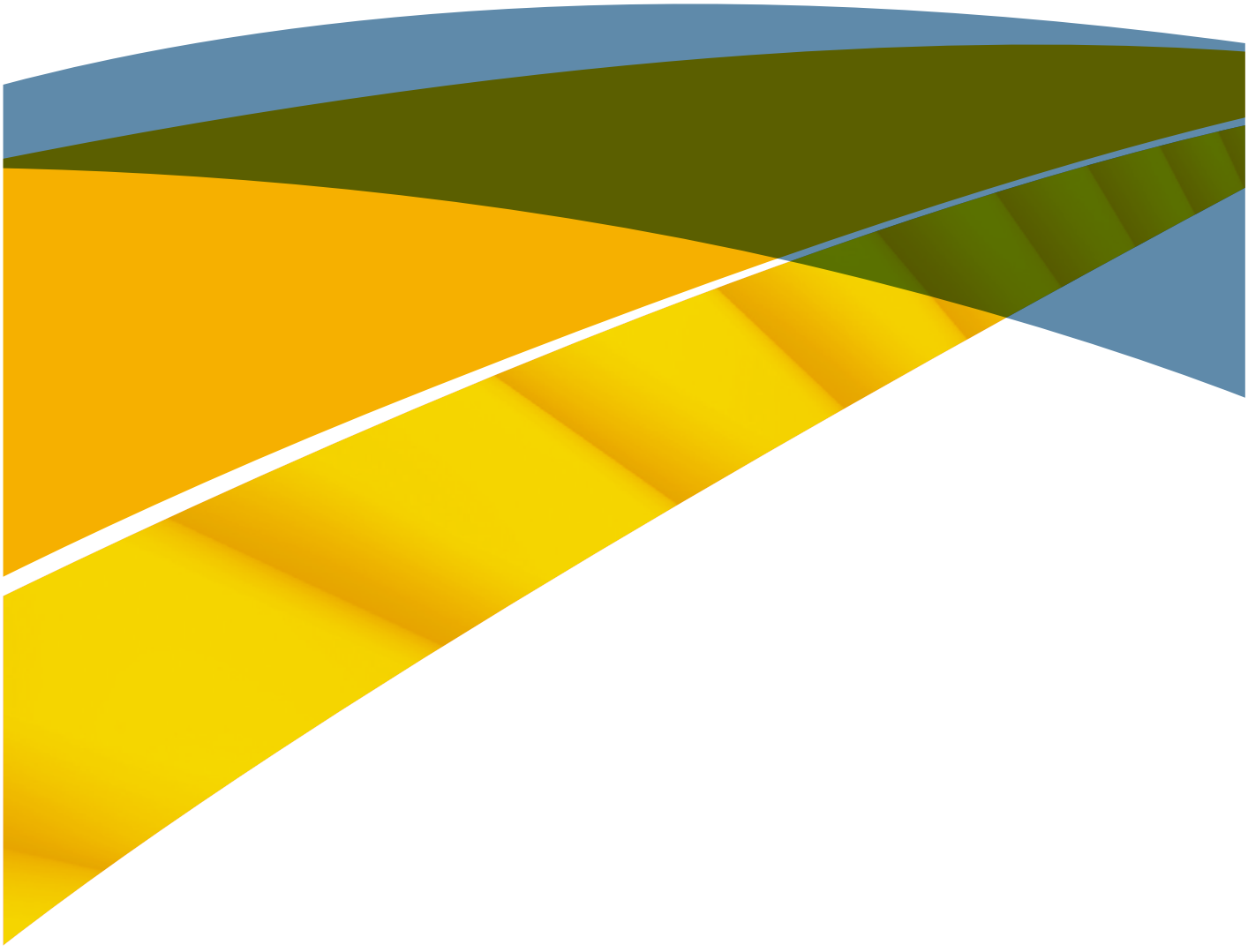
Intellectual Property Office

Guidance on the Collective Management of Copyright (EU Directive) Regulations 2016

(February 2016)



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Contents

About this guidance

1. This guidance is primarily addressed to organisations which fall under the definition of "collective management organisation" in The Collective Management of Copyright (EU Directive) Regulations 2016 (the "Regulations")[1]. Collective management organisations ("CMOs") are the group on whom most of the obligations in the Regulations fall. However, this guidance will also be of interest to others who have rights and responsibilities under the Regulations, including independent management entities ("IMEs"), users, right holders, and members of CMOs.

2. The examples used in this guidance seek to illustrate some of the potential effects of the Regulations. However, they cannot cover every situation and it may be necessary to carefully consider the relevant legislation to see how it applies in your circumstances.

3. The guidance only covers key issues in specific areas of the Regulations.

4. The guidance sets out the views of the IPO on the operation and possible effects of the Regulations. It does not impose any legal obligations in itself and is not a statement of the law. It should not be used as a substitute for obtaining legal advice.

5. Separate guidance on the overlap between the Regulations and The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014 (the "ECL Regulations")[2] was published in April 2016.

6. Any questions about this guidance or other issues regarding the application of the Regulations should be addressed to: Collective Rights, Intellectual Property Office, Concept House, Cardiff Road, Newport, NP10 8QQ (collectiverights@ipo.gov.uk).

1 http://www.legislation.gov.uk/uksi/2016/221/contents/made

2 http://www.legislation.gov.uk/uksi/2014/2588/contents/made

How to use the guidance

1. This guidance is split into an introduction and four Parts.

2. The introduction provides some background to the Regulations, including their interface with the UK's former self-regulatory framework, and their scope.

3. Each of the following four Parts corresponds to a part of the Regulations.

4. Part 1 covers two of the key definitions in the Regulations.

5. Part 2 deals primarily with matters around membership, transparency, governance, distributions and licensing. It explains some of the requirements around corporate structure, the participation of members, when and how a CMO should disclose information, and the distribution of rights revenue. A section on licensing covers matters such as licensing negotiations and provision of data by users to a CMO. This section will be of interest to users and CMOs alike.

6. Part 3 deals with the multi-territorial licensing of online rights in musical works. It describes the minimum quality of cross-border services provided by a CMO, including in relation to transparency of repertoire represented and accuracy of financial flows related to the use of rights.

7. Finally, Part 4 covers matters around enforcement, including complaints and alternative dispute resolution procedures and penalties for non-compliance. It provides information on minimum requirements for complaints procedures and the procedure should a CMO be found non-compliant. This Section also explains the role of the National Competent Authority (the "NCA") and how it will investigate complaints.

Introduction

1. The Regulations came into force on 10 April 2016.

2. One of the Regulations' core objectives is to ensure that CMOs act in the best interests of the right holders they represent. Placing minimum standards of governance, financial management and transparency on all CMOs, are some of the ways in which the Regulations aim to do this.

3. Another of the Regulations' key objectives is to improve market conditions for the take up of online music services across borders. The Regulations do this by supplementing the level playing field for those CMOs that wish to engage in the supply of multi-territorial licences in musical works for online use.

4. The Regulations' provisions for improved transparency and governance broadly complement previous UK legislation for the regulation of domestic CMOs (or "relevant licensing bodies", as they were known in the legislation). The Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014[3] (the "2014 Regulations") required UK CMOs to adhere to codes of practice that comply with minimum standards of governance and transparency set by the Government. UK CMOs were required to self-regulate in the first instance, but Government had a reserve power to remedy any failure to self-regulate and impose sanctions where appropriate. The 2014 Regulation were repealed when the new Regulations came into force.

5. Although the 2014 Regulations have been repealed, CMOs may maintain voluntary codes of practice that reflect their obligations to right holders, users and others. Most CMOs have indicated that the codes of practice have been a useful interface between themselves and those they have obligations to, so the Government would encourage their retention. However, there is no obligation to do so.

3 http://www.legislation.gov.uk/uksi/2014/898/contents/made

6. The majority of the Regulations apply to CMOs. This includes CMOs which are micro-businesses, which were previously outside the scope of the 2014 Regulations.

7. Some of the information and transparency requirements also apply to IMEs, entities which were also previously outside the scope of the 2014 Regulations. Those requirements are listed in **Annex A**. There are also obligations on users, members and right holders.

Part 1: Interpretation and Application

This Part explains two of the key definitions in the Regulations: that of "collective management organisation", upon whom many of the obligations in the Regulations fall, and that of "right holder".

1. What is a "collective management organisation" (CMO)?

The definition

CMOs are organisations which are authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of *more than one right holder*, for the collective benefit of those right holders, as its *sole or main purpose*, and which fulfils one or both of the following criteria:

(i) owned or controlled by its members

(ii) organised on a not for profit basis

Interpretation

CMOs are known colloquially by a number of terms, including licensing bodies and collecting societies.

The "management" of copyright and related rights referred to in the definition, includes the granting of licences to users, auditing of users, monitoring of the use of rights, enforcement of copyright and related rights, collection of rights revenue derived from the exploitation of rights and the distribution of amounts due to right holders. CMOs enable right holders to be remunerated for uses (usually high volume) which they would not be in a position to control or enforce themselves, including in non-domestic markets. CMOs also allow users to buy licences covering some or all of their mandating right holders' repertoire, thereby enabling users to use a range of works without negotiations with each right holder.

Organisations which represent right holders and are themselves members of other CMOs can still be CMOs under the Regulations, if they fall under the definition of a CMO.

CMOs are free to choose to have certain of their activities, such as the invoicing of users or the distribution of amounts due to right holders, carried out by subsidiaries or by other entities they control. In such cases the CMO will still be responsible for compliance with the Regulations. Entities which mange copyright, but which are not themselves CMOs but are owned or controlled in whole or in part by a CMO, may be subject to the requirements of the Regulations.

Example: a picture library, representing a number of photographers, licenses both images for individual photographers and images on behalf of more than one photographer by way of collective licences. The picture library's sole or main purpose is the licensing of images by individual photographers.

Because the picture library is neither owned or controlled by its members nor organised on a not-for-profit basis, it cannot be a CMO.

Because the licensing of images on a collective basis is not its sole or main purpose, the picture library also does not fall within the definition of an IME.

Example: Z is a company which is part owned by a CMO. Z's main purpose is to provide accommodation for tourists. Z decides to undertake, as a side-line, the management of copyright for right holders. If these activities had been undertaken by its part owner CMO they would have had to be conducted by the CMO in accordance with the Regulations. Because Z is part owned by a CMO, Z will be subject to the obligations of the Regulations in relation to its copyright management activities.

2. Who are “right holders”?

The definition

A right holder is any person or entity, other than a CMO, that holds a copyright or related right or, under an agreement for the exploitation of rights or by law, is entitled to a share of the rights revenue.

Interpretation

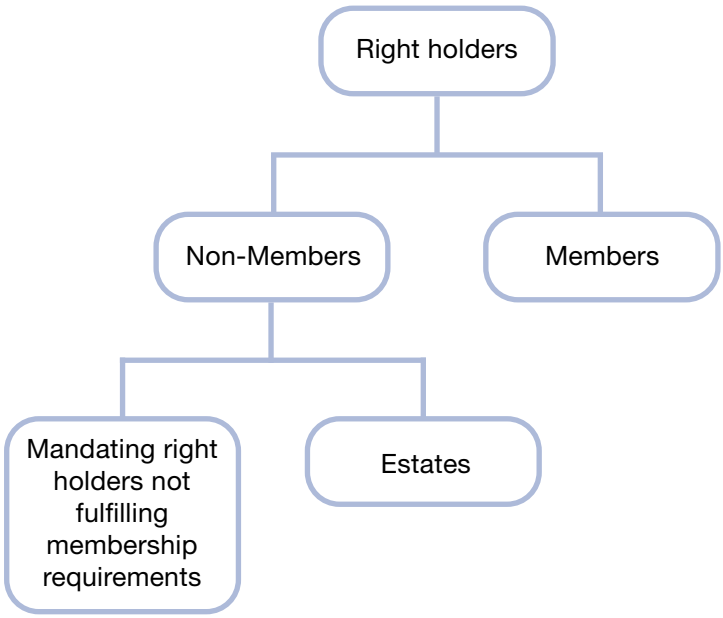
Right holders may be separated into two categories: member right holders and non-member right holders.

The Regulations place minimum obligations on CMOs in relation to all right holders, whether or not they are member right holders. These are supplemented by more detailed obligations in relation to member right holders.

Examples of a non-member right holder include one or more of the following non-exhaustive categories of right holder:

- right holders who have given a CMO a mandate to manage their rights but are not a member of that CMO
- liquidators
- trustees-in-bankruptcy
- a non-mandating right holder in an ECL scheme

Fig 1: an example of the types of right holder found in one CMO



Example: a CMO collects rights revenue for its own members, mandating right holders who aren't members, the members of other CMOs with whom it has a representation agreement, and right holders in an ECL scheme which it has been authorised by the UK Government to operate.

Except for those right holders whose rights are being managed through a representation agreement, all of these right holders would qualify as right holders under the Regulations in respect of that CMO. Accordingly, all obligations placed on CMOs towards right holders in the Regulations apply.

The Regulations make separate provision for CMOs which have representation agreements with each other. These obligations centre on deductions, the timeliness of payments, and the provision of information.

It should be noted that in the ECL Regulations, CMOs face additional obligations in relation to non-mandating right holders in an ECL scheme. These are explained more fully in the guidance document dealing with the overlap between the Regulations and the ECL Regulations.

Part 2: Collective management organisations

Section 1: rights of right holders

A CMO has an overarching obligation to act in the best interests of the right holders it represents. Collective management should allow a right holder being able to freely choose a CMO for the management of their rights, provided that the CMO already manages those rights for other right holders.

Obligation to act in right holders' best interests

1. A CMO has a general obligation to **act in the best interests of the right holders whose rights it represents** and **not impose on right holders any obligations which are not objectively necessary** for the protection of their rights and interests or for the effective management of their rights (Regulation 2(4)).

2. Acting in right holders' best interests means that a CMO should always put itself "in the shoes" of its right holders and should not put other interests above those of right holders. It may mean that a CMO's obligations to its right holders do not stop with specific obligations in the Regulations. For example, the Regulations do not cover membership fees, but a CMO may feel that it is in the best interests of the right holders it represents to keep a renewal fee (where one is applied), at a fair level that reflects the administration cost of processing an application.

3. A CMO may feel that the detailed governance arrangements in the Regulations – for example, the ability of all (qualifying) members to vote at the General Assembly, or the obligation to ensure fair and balanced representation of the categories of members in the decision-making process – effectively capture the spectrum of right holder viewpoints and provide a bulwark against any failure to act in their best interests. Nonetheless, even where a CMO's governance arrangements are fair and robust and comply fully with provisions in the Regulations, the general obligation must always be kept in mind. Broadly, a CMO which acts in the best interests of its right holders is likely to be open and responsive to them, canvass their views where necessary, act in a timely fashion, and not impose on them any obligations which cannot be said to be objectively necessary.

4. CMOs should bear in mind that there may be a multiplicity of right holder interests, which may in turn mean that acting in right holders best interests is not a straightforward determination. In this regard, governance arrangements should help – for example, there is a requirement for fair and balanced representation of right holders in the decision-making process. However, a potential multiplicity of viewpoints may mean that the obligation to act in right holders' best interests can be fulfilled without necessarily meeting the preferences of all right holders.

Obligation to manage rights

5. Right holders have the right to authorise a CMO of their choice to manage their **rights, categories of rights or types of works and other subject matter of their choice** (the "Copyright Material") (Regulation 4(a)). Furthermore, the CMO must agree to the management of a right holder's Copyright Material, unless it has **objectively justified** reasons to refuse management (Regulation 4(b)).

6. The fact that a right holder is in another country *does not* qualify as an objectively justified reason to refuse management.

7. Where the management of the Copyright Material falls outside the CMO's **scope of activity**, this *does* qualify as an objectively justified reason to refuse management (Regulation 4(b)).

8. When looking to find a CMO to manage their Copyright Material, right holders should consider factors such as the relevance, or match, between the CMO's scope of activity and the Copyright Material they want managed. Right holders have a number of ways in which to find this information:

    - a CMO's scope of activity is a question of fact and is usually – but does not have to be – reflected in its statute. A CMO's statute is the memorandum and articles of association, the rules or documents of constitution of a CMO. Under its transparency obligations, a CMO must ensure that its statute is made publicly available. When looking to find a CMO to manage their Copyright Material, right holder's may want to follow this avenue first.

    - within its scope of activity, a CMO may subdivide the types of Copyright Material it manages for rights management and licensing purposes. CMOs often require management of all of a right holders' Copyright Material within a particular category of Copyright Material, as may be defined by a CMO in its statute or membership terms.

    - there are additional transparency obligations requiring a CMO to make available to right holders, upon request, information regarding the works it represents and the rights it manages (Regulation 19(2)(a) and (b)).

9. Right holders should be able to choose from CMOs based on information they must make available as part of their **transparency obligations**. For example, a CMO's **annual transparency report** (Regulation 21), its **statute** and **membership terms** (Regulation 20(3)(a) and (b)), will contain detailed information on financial performance, membership criteria and governance, and must be made public. Right holders will also be able to interrogate a CMO's general policies on distribution, management fees and deductions, and its complaints handling and dispute resolution procedures, all of which also have to be made public (generally, Regulation 20(3)).

10. There is no obligation for the CMO to provide an explanation for its refusal to manage a right holder's Copyright Material.

11. Fig 2 describes the process by which a CMO may manage a right holder's rights and thereafter admit them into membership.

Example: Flight, a Spanish publisher of musical works used in airport lounges, approaches Peterson, a UK CMO whose statute states that it manages the rights of any music publisher regardless of where or how those rights are used. However, Peterson refuse to manage Flight's rights because they say that they do not represent publishers of musical works used in airport lounges.

Managing the rights of music publishers such as Flight appears to be within Peterson's scope of activity and unless they have some other objectively justified reason for refusing management, they should manage Flight's rights.

Part 2: Collective management organisations

Section 2: rights withdrawal, and granting licences for non-commercial uses

Allowing a right holder to withdraw his rights from a CMO is a key provision of the Regulations. This promotes competition amongst CMOs and allows right holders the freedom to choose a CMO, to manage their rights. Right holders should also have the right to grant licences for non-commercial uses of their Copyright Material and CMOs should take necessary steps to ensure right holders can exercise the right to grant licences for such uses.

Withdrawing rights from a CMO's repertoire

1. Right holders must be allowed to remove their Copyright Material, from a CMO **upon serving reasonable notice not exceeding six months** (Regulation 4(d)). However, a CMO may decide, at its discretion, that termination may take effect only at the end of the financial year operated by the CMO. This means – and assuming for the purposes of this example that a financial year is the same as a tax year – that a right holder could give a CMO notice in June that they want to remove a particular category of right from the Copyright Material they have authorised the CMO to manage within the notice period set out by the CMO. It then follows that the CMO must either agree to that request or allow withdrawal to take place only at the end of the financial year.

2. A CMO cannot make it a condition of withdrawal that the right holder entrusts another CMO of its choice with the withdrawn Copyright Material (Regulation 4(f)). A CMO must also pay a right holder for any uses of that Copyright Material up until the termination of authorisation (Regulation 4(e)).

3. Right holders have the right, for example, to remove a particular set of rights or type of work (which may be defined, for example, in the statute or membership terms agreed by the General Assembly), from the Copyright Material but leave the remainder for the CMO to carry on managing.

4. The Regulations do not make provision for the removal of *individual works* from a CMO's repertoire or from specific licences. However, a CMO may, at its discretion, allow right holders to do this.

Granting licences for non-commercial uses

5. Right holders should have the right to grant licences for non-commercial uses of their Copyright Material. This may be achieved through withdrawal of rights relating to non-commercial uses from a CMO's repertoire. It may also be achieved through other means, such as non-exclusive grants of rights to a CMO, a limited licence back to the right holder or a limited grant of agency to the right holder, so long as these means effectively secure this right for right holders.

6. As with the removal of Copyright Material more generally, the Regulations do not specifically make provision for the granting of licences of *individual works* for non-commercial uses. However, a CMO may, at its discretion, allow right holders to do so. In considering what process it puts in place, a CMO may have regard to the requirement in Regulation 3 to act in the best interests of its right holders, and in doing so may need to consult with right holders appropriately.

7. As with rights withdrawal more generally, right holders can grant licences for some rights or types of work for non-commercial uses, subject to any conditions set by a CMO.

8. It is a requirement of the Regulations that:

   - before obtaining the consent of a right holder to manage their rights; and
   - in respect of a right holder whose rights it already manages

the CMO must inform that right holder of **the conditions** attached to the withdrawal of Copyright Material for non-commercial uses (Regulation 4(h) and Regulation 4(i)).

9. The Regulations do not define "commercial" or "non-commercial". Whilst this is a question of fact, and may be articulated in a CMO's statute or membership terms, CMOs and right holders may wish to consider definitions used in other areas of copyright licensing[4].

4 To take two examples, the definition of "non-commercial" at page 2 of Creative Commons UK's response to the consultation on implementation of the CRM Directive: https://www.gov.uk/government/consultations/implementation-of-the-collective-rights-management-directive; or the definition of "commercial" found at page 11 of the Government's "Orphan Works Licensing Scheme - overview for applicants" document (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450649/Orphan_Works_Licensing_Scheme_Overview_for_Applicants.pdf)

The process of withdrawing Copyright Material, and the granting of licences for non-commercial uses

10. Whilst the right to withdraw Copyright Material or grant licences for non-commercial uses both need to be set out in either a CMO's statute or its membership terms, the conditions attached to those rights do not need to be. The Regulations make no provision as to the cost, process or speed with which right holders can grant licences for non-commercial uses. With regard to the withdrawal of Copyright Material, there is provision as to notice periods, but otherwise no specific obligations in relation to process or cost. The requirement for CMOs to act in the best interests of right holders may nevertheless be relevant.

11. A CMO may wish to include any conditions in its membership terms or statute (or otherwise make them publicly available) to ensure the greatest transparency and interrogation of those conditions. In any case, further to point 7 above, it must either notify existing right holders of those conditions, or notify right holders of those conditions before obtaining their consent to manage their rights.

12. Although the process for the withdrawal of rights is largely a matter between a CMO and its right holders to decide, the CMO must have regard to its general obligation to act in the best interests of right holders and not impose obligations which are not objectively justified. Matters which a CMO and its right holders may wish to consider in this context include:

    - how to allow withdrawal of Copyright Material as quickly as possible (whilst having appropriate regard to the needs of users);
    - what processes to have in place to acknowledge and respond to requests for withdrawal;
    - how to allow right holders flexibility;
    - whether or not a charge for withdrawal of Copyright Material is appropriate, and where appropriate what the level of the charge should be, taking due account of the cost of withdrawal of Copyright Material;
    - whether or not, as well as the possible inclusion of processes for withdrawal of Copyright Material in the membership terms or statute, those processes should be signposted elsewhere, such as on a CMO's website

Example: Underlay, a new CMO dealing exclusively with rights in musical works used in cartoons, has a policy which allows right holders to withdraw Copyright Material only at the end of any financial year. Although not a specific requirement of the Regulations, this policy is clearly stated in its membership terms.

In line with obligations in the Regulations, Underlay always pay right holders the rights revenue they are due up until the termination of authorisation.

However, Underlay have not been very responsive in dealing with right holder requests to withdraw their Copyright Material. After several right holder complaints, and informal discussion with the national competent authority (NCA), Underlay, at their discretion, adopt a policy committing them to respond to every request for withdrawal of Copyright Material within 7 working days and furthermore to inform the right holder when the Copyright Material will be withdrawn.

The new approach is included in the membership terms, so that Underlay's right holders are clear about their rights.

Example: Because of new obligations under the Regulations, Underlay allow right holders, for the first time, the ability to grant licences of Copyright Material for non-commercial uses. Underlay ensure that they inform or get the consent of new and existing right holders to the conditions around the granting of licences of Copyright Material for these uses. They also ensure that the ability to grant licences of Copyright Material for non-commercial uses is enshrined in their statute.

When a right holder asks to grant licences of Copyright Material for non-commercial uses, Underlay allow licences to be granted only after six months and only after application of a small fee which covers the administrative cost of carrying out the request. This is in line with its conditions for granting licences of Copyright Material for non-commercial uses, as enshrined in its statute. Underlay resist pressure from some right holders to allow the withdrawal of individual works for non-commercial uses, but keep this option under review.

The aforementioned policy to respond to right holder requests for removal of Copyright Material within 7 working days, is extended to the granting of licences of Copyright Material for non-commercial uses.

Part 2: Collective management organisations

Section 3: membership rules of CMOs & member participation

It is usually the case that when a CMO agrees to manage a right holder's rights, he is automatically admitted as a member of the CMO. However, a CMO may still manage a right holder's rights, but refuse him membership if certain conditions are satisfied. Having admitted him into membership, it is critical for a CMO to provide for systems which enable members to exercise their membership rights by participating in its decision-making process. The rights of members to participate and vote in the General Assembly should be subject only to fair and proportionate restrictions.

Membership

1. A CMO must accept right holders and entities representing right holders as members if they fulfil the membership criteria (Regulation 5(1)(a)), which must be based on **objective, transparent and non-discriminatory criteria** (Regulation 5 (2)(a)). Entities representing right holders can include other CMOs and associations of right holders.

2. In order to achieve transparency, the membership criteria must be included in either a CMO's statute or membership terms. Under its transparency obligations, a CMO must make its statute and membership terms publicly available.

3. The membership criteria will be **non-discriminatory** if a CMO does not discriminate directly or indirectly between right holders on the basis of their nationality, place of residence or place of establishment.

4. The membership criteria may not be **objective** if, for example, a CMO restricts membership to a particular category or type of right holder and the criteria for the restriction cannot be objectively justified.

5. Any refusal to admit a right holder into membership must be accompanied by **a clear explanation** for the refusal (Regulation 5(1)(b)). While it is possible for refusal of membership to be objectively justified without the provision of a clear explanation, any failure to provide a clear explanation itself represents non-compliance with the Regulations. If a CMO refuses management because the right holder does not meet its membership criteria, the obligation to provide a clear explanation may be satisfied if, for example, it points the right holder to its statute or membership terms, as part of an explanation for why the membership criteria have not been satisfied.

6. It is a requirement of the Regulations that the General Assembly of Members decides on any amendments to the statute and the membership terms (Regulation 7(1)(b)). Consideration of the statute and membership terms usually takes place at a CMO's Annual General Meeting (AGM).

7. Fig 2 describes the process by which a CMO may manage a right holder's rights and thereafter admit them into membership.

Example: Peterson, a UK CMO representing music publishers, has agreed to manage the rights of Crown, a Spanish publisher. Upon having their rights managed by Peterson, Crown are automatically admitted as members. The fact that all new right holders automatically qualify for membership is clearly stated in Peterson's membership terms, which are posted on its website.

Example: Crown apply to become a member of another CMO, Trueman, who Peterson has mandated to look after some secondary rights on behalf of all its members. Crown are unhappy with the way Trueman is managing those secondary rights and want to join Trueman as a member in order to have a say in its decision-making.

Trueman also manage the same secondary rights on behalf of the members of Salisbury, a UK CMO which deals with rights in sound recordings.

Trueman only has two members: Salisbury and Peterson.

Trueman's publicly available membership terms clearly state that CMOs can join provided they are a CMO or an association of right holders above a certain size. Trueman refuse to manage Crown's rights on the basis that, as a sole music publisher, they do not fulfil the membership criteria.

Even though they have restricted membership, Trueman's membership criteria may still be said to be based on objective and non-discriminatory criteria. There may be sound commercial reasons why Trueman have chosen to organise themselves in the way they have. If Crown are unhappy with the way Trueman are managing their secondary rights, they could raise this through Peterson, of whom they are already a member.

The decision-making process: appropriate and effective mechanisms

8. A CMO's **statute must provide for appropriate and effective mechanisms for the participation of its members in the decision-making process** (Regulation 6(a)). A "mechanism" might be said to be the *means* by which a member participates in the decision-making process (for example, voting), or a *forum* allowing for their participation (for example, a subcommittee or working group). This obligation extends to *all* members of a CMO.

9. In order to be **appropriate**, a CMO's mechanisms for the participation of its members might be such that they account for the different sizes of its members, how well they are resourced, and the demands those mechanisms might place on them. In order to be **effective**, the mechanisms might be such that members' views are properly accounted for and considered.

10. One mechanism – mandatory under the Regulations – for the participation of a CMO's (qualifying) members is by means of participation in, and voting at, **the General Assembly of Members**.

11. Participation through the General Assembly – which can take place as part of a company's AGM – might not be the only mechanism by which a CMO involves its members in its decision-making process. The need for other mechanisms may depend on a number of factors, such as the nature and speed of the decisions that need to be made, or the size of the CMO. In some cases, it may not be appropriate for a CMO to involve its members in any decision-making processes outside the General Assembly. In other cases, a CMO may want the involvement of members to extend to subcommittees, working groups, focus groups, or other more informal forums. Ultimately, these are matters for a CMO and its members.

12. The mechanisms for the participation of members must be provided for in a CMO's statute. It is also a requirement of the Regulations that the General Assembly of Members decides on any amendments to the statute. This process should allow (qualifying) members in the General Assembly the opportunity to decide upon, following such an amendment, more enhanced mechanisms for their participation, or to review the performance of Directors to whom the task of putting in place appropriate and effective mechanisms has been delegated.

13. It is permissible for a CMO to allow for restrictions in voting and participation rights in the General Assembly (Regulation 7(1)(f)) based on either the duration of membership or amounts received by a member (Regulation 7(4)). However, such criteria must be **determined and applied** in a manner that is **fair and proportionate** (Regulation 7(4)(b)(i)).

14. **Fairness and proportionality**, in this context, may require clear and transparent reasoning of where, why and how certain thresholds have been determined. As evidence that the criteria is fair and proportionate, CMOs may at their discretion choose to disclose the likely impacts of the criteria on the voting rights, for example the numbers of those restricted from voting or the rights revenue they represent.

15. In order to satisfy the requirement that the criteria restricting participation in the decision-making is **applied** in a manner that is fair and proportionate, the CMO may want to ensure that the criteria is applied consistently and in a measured way.

16. If a CMO applies restrictions, those restrictions must be included in the statute or membership terms of the CMO (Regulation 7(4)(b)(ii)), which under its transparency obligations a CMO must make publicly available (Regulation 20(3)). The General Assembly has the opportunity to decide on amendments to the statute or membership terms.

17. If the General Assembly voting restrictions on members (if there are any) are fair and proportionate, and the involvement of the different categories of members in decision making is fair and balanced (see further below), it becomes more likely that there will be appropriate and effective mechanisms for the involvement of members.

The decision-making process: fair and balanced involvement

18. CMOs must also ensure that **the involvement of the different categories of members in the decision-making process is fair and balanced** (Regulation 6(b)).

19. In this context, categories of member may mean the different *types* of member (for example, authors and publishers) that the CMO might represent or the different *tiers* of membership (for example, provisional members and full members) or may have another meaning depending on the CMO.

20. In order to meet this obligation, a CMO need not involve all its categories of members in every decision-making process in the same way. For example, in relation to the General Assembly – a key forum for decision-making – a CMO may apply **restrictions to participation and voting rights** (discussed above). When a CMO chooses to make such restrictions (which it must do in a manner that is fair and proportionate), it may, nonetheless, decide to involve the excluded category of members in other decision-making processes, in order to ensure overall fairness and balance (and a CMO might feel this especially necessary if there is no representation of the excluded category on the Board – see further para 22 below). Where the excluded category represents a sizeable segment of the overall number of members or a significant proportion of rights revenue, the case for their involvement in the decision-making process might be more compelling. However, these are discretionary matters for the CMO.

21. A CMO should also ensure fairness and balance *within* any decision-making process. For example, a CMO may wish to allow the different types of member to have fair and balanced representation (which may or may not mean equal numbers, depending on the circumstances of the CMO) on the Board of Directors. Fairness and balance may also be deduced not just from the *numbers* of Directors belonging to any particular category, but also their powers and responsibilities.

22. A CMO may also wish to give some representation on the Board to a category of the membership that might be excluded from participation in, and voting at, the General Assembly. Such an arrangement should help ensure that the excluded category of member is allowed involvement in other decision-making processes put in place by the Board. A CMO may also choose, at its discretion, to allow representation on the Board of right holders who do not meet the membership criteria but have an interest, as revenue earners, in how the CMO is run.

23. It may be that the involvement of the different categories of members is captured in the statute or the membership terms. If so, it is a requirement of the Regulations that the General Assembly (usually at the AGM) decides on amendments to the statute or the membership terms (Regulation 7(1)(b)).

24. Obligations in relation to fairness and balance extend to the composition of the body exercising the supervisory function (Regulation 8(2)(a)). The supervisory function will often, but does not have to be, performed by the Board of Directors.

Example: Shutter, a new CMO in the photography sector, has several categories of members, who are divided by type (picture libraries and individual photographers) and tier (Beginner and Advanced).

Picture libraries and photographers have an equal number of Directors on the Board of Directors.

Beginner Members have no rights to participate in, or vote at, the General Assembly of Members. Advanced Members have full participation and voting rights. The criteria for the restrictions on Beginner Members might be said to be fair and proportionate.

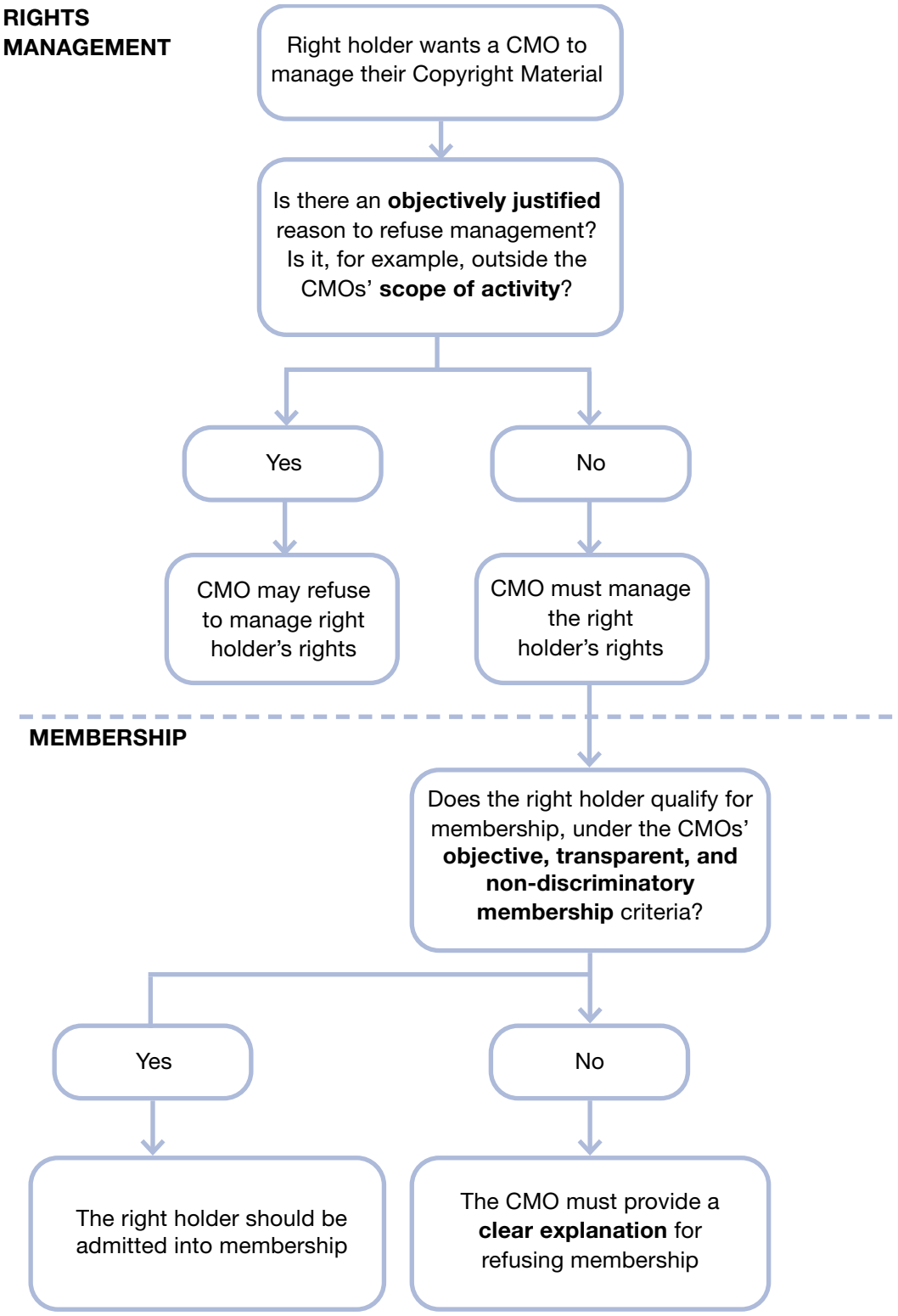
In order to achieve some overall fairness and balance in respect of the different categories of members in the decision-making process, Shutter allow some representation of Beginner Members on the Board of Directors. This helps ensure that the voice of Beginner Members is heard at Board level and therefore helps to ensure that they also have some involvement in other decision-making mechanisms that the Board decides to put in place.

Member records

25. In order to ensure the participation of its members and timely distribution of rights revenue, it is an obligation for a CMO to **keep records of its members** and furthermore to **regularly update** those records (Regulation 6(d)). It is not possible for a CMO to update the records of members without receiving the required information from those members. A CMO may meet this obligation by, for example, allowing members an ongoing opportunity to update their records. However, a CMO may choose to be more proactive about contacting members to ask them to update their records, where there are significant or growing costs involved in finding them, for example.

26. Under their **transparency obligations**, a CMO must make available, at least annually, to each right holder to whom rights revenue has been attributed, the contact details the CMO holds for that right holder (Regulation 17(2)(a)). At this point, right holders will have an opportunity to provide alternative contact details or notify the CMO of impending changes.

Fig 2: the relationship between rights management and membership



Part 2: Collective management organisations

Section 4: the General Assembly of Members

The effectiveness of the rules on the General Assembly of Members of CMOs would be undermined if there were no provisions on how the General Assembly should be run. It is therefore necessary that there are provisions around how often the General Assembly should be convened and that the most important decisions in the CMO are taken by the General Assembly.

1. The General Assembly is the key forum for the involvement of members in a CMO's decision-making process. A meeting of the General Assembly must be convened by a CMO **at least once a year** (Regulation 7(1)(a)). Most CMOs should already be meeting this obligation by holding an Annual General Meeting (AGM).

2. The Regulations require a CMO to ensure its members can **communicate with it by electronic means** (Regulation 6(c)), including for the purpose of exercising their rights. Two such rights are the rights to participate in, and vote at, the General Assembly (Regulation 7(1)(g)). Electronic means, in this instance, may include a secure electronic voting system.

3. A CMO is under an obligation to allow for appropriate and effective mechanisms for the involvement of its member in its decision-making process (Regulation 6(a)). Such mechanisms must be enshrined in its statute. If members feel that the electronic means – the mechanism by which they exercise their rights – that a CMO has in place are inadequate, they may provide for better or more enhanced means through their power to decide upon amendments to the statute in General Assembly (Regulation 7(1)(b)).

4. A CMO can be said to have discharged its obligation for appropriate and effective mechanisms for the participation of its members in an AGM, by either allowing them to attend in person and participate at the AGM or allowing them to participate by electronic means. However, members may provide for better or more enhanced mechanisms through their power to decide upon amendments to the statute in General Assembly.

5. The General Assembly must decide on the matters in **Table 1** below.

6. One of the decisions made by the General Assembly is on the appointment and dismissal of directors and the review of their general performance (Regulation 7(1)(c). The Board of Directors are responsible for the governance of the CMO. The members' role in governance is to appoint the directors and the auditors (unless the auditor has already been appointed in accordance with relevant company law provisions), and to satisfy themselves that an appropriate governance structure is in place. The responsibilities of the Board will usually involve supervising the management of the business and reporting to members on their stewardship. The Board may also be responsible for setting the CMOs' values and standards and ensuring that its obligations to its members are understood and met. The Board is to be distinguished from the day to day operational management of the company by its full-time executives.

7. It should also be noted that a CMO has an obligation to provide, in its **annual transparency report**, a description of its legal and governance structure (Regulation 21(4)(d)).

Table 1: powers of the General Assembly

Amend the statute and membership terms		
Appointment and dismissal of Directors and reviewing their performance		
Appointment and removal of auditor (unless already appointed in accordance with company law)		
Approving the annual transparency report		
Policy	Mandatory	General policy on: - distributions - use of non-distributable amounts - investment policy - deductions
	May be delegated to supervisory function	- risk management policy - approval of acquisition, sale or hypothecation of immovable property - approval of mergers and acquisitions - approval of taking out loans, granting loans or providing security for loans

8. Regulation 7(1)(g) allows members of a CMO to appoint a proxy to vote on their behalf in the General Assembly. Whilst the obligations to ensure members do not appoint a proxy that results in a conflict of interest, and that the holder of the proxy casts votes in accordance with the instructions of the appointing member, are placed on a CMO, it is recognised that this is not a matter wholly within a CMO's control, so in determining whether there has been compliance the extent to which a CMO had made reasonable endeavours to ensure there is no conflict, and that the proxy holder follows the appointing member's instructions, will be relevant. A CMO could do so by taking reasonable, proportionate measures, for example by reminding members on their voting forms ahead of any General Assembly vote.

Part 2: Collective management organisations

Section 5: the supervisory function and the responsibilities of those who manage the business of the CMO

A CMO should have a supervisory function appropriate to its organisational structure and should allow members to be represented on the body that exercises that function. In order to ensure sound stewardship, the management of a CMO should be independent. Managers should be required to declare, prior to taking up their position and thereafter on a yearly basis, relevant conflicts of interest.

The Supervisory function

1. The Regulations place an obligation on a CMO to have in place a **supervisory function** for **continuously monitoring the activities and performance of those who manage the business of the CMO** (Regulation 8(1)). The monitoring function extends, in particular, to the **implementation of the decisions of the General Assembly of Members, especially those in relation to the general policies** (Regulation 8(2)(c)(ii)).

2. A CMO should have a supervisory function appropriate to its size, structure and business needs, and must allow **fair and balanced representation** of members in that function (Regulation 8(2)(a)). There is discussion of fair and balanced representation in Section 3.

3. The supervisory function need not exclude the appointment of third parties, including persons with relevant professional expertise. Also, it need not exclude right holders who do not fulfil the membership requirements or who are represented by the organisation not directly but via an entity which is a member of a CMO. Representation of such right holders or entities should help ensure fair and balanced involvement of members. It would be appropriate for the supervisory function to have an appropriate balance of skills, experience, independence and knowledge of the company to enable them to discharge their duties and responsibilities effectively.

4. A CMO may choose to allow the supervisory function to be fulfilled by its Board of Directors. A CMO may decide that effectiveness of the supervisory function is best achieved by having little overlap in personnel between the supervisory function and those who manage the business of the CMO. It would be appropriate for there to be a clear division of responsibility at the head of the company between those responsible for the supervision and those responsible for the running of the company's business – the latter would not be part of the supervisory function.

5. The supervisory function has an obligation to **continuously monitor** the activities and performance of those who manage the business of the organisation, in order to fulfil its function (Regulation 8(1)). The frequency with which the supervisory function meets, and the intensity with which it scrutinises the decisions of those who manage the business of the CMO, may vary according to the size, structure and business needs of the CMO. It would be appropriate for any supervisory function to have a formal schedule of matters specifically reserved for its decision.

Obligations of those who manage the business of a CMO

6. The persons who manage the business of a CMO is a question of fact. It will usually cover executive directors on a CMO's Board of Directors. However, there may be circumstances where a senior executive who is not on the Board of Directors may be considered a manager. Such a situation may arise, for example, where that senior executive makes a decision that would otherwise fall to someone on the Board of Directors.

7. A CMO is under an obligation to put in place and apply procedures to avoid **conflicts of interest** (Regulation 9(2)(a)), and where such conflicts cannot be avoided to identify, manage, monitor and disclose actual or potential conflicts so that right holders interests are not affected (Regulation 9(2)(b)).

8. Where a person who manages the business of a CMO is also a right holder, the person must declare how much they received as a right holder from the CMO in the preceding financial year (Regulation 9(3)(c)). Where that person exercises management responsibility solely as a representative of a separate entity with a relationship to a CMO (a publisher, for example), the person would have to declare how much the publisher received from the CMO in the preceding financial year.

9. Regulation 9(4) requires a CMO to ensure that its staff training procedures include appropriate training about conduct that is consistent with its obligations in the Regulations. Such staff training may at least include training on matters that were covered by the 2014 Regulations, and also any other areas that have been the subject of complaints, for example. Training should be appropriate to the role and responsibilities of the staff receiving the training. For example, there may be no need for licensing staff to be trained on obligations relating to the General Assembly.

Part 2: Collective management organisations

Section 6: Collection, management and distribution of rights revenue

A CMO should exercise the utmost diligence in collecting, managing and distributing rights revenue. Amounts collected and due to right holders should be kept separately in the accounts from any own assets a CMO might have. It is also important that management fees do not exceed the justified costs of the management of rights and that any deduction other than in respect of management fees is decided by the members of a CMO in General Assembly. Finally, a CMO must pay right holders within certain timeframes and to certain standards.

Collection of rights revenue

1. A CMO is required to keep separate in its accounts amounts due to right holders and any assets the CMO might have (Regulation 10(b)). This is in order to ensure the highest propriety in relation to the amounts that are due to right holders. This does not necessarily mean a physical separation (i.e. in different bank accounts), but it does mean that at any given point in time, the CMO should be able to identify and distinguish between these amounts.

Deductions and management fees

2. There are two methods by which a CMO may deduct amounts from the rights revenue:

   - the management fee (sometimes known as the administration fee)
   - deductions for other purposes (for example, for social or educational purposes)

3. Before obtaining consent to manage a right holder's rights, a CMO is under an obligation to **provide right holder's with information on management fees and deductions** (Regulation 11(1)). There are a number of ways in which a CMO may discharge this obligation, including by providing a web link to its general policies on management fees and deductions, both of which it must make publicly available (Regulation 20(3)(f) and (g)). Alternatively, a CMO may point the right holder to the relevant sections of its annual transparency report.

4. Management fees should **not exceed the justified and documented costs of the CMO** (Regulation 11(3)). A management fee may not be justified if, for example, there is no correlation between the costs involved in rights management and the management fee applied to right holders. The annual transparency report requires a CMO to document detailed information on the cost of rights management, including all operating and financial costs and resources used to cover costs (Regulation 21(4)(i)).

5. A CMO must ensure that **deductions are reasonable in relation to the services it provides** (Regulation 11(2)(a)). It is the General Assembly that decides the general policy on deductions (Regulation 7(1)(d)(iv)).

6. Deductions may be in relation to social, cultural or educational services. Any services funded from deductions should be provided on the basis of **fair criteria** in particular as regards access to, and extent of, those services (Regulation 11(5)). In assessing whether the criteria it has in place is fair, a CMO may need to consider how easily its membership can access those services, the extent to which its membership can benefit from the services, and whether or not the reach of the services is proportionate. A CMO is required, in its annual transparency report, to include detailed information on the deductions made from rights revenue, and in a special report disclose any amounts specifically deducted for social, cultural and educational services, and an explanation for the use of those amounts (Regulation 21(4)(g) and Regulation 21(5)).

7. A CMO cannot make deductions, other than in respect of management fees, from the rights revenue it derives on the basis of a representation agreement, without the express consent of the CMO with which it has the agreement (Regulation 14(1)).

Distribution of amounts due to right holders

8. A CMO is under an obligation to **regularly, diligently and accurately distribute and pay amounts due to right holders** in accordance with the general policy on distributions (Regulation 12(1)). It is the General Assembly that decides on the general policy on distributions. The obligation to pay regularly, diligently and accurately extends to CMOs with whom a CMO has representation agreements (Regulation 14(2)).

9. A CMO must keep proper records of membership, licences and use of works and other subject matter, in order to make **accurate** distributions. How and when a CMO should update members' records is dealt with earlier in this guidance. Accurate distributions to right holders may not be possible without the CMO having appropriate systems or processes in place that interpret and make proper use of users' data.

10. The Regulations contain minimum requirements as to the **regularity** of distributions. In particular, a CMO is under an obligation to distribute rights revenue to right holders within 9 months of the end of the end of the financial year in which the rights revenue was collected, unless there are **objective reasons** preventing them from doing so (Regulation 12(4)). However, a CMO may make more regular distributions in accordance with the general policy on distributions, for example, or at its own discretion for the benefit of right holders. A CMO must also pay any CMO with whom it has a representation agreement within the 9 month timeframe (Regulation 14(3)).

11. **Objective reasons** for a delay in payment may include some or all of the factors in the following non-exhaustive list:

    - poor reporting by users
    - difficulty in identifying rights or right holders
    - problems with the matching of information on works and other subject matter with right holders
    - not having a right holders' bank details
    - disputes over rights ownership

    In its annual transparency report, a CMO must provide an explanation for the reason for any delay in distribution (Regulation 21(4)(j)(vi)).

12. CMOs in some sectors may experience greater challenges in making timely and accurate distributions than CMOs in other sectors. This will often be the result of variations in the quality of usage data.

13. Under its **transparency obligations**, a CMO is required to make available to right holders to whom rights revenue has been attributed, on at least an annual basis, detailed information including a breakdown of the revenue per category of rights managed and type of use and the period over which the use took place (Regulation 17(2) generally). It may be that CMOs will provide this information at the same time as they make a distribution.

14. CMOs are required to take **all necessary measures** to identify and locate right holders to whom rights revenue is due (Regulation 12(6)). Taking all necessary measures is part of the general requirement in regulation 12(1) to distribute. As evidence for acting diligently in this respect, a CMO could point to **proportionate** efforts it has made to identify and locate right holders, taking due account of the cost or resource in doing so. For example, if the cost of finding a right holder is greater than the rights revenue which that right holder is due, this is unlikely to be an outcome which either the CMO or the right holder wants.

15. Where amounts due to right holders cannot be distributed, these amounts must be kept separate in the accounts of the CMO (Regulation 12(6)), for example, from other rights revenue, or from any other assets a CMO might have. Disclosure of the amounts that are **undistributed**, or **non-distributable**, are requirements of the annual transparency report (Regulation 21(4)(v) and Regulation 21(4)(vii) respectively).

16. The General Assembly decides on the general policy on the use of non-distributable amounts (Regulation 7(1)(d)(v)). Rights revenue becomes non-distributable if, three years after the end of the financial year in which the rights revenue was collected, the right holder hasn't been identified or cannot be found (Regulation 12(9)(a)). If the General Assembly decides that all non-distributable amounts are to be used for the benefit of all right holders (an education initiative for example), rather than be kept aside for the right holders to whom they are due, this should not prejudice the right of those right holders to claim the amounts they are due.

Example: Quagmire, a CMO dealing with the secondary rights of authors and publishers in gardening books, has £40 for member right holder B. However, B's membership records are out of date, despite an ongoing opportunity to keep those records up to date through an online system, and other reminders from Quagmire.

Quagmire make proportionate efforts to find B, taking account of the rights revenue he is due.

In line with its obligations, Quagmire makes available all relevant information about B, including his name and the title of his work, first to right holders and those with whom it has a representation agreement, and then publicly. However, B still cannot be traced.

Quagmire's policy on non-distributable rights revenue allows non-distributable sums to be used for various purposes benefitting the wider membership. The policy however must not operate in a manner which adversely affects B's ability to claim the amount due.

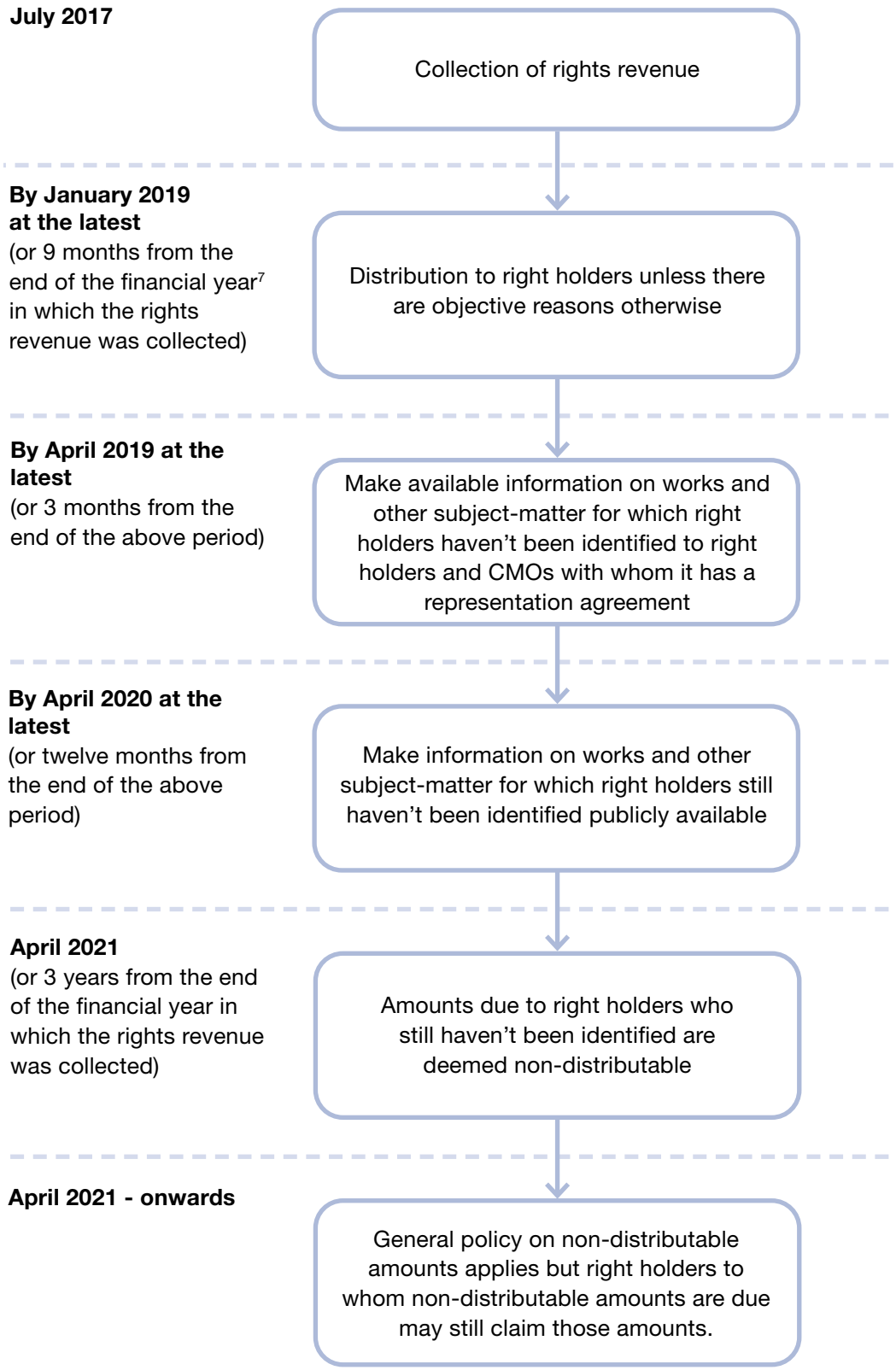
Obligations on CMOs from implementation date

17. The Regulations came into force on 10 April 2016. The obligations in the Regulations apply from that date in relation to rights revenue which may have already have been collected.

18. For example, rights revenue which has not been distributed between January 5 2015 (nine months from the end of the financial year in which the rights revenue was collected) and April 5 2017 (three years from the end of the financial year[5] in which the rights revenue was collected) will be deemed non-distributable, for the purposes of the Regulations. This means that this non-distributable rights revenue will need to be used in accordance with the General Assembly's policy on the use of non-distributable amounts.

5 In this example, it is assumed that the tax year is the same as the financial year.

Fig 3: an example of a distribution timeline



6 For the purposes of this example, the financial year is assumed to be the tax year

Part 2: Collective management organisations

Section 7: management of rights on behalf of other CMOs

The Regulations address the issues of unfair or non-transparent deductions applied to right holders in CMOs with whom a CMO has a representation agreement. They also address issues around the timeliness and accuracy of payments.

The principle of non-discrimination

1. The Regulations require a CMO not to discriminate against right holders whose rights it manages under representation agreements (Regulation 13). The obligation not to discriminate can be said to mean that, where the obligations under the Regulations are identical, right holders in CMOs with whom a CMO has a representation agreement should be treated no differently to right holders whose rights the CMO directly manages.

Deductions and payments in representation agreements

2. The principle of non-discrimination applies in particular to tariffs, management fees and the conditions for the collection and distribution of rights revenue, for it is primarily in these areas that a CMO has responsibilities to right holders it represents via representation agreements.

3. A CMO cannot make deductions, other than in respect of management fees, from the rights revenue it derives on the basis of a representation agreement, without the express consent of the CMO with which it has the representation agreement (Regulation 14(1)). The intention of this principle is to ensure that the practice of applying deductions without any consultation or justification, is prohibited.

4. It is possible for deductions in respect of management fees to be higher for CMOs with whom a CMO has a representation agreement, than it is for right holders domestically. This might reflect, for example, greater costs in administering those rights. However, where a CMO does apply a higher management fee, that fee should be justifiable – in line with the obligation that management fees cannot exceed justified and documented costs (discussed in the previous section) – otherwise a CMO may be in breach of its obligation not to discriminate against right holders abroad whose rights it manages.

5. As with right holders whose rights it directly manages, CMOs are required to regularly, accurately and diligently pay amounts due to other CMOs (Regulation 14(2)). They are also required to make those payments within specific timeframes (Regulation 14(3)). The substance behind these obligations is explained in the previous section.

6. Under its transparency obligations, a CMO is required to provide to CMOs with whom it has representation agreements, detailed information including on deductions in respect of management fees (Regulation 18 (2)(d)), rights revenue attributed to it (Regulation 18(2)(a)) and information on licences granted or refused in relation to the works covered by the representation agreement (Regulation 18 (2)(f)). A CMO is also required to provide information on deductions (including in respect of management fees) in its annual transparency report (Regulation 21(4)(k)(ii)).

Part 2: Collective management organisations

Section 8: licensing

Information obligations before a licence has been offered, or licence negotiations have begun

1. A CMO has a general obligation to respond **without undue delay** to requests from users, **including the information needed for the CMO to offer a licence** (Regulation 15(5)(a)). This general obligation does not mean that a CMO has to respond to *every* information request from a user with the information the user has requested. However, it can be said to *at least* extend to any information request from a user where that request is a relevant general request about a CMO's licences. A CMO that does not to respond to a user with information on the licences it has to offer, may also not be meeting its obligation to act in the best interests of the right holders it represents. A CMO may meet its obligation to respond "without undue delay", by responding "within a reasonable time".

2. A CMO also has specific information obligations which can be said to be a subset of the general obligation to respond to requests from users. Those obligations are as follows:

    - If a user, or potential user who has requested it, asks a CMO about its licensing schemes, their terms and conditions or how it collects royalties, the CMO should provide that information.

    - In response to a duly justified request, the CMO should also provide the user with information on the works or other subject matter it represents, the rights it manages directly or under representation agreements, and the territories it covers (Regulation 19(2)). This is an obligation under its transparency obligations.

3. CMOs have obligations to make **publicly available** information on a wide range of matters including its statute and standard licensing contracts and tariffs (generally, Regulation 20(3)). A CMO's statute will usually cover matters such as the works or rights it represents. Where there is an intersection between the information a user requests and the material that is available publicly, the CMO may discharge its information requirements by pointing the user to the publicly available information.

Licence negotiations

4. In many cases, there will be no licence negotiations and smaller users will purchase off-the-shelf licences with standard tariffs, from a CMO's website. It is often, but not always, larger users or representative groups who will have to engage a CMO in licence negotiations.

5. CMOs and users, and IMEs and users, are required to conduct licensing negotiations with one another in **good faith** (Regulation 15(1)(a)). Furthermore, a CMO is required to treat users in good faith *after* the licence has been issued (Regulation 15(5)(d)).

6. In order to demonstrate good faith behaviour to users, both during licensing negotiations (CMOs and IMEs) and after a licence has been issued (CMOs only), the following principles may be upheld:

   - to treat users and potential users fairly, honestly, impartially and courteously and in accordance with the terms in its rules and any licence agreement
   - to ensure dealings with users or potential users are transparent
   - to consult and negotiate fairly, reasonably and proportionately in relation to the terms and conditions of a new or significantly amended licensing scheme
   - to provide both users and potential users with clear information, including (where applicable) information about cooling off periods which may apply to new licences.

Users will also need to consider how to comply with their obligations to conduct licensing negotiations in good faith. This will depend on the circumstances, but similar principles of fairness, reasonableness and proportionality may apply.

7. In order to facilitate effective, timely negotiations, CMOs and users, and IMEs and users as appropriate, may wish to agree matters such as:

   - when they should try to conclude licensing negotiations;
   - how often they should meet in order to conclude negotiations within the agreed timeframe;
   - an agenda before each meeting.

However, it is up to the negotiating parties how they choose to comply with their obligations.

8. Negotiating in good faith may not be possible without the provision of **all necessary information** during licensing negotiations (Regulation 15(1)(b)). This information obligation falls on both CMOs and users, and IMEs and users. This obligation may require CMOs and IMEs to disclose to users, and to any potential users who have requested it (that is, if they haven't done so already), with some or all of the following information:

   - its repertoire
   - the duration of licensing schemes, their rights and restrictions
   - tariffs

9. The nature and extent of the necessary information a user supplies will normally depend on whether a new licence is being negotiated or an existing licence is being renewed. In the case of a licence re-negotiation, a user may need to

disclose historic usage data. Where a new licence is being negotiated, the provision of all necessary information by a user may require the user to disclose to the CMO information which may include, but is not limited to, the following:

- the service for which a licence is required
- corporate information about the licensee
- territorial scope of the licences

10. After a user provides a CMO with **all relevant information** necessary for the CMO to offer the user a licence, a CMO must **without undue delay** either offer a licence or provide the user with a reasoned statement explaining why it does not intend to license a particular service (Regulation 15(5)(b)). If the user has not provided all relevant information, the CMO need not either offer a licence or provide a reasoned statement. However, even where all relevant information has not been received, it may be in the best interests of the right holders it represents for a CMO to inform the user of what is needed in order to provide a licence. Responding "without undue delay", in these circumstances, can be said to be the same as responding "within a reasonable time".

11. CMOs are under an obligation to provide information on licences they have refused in their **annual transparency report** (Regulation 21(4)(c)). For CMOs with whom they have a representation agreement, they have an obligation to provide information on licences granted or refused in relation to the works covered by the representation agreement (Regulation 18 (2)(f)).

12. A CMO is under an obligation to ensure that right holders receive appropriate remuneration for the use of their rights (Regulation 15(4)(a) and that tariffs it determines are reasonable in relation to matters such as the economic value of the use of the rights in trade (Regulation 15(4)(b)(i)) and the economic value of the service provided (Regulation 15(4)(b)(ii)). However, it is acknowledged that such matters can be a matter of negotiation and consultation with users and representatives of users, and that tariffs and other licensing terms can be subject to determination by the Copyright Tribunal.

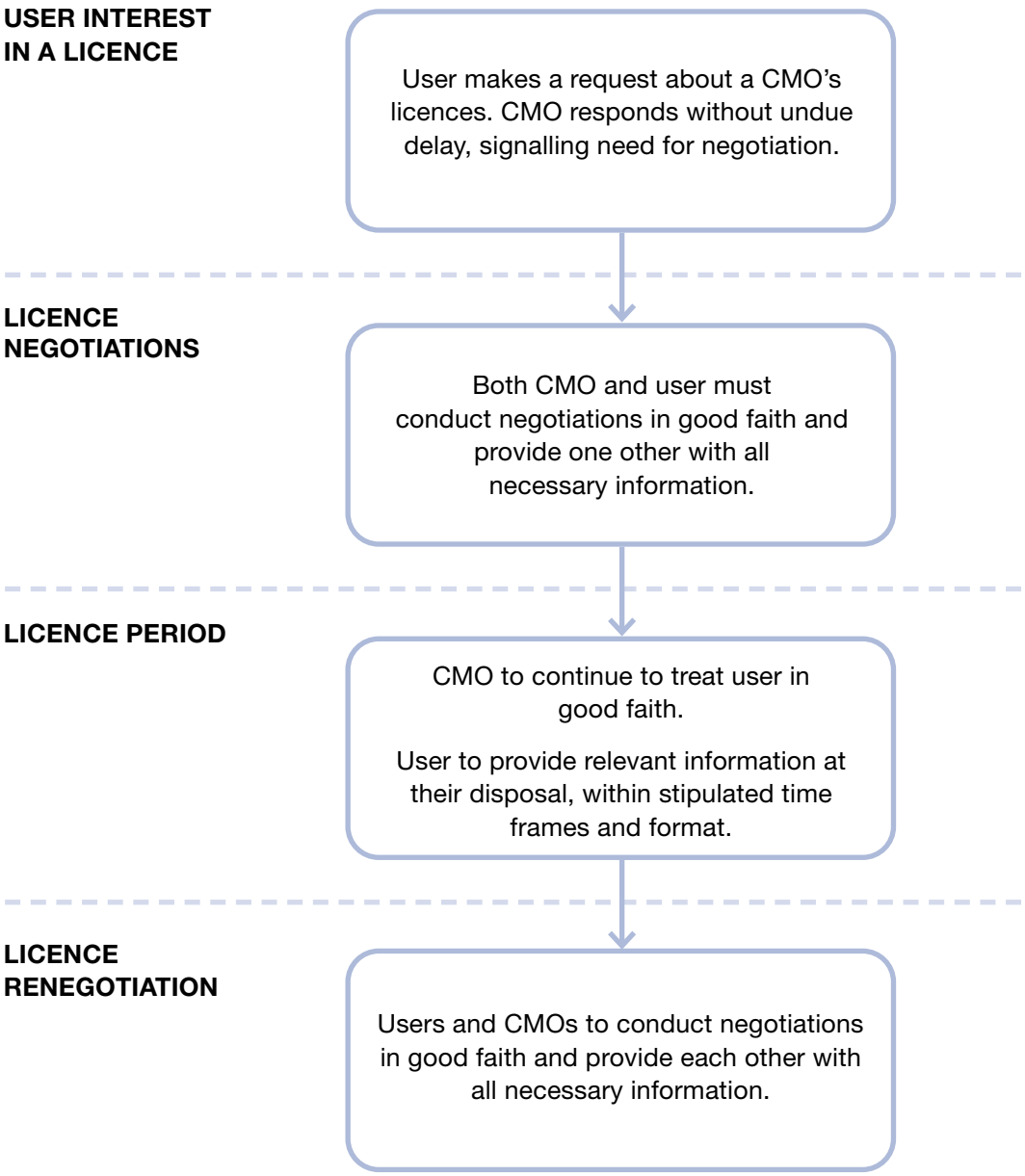
User data

13. Users are under an obligation to provide a CMO within an agreed or pre-established time and in an agreed or pre-established format, with **relevant information at their disposal** necessary for collection of rights revenue and distribution and payment to right holders (Regulations 16(1)). The Government expects that the accuracy, timeframe and format for provision of user data will usually be written into the contracts between CMOs and users.

14. Information required by the CMO should be limited to what is reasonable, necessary and at the users' disposal in order to enable CMOs to perform their functions, taking into account the specific situation of small and medium-sized enterprises. What is at a user's disposal may vary according to not just the size of the user, but on other factors such as how much information the user can possibly or reasonably collect, the ease with which the information can be collected, and any process by which the user has to get the information to the CMO. An automated process for the collection of data, for example, may allow much more information to be at a user's disposal than a manual process.

15. The provision of accurate and timely user data is essential for right holders to be paid quickly and accurately. Inaccurate user data can increase a CMO's management fees and impact on the speed and diligence with which it makes its distributions. It may also be the case that, in order to not to jeopardise a business relationship, a CMO may be reluctant to enforce contractual obligations for the provision of user data. With these things in mind, in 2016 the Government will be conducting roundtables one of whose objectives is to discuss voluntary industry standards or codes for the provision of data by users to CMOs.

Fig 4: some of the rights and responsibilities on CMOs and users during the life of a particular licence



Part 2: Collective management organisations

Section 9: transparency and reporting

The Regulations impose a number of information obligations on a CMO in relation to its users, right holders, CMOs with whom it has a representation agreement, and the public. In addition, and in order to ensure that right holders are in a position to monitor and compare the respective performances of CMOs, a CMO must make public an annual transparency report, including comparable audited financial information as well as information on the use of amounts for social, cultural and educational services.

1. CMOs have obligations to provide:

   - right holders with certain information on the management of their rights, on at least an annual basis (Regulation 17) (this obligation also falls to IMEs);
   - CMOs with whom it has representation agreements certain information on the management of their rights, on at least an annual basis (Regulation 18);
   - right holders, other CMOs with whom it has a representation agreement, and users, following a **duly justified request**, and **without undue delay**, with information on the works it represents, the rights it manages, and the territories it covers (Regulation 19) (some of these obligations also fall on IMEs);
   - the public with information on a range of matters, including its statute, membership terms, policy on management fees and policy on non-distributable amounts (Regulation 20(3)) (some of these obligations also fall on IMEs). This information must at least be made available, and kept up to date, on a CMO's website (Regulation 20(1)).

   Table 5 describes, in shorthand, the information obligations CMOs have.

2. A request may be **duly justified** if, for example:

   - it originates from CMO with whom the CMO has a representation agreement, or right holders or users to whom it has an obligation;
   - it is restricted to requesting the information which the CMO is obliged to provide; and
   - it is not vexatious or frivolous

   Where the information request exceeds what the CMO is obliged to provide, the CMO need only provide the information it is obliged to. However, it can provide, at its discretion, the additional information requested. It may provide this information by directing the requester to its website, where information on its scope of activity may be contained in its statute.

3. CMOs have an obligation to publish on their websites their annual transparency reports, containing a range of information, including financial and on amounts deducted for social, cultural and educational purposes (Regulation 21).

4. It is possible for a CMO's annual transparency report to be incomplete because, for example, incomplete information is received from CMOs with whom it has a representation agreement, and a CMO may therefore not be in receipt of complete information on the matters referred to in regulation 21(4)(k). In such cases the description of the information which the CMO will be able to give of these matters which is required under that provision will necessarily be limited.

Table 5: information requirements on CMOs

M = information which must be provided on at least an annual basis

P = information which must be made publicly available, including on its website

	Who information must be made available to			
Type of information	Individual right holders	CMOs with whom it has a representation agreement	Users	The public
Right holder contact details	M			
Rights revenue attributed	M	M		
Rights revenue per category of rights and per type of use	M	M		
Period during which the use took place, for which rights revenue was attributed	M			
Deductions in respect of management fees	M	M		
Other deductions	M			
Rights revenue which is outstanding	M	M		
Deductions in respect of (agreed) deductions		M		
Information on any licences granted or refused		M		
Relevant resolutions of the General Assembly of Members		M		
Information on works and other subject matter, rights, and territories covered OR because works and other subject-matter cannot be determined, the types of works, the rights, and territories covered	On request	On request	On request	
Statute				P
Membership terms (where not covered by statute)				P
Standard licensing contracts and standard applicable tariffs				P
The names of those who manage the business of the CMO				P
General policy on distributions				P
General policy on management fees				P
General policy on deductions (other than management fees), including deductions for social, cultural and educational services				P
List of representation agreements				P
General policy on use of non-distributable amounts				P
Complaint handling and dispute resolution procedures				P

Part 3: multi-territorial licensing of online rights in music

This part makes provision for CMOs that wish to engage in the multi-territorial licensing of online music rights. It places additional obligations around the minimum quality of cross-border services to be provided by CMOs offering multi-territorial licences. These obligations are mainly in relation to the transparency of repertoire and the speed and responsiveness of a CMO in updating that repertoire.

1. A CMO which grants multi-territorial licences (an "MTL CMO") is required to have **sufficient capacity** in order to quickly and accurately process the data needed for the administration of those licences (Regulation 23(1)). "Sufficient capacity" may not mean "limitless capacity", but must at least include having the capacity to invoice users, collect rights revenue, and do the other matters prescribed by Regulation 23(2)).

2. The availability of accurate and comprehensive information on musical works, right holders and the rights each CMO is authorised to represent in a given territory is of particular importance for an effective and transparent licensing process, for the subsequent processing of user reports and the related invoicing of service providers, and for the distribution of amounts due. For this reason, an MTL CMO should be able to process such detailed data quickly and accurately.

3. Keeping information up to date, helps ensure that prospective users and right holders, as well as CMOs, have access to the information they need in order to identify the repertoire that an MTL CMO represents. In response to a **duly justified request** from any one of these parties, an MTL CMO must provide up-to-date information on the musical works it represents, the rights represented, and the territories covered (Regulation 24(2)(a)-(c)).

4. Whether or not a request qualifies as "duly justified" depends on the facts. For example, a request may not be "duly justified" if it does not come from one of the persons listed in Regulation 24(1). If a request covers matters wider than those regarding an MTL CMO's repertoire, the request may be "duly justified" only insofar as it covers the information in Regulation 24(2). Accordingly, the CMO need limit its response only to that information, but may provide the totality of the requested information, at its discretion.

5. The obligation to provide information is limited by the **reasonable measures** provided for in Regulation 24(3), which allow an MTL CMO to make appropriate redactions or withhold some of the requested data, to protect commercially sensitive information, for example (Regulation 24(3)(c)). If an MTL CMO takes such reasonable measures, a best practice approach (which may be consistent with acting in the best interests of the right holders it represents) might encourage a CMO to provide the requestor with an explanation for where and why it has taken the measures it has.

6. An MTL CMO is required to have "arrangements" in place to allow right holders, other CMOs, and online service providers, to request corrections to certain conditions or data where they believe, on the basis of reasonable evidence, that information to be incorrect (Regulation 25(1)). Such "arrangements" may encompass easily accessible procedures allowing those parties to inform an MTL CMO of any inaccuracy. If the claim that the information is incorrect is sufficiently substantiated, a CMO must then correct the information, **without undue delay** (Regulation 25(2)). In order to meet this obligation, a CMO may not take an unnecessary or unwarranted period of time between substantiation that the data is incorrect, to correction of the data itself.

7. An MTL CMO is required to monitor the use of online rights in musical works which it represents, wholly or in part, by online service providers to whom it has granted multi-territorial licences (Regulation 26(1)). The Regulation does not specify how this monitoring is to be carried out. Whilst the effectiveness of monitoring may be affected by the information users provide to a CMO, the degree of monitoring should not.

8. An MTL CMO is required to invoice an online service provider accurately and **without delay** after usage is reported unless this is not possible for reasons attributable to the online service provider (Regulation 26(10)). One such reason may be inaccuracy of data preventing proper invoicing. Inaccuracy of data from an online service provider might also account for an MTL CMO being unable to distribute amounts to right holders accurately and without delay (Regulation 27(1)).

9. An MTL CMO is required, subject to conditions it is permitted to apply under Regulation 29(2)(c)), to agree to represent the repertoire of any CMO that decides not to offer or grant multi-territorial licences itself, subject to the other requirements of the Regulation (Regulation 29(2)(a)). The requested MTL CMO need only be required to accept the representation if the request is limited to the online right or categories of online rights that it represents (Regulation 29(2)(c)).

Part 4: Dispute resolution and enforcement

A CMO is required to have procedures in place for handling complaints and must make it possible for disputes to be submitted to alternative dispute resolution. The Secretary of State (through a unit within the IPO) is the national competent authority responsible for monitoring compliance with the Regulations. The national competent authority has procedures in place for monitoring compliance and, where there is breach of the Regulations, their enforcement.

Complaints procedure

1. A CMO is required to have **effective and timely** procedures for dealing with complaints from members, right holders, CMOs with which it has a representation agreement and users (Regulation 31(1)). An effective complaints procedure would normally:

   - define the categories of complaints and explain how each will be dealt with;
   - ensure information on how to make complaints is readily accessible to members, users and potential users;
   - provide reasonable assistance to a complainant when forming and lodging a complaint;
   - specify who will handle a complaint on behalf of the CMO;
   - ensure that the CMO makes adequate resources available for the purpose of responding to complaints;
   - ensure that its employees and agents are aware of procedures for handling complaints and resolving disputes and are able to explain those procedures to members, right holders, users and the general public in plain English; and
   - provide that the CMO must regularly review its complaint handling procedure and dispute resolution procedures to ensure they comply with the Regulations.
   - indicate a timescale for handling the complaint

2. Whilst the Regulations specify a number of matters that a CMO's complaints procedure should specifically deal with (Regulation 31(2)), complainants do not need to restrict their complaints to a CMO's obligations under the Regulations. Complaints can feasibly cover any matter encompassing the relationship between the complainant and the CMO.

3. A CMO is required to respond in writing to complaints and give reasons where it rejects a complaint (Regulation 31(3)). As evidence that a CMO's complaints procedure is timely, it may be essential for it to deal with complaints within a timeframe which is not of a length which is inappropriate having regard to the nature of the complaint. It is possible for some complaints to take longer than others, depending on factors such as who is making the complaint, the complexity of the complaint, or what category it falls into.

4. A CMO's complaints procedure can include a procedure for dealing with vexatious complaints and still be effective. A vexatious complaint may, for example, be one which a CMO's complaints procedure (and, where appropriate, ADR) has dealt with but which a complainant then revives, in identical terms, on one or more occasions. Vexatious complaints could also include complaints about matters where the complainant has no feasible or objectively justifiable interest.

5. A CMO's complaints process can both be compliant with the Regulations and not resolve a complaint in a complainant's favour or to the complainant's satisfaction. However, the CMO may be required to offer the option of ADR in this circumstance.

Alternative dispute resolution (ADR)

6. A CMO is required to make it possible to submit to ADR disputes relating to any matter between itself and a member, right holder, CMO, or user (Regulation 32(1)). In practice, this will almost invariably mean that a dispute will go to ADR following agreement of both parties and after the internal complaints procedure has been exhausted.

7. However, not every dispute is required to able to be submitted to ADR (Regulation 32(2)). Disputes around licence tariffs are outside the scope of ADR, on the basis that a mechanism for such disputes is already available through the Copyright Tribunal (Regulation 32(2)(b)). However, a CMO still has the discretion to offer ADR in relation to disputes around tariffs.

8. Disputes around multi-territorial licensing must also be able to be submitted to ADR. These are specific to certain parties and matters (Regulation 32(3)).

9. The requirements both to have a complaints procedure for users, and to make it possible to submit disputes to ADR (other than certain MTL disputes), do not apply to CMOs which are micro-businesses. However, CMO micro-businesses may, at their discretion, meet these requirements. This is explained more fully in Annex A.

Investigating non-compliance

10. The Secretary of State is the national competent authority ("NCA") (Regulation 35) responsible for monitoring and enforcing compliance with the Regulations. In practice, the NCA functions will be undertaken through a unit in the IPO.

11. The NCA has a variety of means of monitoring compliance with the Regulations. One means might be through its own proactive monitoring work, which may include, for example, interrogating a CMO's annual transparency report – which will contain information on matters such as non-distributable sums – and other documents which it has an obligation to make public, such as its membership terms, statute, and general policies on distribution and deductions. It could also interrogate documents in the public domain produced by other parties as part of any investigation.

12. Another means of monitoring compliance is by receipt of information alleging non-compliance with the Regulations. Under the Regulations, the NCA has an obligation to be able to receive such information.

13. The NCA has produced separate guidance about the process of submitting information, which sets out how it will deal with any such information it receives.

14. The NCA has produced guidance on how it will carry out its investigation and enforcement activities. It sets out criteria under which the IPO may choose to carry out an investigation. It also sets out the relationship with a CMO's complaints procedure – specifically, that the NCA will not usually launch an investigation in relation to an individual complaint where the option to use a CMO's internal complaints procedure has not been explored by the complainant.

15. Before considering a formal investigation, the NCA will also consider matters such as whether there may be a breach and whether it is proportionate to pursue an investigation.

16. The Secretary of State can give notice to a range of different parties (listed in Regulation 36(1)) requiring them to provide information on compliance with the Regulations. In any notice, the Secretary of State must also state when and how a response to the notice should be supplied (Regulation 36(2)). The Secretary of State will use best endeavours to keep an information request proportionate to the matter at hand.

Enforcement

17. Where an investigation by the IPO establishes a breach of the Regulations, and the IPO considers use of its enforcement powers to be proportionate and likely to be effective, the Secretary of State may choose to issue a compliance notice or impose a financial penalty. The guidance on enforcement sets out the criteria it will take into account when taking such decisions.

18. In line with its main objective to ensure that its actions promote compliance with the Regulations, the NCA is likely to use informal means where a breach of the Regulations is less serious or can be quickly corrected before it has a significant detrimental impact.

19. The purpose of a compliance notice is to give a CMO an opportunity to put in place steps to remedy any breach. Where a compliance notice is considered appropriate, it can be served on any party (these parties are set on in Regulation 38(1)), which has obligations under the Regulations. A compliance notice must be provided to the relevant party in writing and will set out:

    - how and why the NCA thinks that the Regulations have been breached
    - the specific provision or provisions which have been breached
    - the action that the NCA requests to be taken to end the non-compliance (if applicable)
    - the time by which the action specified above must be taken
    - the evidence that the NCA requires to demonstrate that the non-compliance has ended (if applicable)
    - the consequences of failing to comply with the compliance notice or any undertakings provided in respect of the compliance notice

Many of these obligations are set out in Regulation 37.

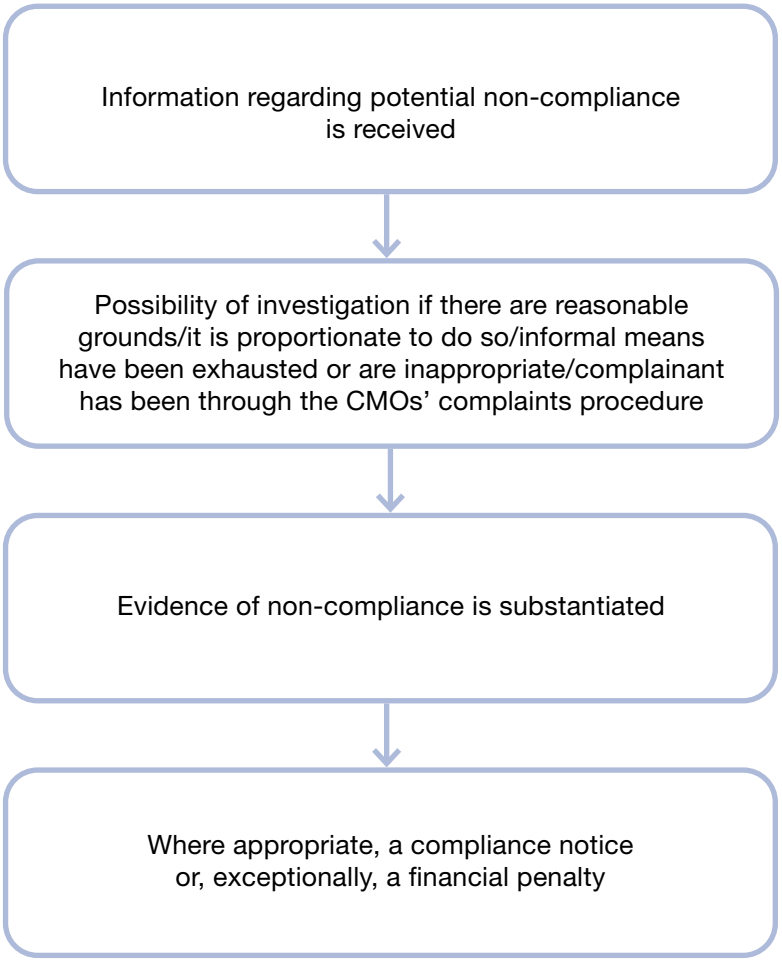
20. In order to impose a financial penalty on a person, the NCA must be satisfied that a breach of the Regulations has occurred – this is a higher threshold than required to issue a compliance notice.

21. The Secretary of State can impose a financial penalty on a director, manager or similar officer of that CMO. Persons on whom such fines can be imposed will be identical to the persons who manage the business of a CMO, discussed above (para 6, p. 26). However, there may be exceptional circumstances where a fine might be imposed on a senior executive who is not on the management board. Such a situation may arise, for example, where that senior executive makes a decision that would otherwise fall to someone on the management board.

22. If imposing a penalty, the NCA must have regard to the nature of the breach and the appropriate level of the penalty. A measure of appropriateness could include consideration of the deterrent effect of a penalty, and looking at any evidence which suggests the breach occurred intentionally.

23. Breaches of duty in relation to Regulation 4 are directly actionable by the right holder as a breach of statutory duty. The NCA may also choose to take enforcement action under the provisions relating to compliance notices and financial penalties should there be non-compliance with regulation 4.

Fig 5: an example of enforcement activity following possible non-compliance with the Regulations



Annex A – independent management entities (IMEs)

Some obligations in the Regulations which relate to dealings with licensees, as well as some information and transparency obligations, also apply to IMEs. Some of those obligations have been dealt with in this guidance.

In their entirety, those obligations cover the following provisions:

- paragraph (1) of regulation 15 (licensing);
- regulation 17 (information to be provided to right holders);
- paragraph (1)(b) of regulation 19 (information to be provided on request); and
- paragraph (2) of regulation 20 (disclosure of information to the public).

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