

# **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

## **RESPONSE FROM NLA MEDIA ACCESS LIMITED**

10 November 2015



NLA media access is a collective rights management organisation owned by 8 national newspaper groups. NLA currently holds mandates from 240 newspaper and magazine publishers to license organisations to copy content from their publications, and has reciprocal agreements with overseas reprographic rights organisations for representation of rights in each other's territory. NLA additionally operates a database, holding copies of articles from certain publications, which enables it to supply data efficiently to media monitoring agencies for their services to their clients. Further information can be found at [www.nlamediaccess.com](http://www.nlamediaccess.com).

### **Draft Regulations**

1. *Do the draft Regulations correctly implement the Directive?*

We note, and are pleased that, as indicated by Government in its response to the Consultation, the draft regulations are mainly a copy out of the Directive. We feel that this is important to maintain a 'level playing field' with other European CMOs.

As regards the importation of certain provisions from the 2014 Regulations, we acknowledge that Government indicated that they would be looking to do this in their Consultation Response, but we think certain of these provisions do not sit easily within the context of the Directive (e.g. staff training and complaints to the competent authority as discussed below).

We also think that there are certain points of the draft Regulations which could be clearer, but understand 'Guidance Notes' are being prepared to help explain the provisions (for example - Clause 9 (Collective management organisations : management) - we do not think it is clear who is meant by 'persons who manage its business'. However we believe that this provision is only intended to relate to Board Members and this will be clarified in the Guidance Notes). We hope that there will be an opportunity to comment on the Guidance Notes before publication.

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 – subject to the comments made in this response.

### **Definition of 'licensing body'**

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

The definition closely follows that set out in the Directive. Some concerns have been expressed that as it is a wide definition there might be some non-CMO organisations who get caught in the definition – but it is important that the definition is sufficiently wide so that all relevant bodies are subject to the Regulations.

### **The General Assembly of members of collective management organisations (regulation 7)**

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

As was stated in the consultation it is important that it is recognised that CMOs have different corporate structures and so the provisions regarding General Assembly should reflect this and take in to account the general requirements of UK Company Law. Whilst this has, of necessity, resulted in a detailed set of provisions, these are appropriate to the complexity of the corporate structures and differing membership criteria. We are pleased that Government has included the discretionary provisions.

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)?*

If appropriate, yes we would consider making use of these provisions.

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**

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

Whilst acknowledging that appropriate staff training was one of the 'Specified Criteria' included in 2014 Regulations, and has been included in these Regulations as it is a protection for users not covered elsewhere, as drafted the provisions set out in clause 9(4) could be read as implying that all staff need to be trained on the minutiae of the directive – which we do not believe is the intention. If it has to be included in the Regulations (and it is not clear why it is deemed necessary) the obligation to train staff has to be appropriate and proportional to their function within the organisation. Getting this balance right is particularly important as the inclusion of this provision in these Regulations makes it a statutory obligation and subject to the sanctions.

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

Whilst we are not aware of any other industry that has an equivalent statutory obligation to engage in staff training and such an obligation is really more appropriate to codes of practice, if it is really felt necessary and appropriate to retain this obligation in the Regulations it does need to be qualified as discussed above.

#### **Maintaining current protections: 'Good faith obligations'**

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?*

If Government thinks it is necessary to include an obligation to 'treat users in good faith' after giving a licence (noting that this is not a requirement of the Directive, and we are not aware of any particular problems in this area requiring a statutory solution) is difficult to opine on whether or not this is an effective mechanism as it would need to be tested to prove its efficacy. However we think that there may be a danger with such a broad obligation that it could lead to an increased number of unjustified complaints, as there are differing views on what constitutes 'good faith' in a particular context.

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

As 'good faith' is not defined, and is really an abstract term, it should be understood to have the commonly understood meaning in this context – which is to deal fairly, openly and honestly with the matter in hand.

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

NLA does not believe that there are any other important standards that should be included, noting that CMOs remain subject to standards set out in other statutes, for example fraud, data protection, privacy and it is our understanding that it is not the intention of these Regulations to affect existing obligations.

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

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?*

Regulation 31 complies with the requirements of Article 33 of the Directive, but the Directive only refers to this obligation applying to ‘members and collective management organisations on whose behalf they manage rights...’. We think there is scope for confusion in expanding the scope of this clause, particularly including ‘users’ as, whilst we agree that CMOs should provide a clear complaints procedure for users, including them in this provision means it could be read that users are to be able to make complaints about the points set out in 31 (2) – which do not really concern them.

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

No. We believe that CMOs have proved that they can make their own arrangements.

### **Sanctions and Enforcement**

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

Apart from the general concern that the inclusion of these provisions goes beyond what is required by the Directive, the main comment we have is that, as stated in 38 (2), financial penalties may be imposed on ‘managers or similar officers’ without any clarity as to the level of personnel who could get caught by this provision (noting that the Directive requires that sanction measures should be ‘proportionate’).

### **Micro-businesses**

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?*

It is not clear why ‘micro-businesses’ are exempt from certain of the standards of behaviour Government have deemed necessary to include (e.g. acting in good faith).

### **Funding the NCA**

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 - as long as it is made clear in the Guidance that the CMO published procedures have to be followed (including that complaints should in the first instance be made to the CMO).