliance notice. Regulation 37 (4) makes provision about this. The Government believes that this system provides for an effective and dissuasive set of powers to promote compliance with these Regulations, while retaining the ability to act proportionately through the ability to issue a compliance notice in the first instance, and by encouraging the resolution of simple complaints through a CMO's own complaints procedure. Guidance will provide more detail about the NCA's approach to complaints.

As with the 2014 Regulations, the draft Regulations provide for a right of appeal in the event that a financial penalty is imposed. The draft Regulations also make provision on related issues, such as a duty on the Secretary of State to consider evidence presented to them about a breach of the Regulations, and a power to request information.
It should also be noted that the ability to take enforcement action extends to any party with obligations under these regulations: for example, this could include action against a user who fails to provide a CMO with relevant information as required by section 16.

As set out in the consultation response, the Government would only expect to consider taking such action where there was a general public interest argument for doing so.

Questions

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

BECS believes that Guidance along the lines of the comment issued in the commentary for the technical review should be published to show the importance of "proportionality" for and financial penalties which may be imposed.

If Regulation 38 (1) could refer specifically to imposition of "a proportionate financial penalty" this would be helpful.

There is also a concern that Guidance is needed to reconcile the range of persons listed in the Directive and transposed into Regulation 38 (2) with company law rules for allocation of responsibilities to directors or managers who are legally responsible for the operation to a CMO operating through a company limited by guarantee.

Clarification of duties attaching to individuals as Directors of a company (even though the same people may act as representatives of "members") in the context of Regulation 38 (2) will be important.

Likewise, clarity should be provided over the responsibilities of "officers or managers" of a company continuing to be reflected by application of usual corporate governance rules.

It is assumed that the Regulations are not expected to impose a "new" layer of regulatory responsibilities being directly applied to such officers or managers within CMOs which may somehow contradict rules for internal corporate compliance?

Micro-businesses

The 2014 Regulations exempt any licensing bodies who are micro-businesses from the requirement to implement a code of practice that meets the specified criteria. The Directive has no equivalent exemption for micro-businesses, and so the majority of the relevant provisions in the Directive will apply to CMOs which are micro-businesses. However, the Government proposes to maintain a limited exemption for micro-businesses in relation to provisions in the Regulations which are outside the scope of the Directive itself. This exemption would cover:

- Regulation 9(5) (staff training)
- Regulation 15 (5)(d) (good faith in relation to licensees)
- Regulation 31(exemption applies only to complaints process for users)
- Regulation 32 (ADR provision except where required in relation to multi-territorial licensing)

The Government believes this approach is consistent with its policy to minimise burdens on micro-businesses, and reflects the position taken during the development of the 2014 Regulations. This will not prevent such businesses from taking action that 11 would comply with these provisions (and they may wish to do so either as part of Collective rights management in the Digital Single Market
own policy).

Questions

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?

The draft Regulations address a number of issues that have their origins in the way in which the Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014 were implemented within the UK, rather than being directly linked to the CRM Directive.

Therefore it is not always easy to see the elements of the Regulations that flow purely from the Directive and those which flow from current UK practice.

If these two sources within the Regulations could be highlighted clearly within any Guidance issued, this would be helpful. Retention of any such provisions would then be clearly and more easily identified when the scope of any possible micro-business exemption is considered.

Beyond this, the distinctions that were made for the 2014 Regulations have not led to CMOs "avoiding" the issue of Codes of Practice.

The concern is more how "gold-plating" Regulations applicable within the UK may put UK "micro business" CMOs at a disadvantage over similar organisations operating within other EU Member States.

Funding the NCA

In the consultation response, the Government stated that:
'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.'

We do not intend to include express provision for the recovery of costs in the Regulations at this time. However, we will keep the cost of the NCA under review, and will consider whether alternative funding mechanisms are required in the event that costs significantly exceed current estimates. These costs will of course be largely dependent on the workload of the NCA. Any change to funding mechanisms which would impact on stakeholders would be subject to consultation.

Questions

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?

BECS welcomes the approach being taken. Practical application of the BECS Code of Practice has not led to any demand for revising the assessment of the likely workload of the NCA since publication of the original consultation and Impact Assessment.

The only variation that is difficult to confirm relates to the subjects on which external legal advice may be needed to ensure compliance going forward.

Extended Collective Licensing

BECS members do not grant mandates that would support BECS offering any ECL relevant to laws applicable within the United Kingdom at the present time.

November 2015