RESPONSE TO UK GOVERNMENT TECHNICAL REVIEW

OF DRAFT REGULATIONS TO IMPLEMENT THE EU DIRECTIVE ON COLLECTIVE MANAGEMENT OF COPYRIGHT AND MULTI-TERRITORIAL LICENSING OF ONLINE MUSIC RIGHTS

1. INTRODUCTION

1.1 PPL welcomes the opportunity to respond to the UK Government's technical review of the draft Collective Management of Copyright (EU Directive) Regulations 2016 (referred to in this Response as the "**Regulations**") which seek to implement EU Directive 2014/26/EU on the collective management of copyright and multi-territory licensing of online music rights (the "**Directive**").

1.2 This Response includes general comments on the draft Regulations (set out in section 2 of this Response) together with comments on the specific questions posed by the technical review document (the "**Technical Review**") (set out in section 3 of this Response). Under separate cover, PPL will also be submitting drafting comments, by way of a marked-up copy of the draft Regulations.

1.3 PPL notes that Government is not re-consulting on the policy underlying the Regulations, but is instead focusing on the legal effectiveness of the Regulations and the way in which they implement Government policy. Accordingly, PPL's comments in this Response are similarly focused.

2. GENERAL COMMENTS ON THE DRAFT REGULATIONS

In PPL's opinion the Regulations, on the whole, follow a reasonable approach to implementation of the Directive. We note that there are a number of provisions that go beyond the requirements of the Directive and we comment on each of these in more detail in response to the questions below.

Before turning to the specific Technical Review questions, PPL wishes to make some important general comments, on the following topics:

- The importance of the proposed, Government-issued guidance on the Regulations;
- Certain unintended adverse consequences arising from the *"CMOs must ensure…"* drafting formula that is used in the Regulations, which place inappropriate obligations upon CMOs;
- A drafting issue with regulation 12(9), relating to non-distributable monies, which potentially creates a materially different outcome from that which the Directive intends.

Government-issued Guidance on the Regulations

PPL notes that the Government intends to deal with a number of important matters concerning the interpretation of the Regulations in separate (non-statutory) guidance. PPL further anticipates that, where the Government is minded to make changes following the Technical Review process, Government may likewise contemplate doing so as part of its guidance (rather than addressing all such changes in the drafting of the Regulations).

PPL would encourage the Government not to unduly dismiss the option of inserting such clarity, or making such changes, in the Regulations. However, we recognise that, for at least some matters, the guidance may be the most viable way of addressing such points. Consequently, the promised accompanying guidance will be of significant importance and we welcome the indication in the Technical Review that stakeholders will be given the opportunity to contribute to the guidance.

Pending that opportunity, and on a preliminary basis, PPL considers that the matters to be covered by the guidance should at least include the following:

- Guidance on the process for making complaints to the NCA, factors the NCA will take into account when considering such complaints and the typical steps they will take in dealing with complaints. This should include explicit encouragement to users, members and rightholders that, if they have complaints about a CMO, they should in the first instance use that CMO's internal complaints processes and (if appropriate) any dispute resolution procedures that they make available.

- Guidance in order to provide certain clarifications around the rights of rightholders set out in Regulation 4, including relaying of important principles regarding these rights as are set out in the recitals to the Directive, such as the role of CMOs in setting the rights, categories of rights, types of work and other subject matter that they manage. (See further PPL's response to the Government's main consultation on implementing the Directive.)
- Guidance on which persons are considered "the persons who manage the business" of a CMO, for the purpose of the Regulations (with regard to provisions such as recital 25 of the Directive, which indicates that it is a director-level concept, albeit which caters for different potential CMO forms and structures across Europe).
- Guidance on what the obligation to act "in good faith" contained in Regulation 15 includes (and does not include) in practice (see also PPL's comments in section 3 below on Technical Review questions 9-11).
- Guidance on the types of information that users may be expected to provide under Regulation 16.
- Guidance on the types of dispute resolution procedure that would satisfy the obligations placed on CMOs by Regulation 32 (see also PPL's comments in section 3 below on Technical Review question 12).
- Guidance on what is meant by "discrimination" under the Regulations, particularly in respect of regulations 5(2), 13 and 15(2). Specifically, discrimination in this respect can only reasonably be interpreted as meaning "unfair discrimination" and it would be helpful for this to be how the NCA approaches it and for this to be confirmed in guidance.
- Guidance on timescales, in terms of what stakeholders can expect will be in place in April 2016 as compared to those aspects of the Regulations which will only have practical effect at a later date (e.g. the timing of a CMO's first general assembly or Annual Transparency Report under the Regulations). This should include clarity on timescales for the process in regulation 12(7)-(9) relating to identifying and locating rightholders and the first "collection year" to which this applies.

Clarifying these points and timescales in this way will be important to help manage stakeholder expectations appropriately as regards what a CMO must do (and by when) in order to be compliant. Otherwise there is a risk of unnecessary and inefficient demands being made of both CMO complaints processes and NCA resources, through stakeholders complaining about what they (erroneously) perceive as non-compliance.

Drafting issue: Inappropriate obligations placed on CMOs

There are certain elements of the Regulations which attempt to implement Directive requirements by placing the obligation upon CMOs (*"A collective rights management organisation must ensure…"*), but which do so in cases where this is not actually required by the Directive (which instead places the obligation on Member States) and where achieving the particular objective of the Directive is not fully within CMOs' direct control.

In these cases, the Regulations do not achieve correct implementation of the Directive, as CMOs cannot fully ensure the objective that the UK, as a Member State under the Directive, is obligated to secure. These cases also cause unhelpful and presumably unintended consequences:

- One example of this issue, as regards proxies, is identified in PPL's response to Technical Review question 4 (see section 3 of this Response below).
- A further example, with the potential for much more significant adverse consequences, relates to the role of CMOs in providing alternative dispute resolution (ADR) and this is discussed in more detail in PPL's response below to question 12.
- Another example, and one which again has potentially severe consequences, occurs in regulation 15(4), and is discussed in this part of the Response in the absence of an applicable Technical Review question.

Regulation 15(4) provides, (in broad terms) in relation to the setting of tariffs, that the CMO *"must ensure"* that (a) right holders receive appropriate remuneration for the use of their rights and (b) tariffs for exclusive rights are reasonable in relation to the economic value of the rights and the CMOs services. The placing of this obligation solely upon CMOs is not required by the Directive. Furthermore, it is not within the powers of CMOs to fully ensure that these objectives are achieved, as the tariffs and licence terms that are ultimately agreed are a matter of negotiation and consultation between CMOs and licensees and licensee representatives, and are also subject to review by the Copyright Tribunal.

The inclusion of this provision in the Regulations also seems to create a right of complaint to the Secretary of State if a member believes that a CMO has not secured appropriate remuneration for the use of their rights, or if a user believes that the tariff is not reasonable (on the basis that the CMO would therefore be alleged to be in breach of regulation 15(4). The former type of complaint is surely inappropriately broad and outside of the expertise of the NCA. The latter type of complaint is affected by the same considerations and also cuts across what it already the exclusive jurisdiction of the Copyright Tribunal, pursuant to Part I, Chapter VII of the Copyright Designs and Patents Act 1988 ("CDPA").

In PPL's opinion any consideration of the value of rights should be considered by a specialist tribunal with appropriate expertise and that it is therefore not appropriate to create a right of complaint over these matters to the NCA. It is also inappropriate and unhelpful to create parallel processes which may conflict and be overly onerous. This seems to be an unintended consequence of how regulation 15(4) has been drafted, but one which is important for the final Regulations to fix.

In PPL's opinion, Part I, Chapter VII of the CDPA, and the jurisprudence of the Copyright Tribunal under that chapter, already fulfils the UK's obligation (as a Member State) to "ensure" the matters required by the relevant provision of the Directive, in that the Copyright Tribunal is bound to consider the appropriate remuneration for rightholders and the economic value of the rights and the service provided by the CMO. PPL therefore believes that no amendment to UK law is actually required in respect of this requirement of the Directive. Alternatively, the relevant wording of the Directive could perhaps be added to the CDPA, in the form of refining the role of the Copyright Tribunal.

Drafting issue: Treatment of non-distributable monies

Although the Regulations generally replicate the wording of the Directive wherever possible, one subtle but notable exception occurs in regulation 12(9). This regulation provides that, after the attempts to identify and locate rightholders as set out in that regulation, the *"CMO must ensure that amounts due to right holders are treated as non-distributable"*. The relevant part of the Directive merely says that these monies are "deemed non-distributable".

This may be an important difference. Under the Directive the effect of the monies being deemed non-distributable is that they must be treated in accordance with an appropriate policy agreed by the general assembly, but there is nothing to prevent that policy including, at least in part, continuing attempts to find the correct right holder. Conversely, the wording of the regulation suggests that this continuing attempt to find the right holder may not be permissible (because the monies must be treated as non-distributable). This would be a retrograde step, as PPL is still often able to find appropriate right holders between three and six years from the end of the distribution period (and, PPL understands, other CMOs make similar progress during those later years). Furthermore, as monies continue to accrue to a work in respect of usage over many years, even if some monies become "non-distributable" under this provision, there will be other, more recent monies in respect of the same work that are still distributable. The CMO will continue to seek out the correct rightholder for this more recent money, and it would not be helpful, when the rightholder is identified or located, if certain of the monies still within the legal limitation period, nevertheless *must be treated* as non-distributable.

A more appropriate provision (more in line with the requirements of the Directive) would be for regulation 12(9) to state that where the relevant conditions (as currently set out) are satisfied then the CMO will treat the money in accordance with the general policy on the use of non-distributable amounts as decided on by the general assembly of members, pursuant to regulation 7(1)(d)(ii).

3. RESPONSES TO TECHNICAL REVIEW QUESTIONS

3.1 PPL's responses to the Technical Review questions are set out below. Definitions used in the Technical Review documentation have the same meaning below unless expressly stated otherwise.

GENERAL

1. Do the draft Regulations correctly implement the Directive?

It is not for PPL to answer this question definitively, but we have included some observations below which we hope are helpful.

To a large extent the Regulations copy out the provisions of the Directive. All of the relevant elements of the Directive are replicated or adapted in the Regulations and the requirements of the Directive therefore largely appear to be correctly implemented. One notable exception to this occurs in regulation 21 where the required timescale for publishing the annual transparency report has not been carried over from the Directive to the Regulations.

The Directive is mostly framed in terms of requirements that Member States must ensure are complied with. In general the Regulations convert this into an obligation on each CMO to ensure that the requirements are complied with, which, together with a sanctions and enforcement mechanism to ensure that CMOs comply with the requirements placed upon them, generally achieves correct implementation of the Directive.

However, as explained in more detail in this Response, there are certain provisions of the Directive where the objective that the Member State is required to achieve is not (or not fully) within the CMO's power, and yet the Regulations place the obligation upon the CMO to ensure the objective is achieved. Accordingly, these elements of the Regulations do not successfully implement the Directive. In these cases the Government should consider an alternative method of achieving the required objective.

Section 2 of this Response above also identifies a potential drafting issue in relation to regulation 12(9). There are additionally a number of other, minor drafting errors in the Regulations. PPL will highlighted these in the marked-up copy of the Regulations that it will submit under separate cover.

Some of the provisions of the Regulations intentionally create obligations upon CMOs that go beyond the requirement of implementing the Directive. The Government's consultation asks specific questions regarding each of these provisions and comments are provided in this Response on each of these individually.

Lastly, as noted in PPL's submission to the Government's main consultation on implementing the Directive, there is a very important clarification contained in Recital 56 that the provisions of the Directive are without prejudice to *"any other relevant law in other areas, including confidentiality, trade secrets, privacy, access to documents, [and] the law of contract".* It would be helpful for this to be expressly stated in the Regulations (as well as in the Government's guidance). It is also an important point to which the NCA should have regard, when assessing post-implementation compliance.

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?

The Government response to the recent consultation indicated that the Government intended to *"copy out the Directive into UK law as far as possible, and look to minimise burdens on business by avoiding any unnecessary 'gold-plating' of the Directive's new requirements."* It also intended to reflect on whether to maintain some protections in the existing domestic regulations. In general, and subject to comments made in this Response, PPL agrees that the approach taken in the draft Regulations is consistent with this approach.

However, PPL considers that it is important not to lose sight of which provisions of the Regulations are derived from the Directive, and which are carried across (in an adapted form) from the 2014 regulations (the latter being referred to in this Response as "Non-Directive Requirements"). For example, the principles of interpretation that apply to EU directives should not be applied to Non-Directive Requirements, and if the NCA was considering an allegation of non-compliance with a Non-Directive Requirement, it would not be appropriate to have the same regard to the requirements of the Directive as would apply to other provisions.

PPL therefore considers that any provisions of the Regulations which comprise Non-Directive Requirements should be easily identifiable as such on the face of the Regulations. To this end, PPL recommends either that these Non-Directive Requirements provisions are set out in a separate part of the Regulations, or that an additional regulation be included which lists which regulations comprise Non-Directive Requirements.

DEFINITION OF "LICENSING BODY"

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

PPL notes the Government's proposed amendment to section 116 of the CDPA, to ensure that "licensing body" as defined in that section encompasses a CMO as defined by the Directive. PPL is already a "licensing body" for the purposes of section 116, and is not aware that this change will have any additional consequences upon PPL. (PPL understands that this change may have consequences for some other CMOs, but PPL does not comment in this regard.)

THE GENERAL ASSEMBLY OF MEMBERS OF COLLECTIVE MANAGEMENT ORGANISATIONS

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

In PPL's opinion, regulation 7 effectively implements the requirements of the Directive, with one minor exception. The Directive requires that proxy holders must cast their votes in accordance with the instructions issued by the appointing member. Regulation 7(1)(h)(iii) seeks to require that *CMOs ensure* that this objective is achieved. However, this is not within the full control of CMOs and therefore the Regulations do not secure the objective required by the Directive. The Companies Act 2006 already places the requirement on a proxy to vote in accordance with any instructions given by the member by whom the proxy is appointed (S324A) and so it would seem there is no need for additional regulation on the subject.

The Government also stated that its intention was to take advantage of flexibilities in the Directive to give CMOs more choice about how they operate. In this regard, PPL welcomes the inclusion of regulation 7(4) which introduces a flexibility that is essential to ensuring fair and balanced representation of members' interests in the running of CMOs.

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)?

In the interest of providing fair and balanced representation of members' interests, PPL's constitutional rules already provide for voting shares at the general assembly of members to be calculated by reference to the amounts received or due to the member. PPL will continue to make use of this system, pursuant to the discretion afforded by regulation 7(4).

Regulations 7(5) and 7(9) (and therefore regulations 7(6), 7(10) and 7(11)) do not apply to PPL. Further, PPL does not anticipate making use of the discretionary provisions in regulation 7(7) and therefore regulation 7(8) would not apply to PPL.

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

PPL does not make any comment in response to this question, as it is not best placed to do so.

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?

PPL notes that regulation 9(4) is, in itself, a Non-Directive Requirement, albeit that CMOs would be likely to make appropriate use of staff training in any event, as part of the steps they take to maintain compliance with the Directive.

PPL already provides training to its staff on the rights of members and on appropriate customer service standards, and will continue to do so following the coming into force of the Regulations. Similarly, where PPL works with third party companies as an additional resource for contacting businesses about music licensing, it provides appropriate training on licensee customer service (and PPL's complaints process).

However, the wording of draft regulation 9(4) goes further than is required in that it does not distinguish between the elements of the Regulations which may be relevant to particular members of staff but not others, or allow flexibility as regards the type or extent of such training that is suitable for different categories of staff. That is exacerbated by the fact that the Regulations cover a much larger "checklist" of compliance than was required under the 2014 regulations regime from which the staff training requirement is being imported.

In practice, CMOs will usually have different departments carrying out different functions, and with a hierarchical management structure – meaning that "one size fits all" training for everyone, on all aspects of compliance with the Regulations, would be disproportionate, inefficient and inappropriate, For example, the appropriate training for a developer of back office software engaged by PPL would not necessarily be the same as the training required for staff with responsibility for licensing transactions. Similarly, *"agents and representatives"* (who must also be trained, under draft regulation 9(4)) is very broad. CMOs are likely to work with a range of third parties which technically fit those descriptions, and it will not be the case that all aspects of the Regulations are relevant to the services being provided by all of those third parties.

PPL wishes to be both effective and efficient in its staff training and in light of the above considerations it would therefore be helpful for the Regulations to make clear that staff training should be relevant, proportionate and appropriate to the roles of a CMO's employees, agents and representatives.

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

While PPL is firmly committed to providing appropriate training to staff, it should be noted that a specific legal obligation to train staff on other legal obligations is, to say the least, relatively unusual. PPL is not aware of another, comparable example in UK legislation.

PPL would therefore ask that, if this provision is retained, its unusual nature should be noted when the NCA is considering any enforcement procedures. In such instances, the NCA should bear in mind that it is not a requirement for which a standard process for demonstrating compliance exists and therefore the particular way in which it may be (validly) complied with is likely to vary from CMO to CMO.

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?

The available evidence demonstrates that CMOs are already maintaining good standards of behaviour in their relations with users. The report from last year's Independent Code Review found that CMOs were compliant with their Codes of Conduct, that their complaints and disputes processes appeared to be working, and that complaints to ministers were at a low level that was not of concern. The Government has similarly stated publicly that complaints are low. PPL continues to publish its complaints statistics, and in 2014 received just 78 complaints from licensees (representing just 0.02% of PPL's total interactions with licensees during the year). Ombudsman Services has not been required to consider and make a decision on any complaints against PPL (and similarly PPL understands that Ombudsman Services has had to consider very few complaints arising from dealings with any other CMOs).

That said, PPL has no objection in principle to the Regulations retaining the concepts of CMOs treating users fairly, honestly etc – which we understand (based on the Technical Review documentation) is what the proposed "good faith" duty in draft regulation 15(5)(d) is seeking to achieve.

However, from a technical perspective, we have some comments on the proposed drafting approach. We do not quite follow the logic of why it is necessary to convert the previous wording from the 2014 regulations into a "good faith" duty, simply because "good faith" is a concept used in the Directive. If the Government is going to use the "good faith" wording, it is very important that its meaning is clearly and consistently understood.

Without that clarification, the wording of regulation 15(5)(d) is particularly open to interpretation. There is a risk of this provision being interpreted too widely by licensees and prospective licensees, which could lead to unreasonable complaints or requests. In turn, that could damage the functioning of an effective licensor-licensee business relationship, and create a disproportionate burden and inefficiency not just in the operation of CMO complaints processes but also the NCA's compliance function.

The guidance that is due to be issued by the Government will be of particular importance in determining whether this provision is, in practice, an effective mechanism. It is important that some clear boundaries regarding what "good faith" does and does not involve should be put in place.

For example, it should be made clear that this does not alter the fact that the licensor-licensee relationship is an "arm's length" commercial relationship where normal principles such as commercial confidentiality and legal privilege continue to apply. It should also be made clear that it does not override obligations owed to others, such as those relating to protection of personal data, and that "good faith" does not constitute anything approaching "utmost good faith".

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

Acting in good faith, in this context, means to act fairly, reasonably, honestly and impartially. These principles have formed the basis of the Codes of Conduct put in place by CMOs, which have in turn been part of a successful effort by CMOs to improve service standards and manage complaints. We note that the Technical Review documentation indicates that this is the meaning which the Government is intending, and that it is simply using the phrase "good faith" because it already appears in the Directive.

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

PPL does not consider that the Regulations need to go any further in this regard. To introduce or retain more stringent requirements as regards dealing with licensees could place UK CMOs at a competitive disadvantage as compared to other European CMOs. As noted in PPL's submission to the Government's main consultation on implementing the Directive, it is significant that the Directive sets out certain user-facing obligations and does not go further. Also, as noted in response to question 9 above, the evidence does not support the need for any further safeguards in the UK.

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?

PPL wishes to comment separately on regulation 31 (complaints) and regulation 32 (ADR).

<u>Regulation 31</u>

As noted in response to question 9 above, the available evidence demonstrates that complaints to UK CMOs are low, and that they are being dealt with effectively by CMOs and the processes that are currently in place. PPL envisages that regulation 31 will broadly enable CMOs to continue providing equivalent complaint processes for members, rightholders, other CMOs and users, and in this regard the regulation allows for suitable complaint processes.

PPL notes that the matters which the complaint procedures must cover, set out in draft regulation 31(2), are wider than the matters that fall under the complaint procedures required by the 2014 regulations. This arises from how the Government has sought to combine the scope of the complaint procedures from the 2014 regulations with the types of complaint listed in Article 33 of the Directive. The resulting drafting may cause confusion and a lack of clarity. Not all of the complaint subject-matters set out in regulation 31(2) are relevant to all of the categories of complainant types set out in regulation 31(1), and CMOs should be given flexibility to take account of this in its compliant procedures. For example, the Directive does not intend for users to be able to complain about membership terms, or CMO deductions and distributions, but regulation 31 implies otherwise. Unfortunately PPL's experience is that some users do raise "complaints" about these matters in bad faith, as a way of seeking to distract from, and delay any enforcement of, their obligation to obtain a licence.

Regulation 31 is therefore a good illustration of the general point made by PPL in response to Technical Review question 2, about setting out Non-Directive Requirements separately within the Regulations. It would also be helpful for Government guidance to expressly acknowledge that CMOs need to have reasonable flexibility in terms of how to deal with different combinations of complainants and complaint subject-matters, especially as regards vexatious complaints. Indeed, arguably a complaint procedure cannot be properly "effective" (as required by the Directive) without such flexibility

Regulation 32

PPL notes that:

- Article 34 of the Directive states that *"Member States may provide"* that disputes regarding the provisions of national law adopted pursuant to the requirements of the Directive can be submitted to alternative dispute resolution (ADR). Except in relation to Title III matters (under Article 34(2) of the Directive), this provision is therefore optional. It is not an obligation upon CMOs to ensure a particular outcome.
- Article 35 of the Directive goes on to *oblige* Member States to ensure that disputes between CMOs and users can be submitted to a court or other independent body with IP law expertise.
- The Government's stated policy position is to *"maintain the current level of protection".* The Technical Review explains that draft regulation 32 is specifically designed to maintain the existing role played by Ombudsman Services.

Against that backdrop, there is a risk that regulation 32 is inadvertently and inappropriately broad (or at least of being perceived as such). This arises from the drafting formula that a CMO *"must ensure"* that disputes concerning compliance with the Regulations can be submitted to independent and impartial dispute resolution procedures. The concern here is twofold:

Firstly, the responsibility to "ensure" ADR should not fall squarely and solely on the CMO, without qualification. That is not what the Directive requires and it is unworkable in practice. For example, the Government has previously indicated that the IPO's own mediation service is one of the options that parties in the UK might wish to use. However, a CMO cannot influence the availability of such a service, or ensure that it will be available. Similarly, a dispute might be such that Ombudsman Services declines jurisdiction over it, which would again be beyond the CMO's control. It would not be appropriate for a CMO to be considered to be in breach of regulation 32 in such circumstances. The Government's policy position appears to be simply that CMOs should play their part – within a larger portfolio of ADR options in the UK – by continuing the current Ombudsman Services arrangements and offering other ADR options as appropriate. Rather than a "must ensure" obligation, it would better reflect Government policy for regulation 32 to refer to CMOs offering ADR, on terms which it considers fair, reasonable and proportionate (which in practice will mean that members make this decision, through their fair and balanced participation in CMO decision-making). To go any further would not meet the Government's stated policy objective, would potentially have far-reaching unintended consequences, and would constitute "gold-plating" given what Article 34 actually says.

Secondly, a "must ensure" obligation might be argued to oblige the CMO to bear the complainant's costs of ADR (on the basis that, otherwise, it is not ensuring that the dispute can be submitted). A number of the types of disputes that could arise under the Regulations would require substantial expert technical or legal knowledge. The making available and operation of such processes would involve substantial internal resource and external cost. As these requirements are not imposed by the Directive (except as regards the multi-territorial licensing of online rights in musical works, under Title III), there is a risk that the imposition of such costs on CMOs would have an unfair adverse impact on the CMO's members and put UK CMOs at a competitive disadvantage as compared to other European CMOs.

Consequently, PPL would ask the Government to clearly provide that the CMO is not obliged to make available such services at the CMOs own cost, but rather that the costs of any such dispute resolution procedure shall be borne by the parties to the dispute in accordance with normal principles applying to the relevant form of dispute resolution.

This will also be particularly important in the context of disputes arising in the course of negotiation with users, as an ability for one side in a commercial dispute to require the other side to bear a disproportionate share of the costs of dispute resolution would significantly undermine the appropriate balance of power in negotiations. PPL notes that the dispute resolution procedures will only apply to disputes regarding compliance with the Regulations, and therefore, subject to the point made in section 2 of this Response regarding regulation 15(4), the dispute resolution procedures should not cover matters such as the reasonableness of licences or tariffs. However, the Government should make this limitation clear in the accompanying guidance and, for safety, PPL recommends that provisions are included in the Regulations to make it clear that the regulation 32 requirement should not apply to any matter within the jurisdiction of the Copyright Tribunal.

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

Please see our comments above in response to Technical Review question 12.

SANCTIONS AND ENFORCEMENT

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

PPL has commented below on these provisions as they apply to CMOs.

Proportionality

PPL welcomes the various safeguards built into the proposed sanctions regime, and the Government's stated intentions (i) that enforcement action would be primarily reserved for cases of systemic or repeated breach, or breach causing substantial harm and (ii) that financial penalties would only be applied following repeated or continuing breaches after issuance of a compliance notice. It is important that the sanctions regime acts as a deterrent (as opposed to being punitive for the sake of it) and affords a CMO a reasonable opportunity either to explain why an alleged breach is not a breach, or put right a breach which has genuinely occurred.

In this regard, it would be helpful for Regulations 37(2) and 39(2) to make it clearer that compliance notices and financial penalty notices will explain the *reasons why* the Secretary of State believes a provision has not been complied with (not just stating which provision it is). Related to this, PPL notes that Regulation 37(3) allows the Secretary of State to rescind a compliance notice but does not set out the process for this to happen. PPL would ask that the Secretary of State therefore takes appropriate steps to be satisfied that a breach has occurred (including informally raising the matter with the CMO) before issuing a compliance notice, and that a clear process is set out in the Regulations for a CMO to apply to the Secretary of State for rescission of a compliance notice under Regulation 37(3).

Whilst it is hoped that the Government will seldom need to use the sanctions regime, it nevertheless remains important to ensure proportionality across all steps of the process, given the potentially severe effect of a financial penalty, and so as not to be counter-productive to other aspects of the Directive. For example, from the perspective of fair and balanced decision-making within a CMO, it would be a shame if individuals who might otherwise be willing to take part in the management of a CMO (e.g. by standing for election as a director), were deterred by what was perceived to be a disproportionate sanctions regime. Against that backdrop, PPL would highlight two specific respects in which the sanctions regime set out in the Regulations fails to be proportionate (as the Directive requires):

Firstly, the power of the Secretary of State (under regulation 36) to require persons to supply information or documents should be limited to only proportionate requests (and allow a proportionate timescale for the CMO to respond). In order to be an "effective" regime, the Secretary of State needs a reasonable ability to obtain the information it needs to assess an allegation of non-compliance. However, in order to be proportionate, the Secretary of State should, for example, seek to identify whether the allegation is genuine and made in good faith by a genuinely interested party, before requiring a CMO to undertake what could be the time-consuming and cost-intensive process of responding to an information request. Regulations 36(4) and 36(5) deal with legal professional privilege and self-incrimination respectively, but those exceptions to Regulation 36 are too narrow. Many procedures of CMOs are highly technical and detailed, and certain matters, particularly as regards licensing, will be commercially sensitive and confidential. Collation and provision of information may therefore be burdensome, and in some cases contrary to the legitimate interests of the CMO (or its members and/or licensees).

Secondly, regulation 38(2) is not proportionate. Whilst the Directive does create certain obligations upon directors, managers or similar officers and members managing a CMOs affairs, these obligations are specific and limited. It is therefore disproportionate to retain a power to impose financial sanctions upon such persons in relation to breaches of other provisions of the Regulations, as regulation 38(2) does. Even where a person belongs to the category of persons to whom a breached obligation applies, it does not follow that it would be proportionate to impose "strict liability" sanctions on that person regardless of any culpability by them personally in relation to the breach.

PPL would therefore ask that both regulation 36 and regulation 38(2) be amended to expressly include proportionality, and that this should then be expanded upon in Government guidance.

Sanctions in relation to Non-Directive Requirements

In the context of sanctions, it is important to note that the provisions of the Regulations that are intended to maintain existing protections for licensees will in principle create a direct right of complaint to a governmental authority (the NCA). In this respect, the Regulations do not "maintain" those existing protections but instead make them more stringent. This should be borne in mind when considering the appropriateness of the sanctions and enforcement measures set out in the Regulations, and how the NCA will operate in practice.

PPL therefore welcomes the reference in the Technical Review (at page 9) to the NCA potentially asking whether the complainant has sought redress through the CMO's internal complaints procedure, and also the acknowledgement (at page 10) of the importance of encouraging resolution of complaints through a CMO's own complaints procedure. PPL would ask the Government to include appropriate wording to this effect in any guidance it issues in relation to the process by which people may raise a complaint with the NCA. Similarly, the NCA should take account of whether complainants have first made use of the CMO's procedures, when assessing any complaint made to the NCA and considering whether any enforcement action by the NCA is appropriate. This is important so as to encourage the most efficient and effective use of CMO and NCA resources, in relation to resolving any issues of non-compliance with the Regulations.

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?

PPL does not make any comment in response to this question, as it is not best placed to do so.

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?

PPL's assessment of the likely workload of the NCA has not changed since PPL's response to the original consultation. We are pleased that the Government has not included provision for the recovery of costs from CMOs (and therefore from its members) in the draft Regulations.

EXTENDED COLLECTIVE LICENSING

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

PPL does not make any comment in response to this question, as it is not best placed to do so.

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?

PPL does not make any comment in response to this question, as it is not best placed to do so.

PPL
10 November 2015