

Collecting societies under the microscope

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The European Commission's proposal for a Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market

In a display of synchronicity, both the UK government and the European Commission are proposing legislation on the governance of collecting societies. The UK proposals go no further than legislation to allow the introduction, through Regulations, of a backstop power to apply a code of conduct setting out certain minimum standards that a collecting society must meet. In contrast, the Commission's proposal goes much further, laying down, in addition to minimum standards, an array of requirements in relation to multi-territorial licensing by collecting societies of rights in musical works for online use.

One of the drivers of these proposals for improving the governance of collecting societies is a perception that, in the information society era, the societies will have an ever-increasing role to play in facilitating the development of innovative new services. Proposals such as those in the Hargreaves report for the creation of a Digital Copyright Exchange are an example of this. Alongside that driver, though, is the view that the governance, practices and procedures of collecting societies could stand some improvement. One question in our minds is whether the draft Directive's requirements for transparency, automation and provision of data on repertoire and rights will require such a substantial investment that only the major societies will be able to meet the new standards, leading to a consolidation of collective licensing in fewer hands.

The need for legislative intervention to facilitate music rights licensing for multi-national online music services has been apparent for many years. The Commission's previous interventions – the 2005 Recommendation¹ and the proceedings against CISAC and certain of its members² –

failed to produce the simplified licensing system that online music service providers need. Today, such providers can obtain pan-European licences only by engaging with a variety of licensing entities connected with certain publishers and only in respect of their particular repertoires. For the rest of the musical repertoire the operators must still obtain licences (now known as 'residual blanket' licences) from collecting societies in each country in which they wish to provide their services. As the market has evolved, the rights clearance task facing operators has become more complex year by year. While the proposed Directive will not transform this situation in the short term, it is nonetheless a step in the right direction and to be welcomed on that score. Again, the draft Directive seems to point towards a consolidation of collective licensing by including express provisions to facilitate the placing of repertoires of collecting societies which do not offer multi-territory licences into the hands of other societies (such as the PRS) which do.

We thought it would be helpful to provide an aide-memoire to the principal terms of the draft. As will be seen, the terms reflect a thorough analysis of the problems in the collective licensing market and clearly indicate that the Commission thinks a very major intervention is needed if the long-standing problems in this market are to be resolved.

Summary of the draft Directive's terms

1. Collecting Societies

The draft Directive commences with provisions dealing with the governance and management of collecting societies.

a) Membership: All rightholders are to have the right to authorise a collecting society of their choice to manage their rights for the Member States of their choice and to terminate this authorisation or withdraw any of the rights for the Member States of their choice.

Collecting societies are also required to accept all rightholders as members if they fulfil their membership requirements. Furthermore, they will have to provide mechanisms of participation of

members in the decision-making process, allow members to communicate by electronic means and keep updated records of members.

At least once a year, a general meeting of members shall be convened to approve any amendments to the statute or membership terms, the annual transparency report and the auditor's report. They shall also take decisions on:

- The appointment, dismissal and remuneration of the directors
- The policy on the distribution of the amounts due to rightholders
- The use of the amounts due to rightholders
- The general investment policy and the rules on deductions from rights revenue
- The appointment and removal of the auditor

Any restrictions on the right of the members to participate and to exercise voting rights can only be based on two criteria: the duration of membership and the amounts received or due to a member.

b) Governance:

(i) Supervisory function All collecting societies will have to establish a supervisory function responsible for continuously monitoring the activities and the performance of the duties of the persons entrusted with managerial responsibilities. Any acquisition of immovable property, setting-up of subsidiaries, acquisitions of other entities, taking-out of loans, granting of loans and provision of security or guarantee for loans will have to be approved by the supervisory function.

However, Member States are free to decide if the supervisory function is required for small collecting societies which do not exceed the limits of two of the three following criteria on their balance sheets:

- Balance sheet total: €350 000
- Net turnover: €700 000
- Average number of employees during the financial year: 10

(ii) Obligations of the persons who effectively manage the business and directors In addition to requiring that managers and directors of collecting societies use sound administrative and accounting procedures and internal control mechanisms, the proposed Directive stipulates procedures must be designed to avoid any conflicts of interest. They shall include:

- An annual individual statement by directors and persons who effectively manage the collecting society to the body entrusted with the supervisory function where any interest, remuneration or amounts received as a rightholder in the collecting society must be revealed
- A declaration on any actual or potential conflict of interest

(c) Management of rights revenue

(i) Collection and use Rights revenue and derived income must be kept separate from the society's own assets and derived income. They cannot be used for the society's own account except for the deduction of its management fees.

Pending the distribution of the amounts due to rightholders, the collecting society can invest the rights revenue and derived income in accordance with the general meeting's policy and the best interest of members. The assets shall be invested in order to ensure the security, quality, liquidity and profitability of the portfolio as a whole and shall be diversified to avoid excessive reliance and accumulations of risks.

(ii) Deductions Agreements governing the relationship of the collecting society with its members and rightholders shall specify deductions applicable to the rights revenue. Where a collecting society provides social, cultural and educational services funded through those deductions,

members must be entitled to them on the basis of fair criteria, even if they have terminated or withdrawn their authorisation to manage rights.

(iii) Distribution The collecting society must distribute and pay amounts due to all rightholders no later than 12 months from the end of the financial year in which the revenue was collected. However, if these amounts can't be distributed five years after the end of the financial year in which the revenue collection occurred, the collecting society shall decide on the use of them if all necessary measures to identify and locate the rightholders have failed.

(d) Management of rights on behalf of other collecting societies A collecting society must treat equally rightholders whose rights are managed under a representation agreement with another collecting society and its own members.

It shall not apply deductions, other than management fees, to the revenue collected from the rights it manages under a representation agreement unless the other collecting society expressly consents to such deductions.

(e) Licensing Both the collecting society and the user who seeks a licence from it must negotiate in good faith.

Licensing terms are to be based on objective criteria. Tariffs for exclusive rights must reflect the economic value of the rights in trade and of the service provided by the collecting society. Generally the collecting society must, in the absence of a law which establishes the amounts due, base its determination of the amounts on the economic value of the rights in trade.

(f) Transparency and reporting

(i) A collecting society must make available once a year and by electronic means:

To rightholders:

- Any personal data which the rightholder has authorised it to use

- The rights revenue collected on behalf of the rightholder
- The amount due to the rightholder and details per category of rights and types of use
- The period during which the uses took place for which amounts are due
- The deductions made for management fees and other purposes
- Any outstanding amounts due to the rightholder
- The available complaint handling and dispute resolution procedure

To other collecting societies on whose behalf it manages rights:

- The amounts due to rightholders with details
- All deductions made
- Information on the licences and rights revenue pertaining to works included in the repertoire covered
- Resolutions of the general meeting

(ii) A collecting society must also make available by electronic means and at the request of any rightholders whose rights it represents, collecting societies on whose behalf it manages rights and users:

- Standard licensing contracts and applicable tariffs
- The repertoire and rights it manages and the Member States it covers
- A list of representation agreements it has entered into

Furthermore, if requested by any rightholder or other collecting society, all information on works for which a rightholder has not been identified must be provided.

(iii) A collecting society must publish on its website:

- Its statute, membership terms and terms of termination of the authorisation
- The list of the persons managing the business and the directors
- Rules on distribution of the amounts due to rightholders, on the management fees and other deductions and on complaint handling and dispute resolution procedures available

(iv) A collecting society must publish an annual transparency report on its website for each financial year. This report must contain the information requested in Annex I of the Directive and a special report on the use of the amounts deducted must be attached. Annex I sets out a detailed list of requirements, chiefly focused on financial information but including also a report on activities, on remuneration of directors and on deductions for social, cultural and educational services.

2. Multi-territorial licensing of online rights in musical works by collecting societies

(a) Requirements for collecting societies which grant multi-territorial licences for online rights in musical works The draft Directive sets out minimum requirements which any collecting society who wishes to engage in multi-territorial licensing must be able to meet, as follows:

(i) Capacity to process the data needed for the administration of such licences The collecting society should be able to:

- Identify the musical works, rights and rightholders represented
- Use unique identifiers to identify rightholders and musical works

- Take into account any changes of this information without undue delay
- Identify and resolve inconsistencies in data held by other collecting societies granting multi-territorial licences

(ii) Transparency The collecting society shall provide to online music service providers, rightholders and other collecting societies up to date information allowing the identification of the online music repertoire it represents (musical works, rights and Member States represented).

Procedures shall be put in place to enable rightholders and other collecting societies to object to the contents of this data. Furthermore, the collecting society shall provide rightholders with means of submitting information on their musical works or rights.

(iii) Invoicing The collecting society shall monitor the use of online rights in musical works which it represents by online music service providers to which it has granted a multi-territorial licence for those rights and offer to them the possibility of reporting their actual use electronically. Invoicing shall be by electronic means, without delay after the actual use is reported and it shall identify the works and rights which are licensed and the corresponding actual uses. The collecting society shall have procedures in place for the online music service provider to challenge the accuracy of the invoice.

(iv) Payment to rightholders The collecting society shall distribute amounts due to rightholders without delay after the actual use of the work is reported. It shall also provide information to rightholders on the period and the Member States in which the uses took place, the amounts collected, distributed and the deductions made for each online rights and each online music service provider.

(v) Outsourcing Outsourcing of elements of its service by a collecting society does not affect the liability of the collecting society towards rightholders, online services providers or other collecting societies.

(b) Agreements between collecting societies for multi-territorial licensing

(i) Non-exclusive nature Any representation agreement between collecting societies shall be of a non-exclusive nature.

The members of the mandating collecting society shall be informed of the duration, the costs and any other significant terms of the agreement.

(ii) Obligation to represent another collecting society for multi-territorial licensing: A collecting society which does not grant or offer to grant multi-territorial licences for the online rights in musical works in its own repertoire can request another collecting society that meets the requirements to enter into a representation agreement. The latter society shall accept if it is already granting or offering to grant multi-territorial licences for the same category of online rights in the repertoire of one or more other collecting societies.

(c) Access to multi-territorial licensing If a collecting society does not grant or offer to grant multi-territorial licences or does not allow another collecting society to represent those rights for such purpose by one year after the transposition date of this Directive, rightholders will be able to grant such licences themselves or through another collecting society or other party they authorise.

(d) Derogation for online music rights required for radio and television programmes: None of these requirements shall apply to collecting societies which grant, on the basis of the voluntary aggregation of the required rights, a multi-territorial licence for the online rights in musical works required by a broadcaster to communicate or make available to the public its radio or television programmes simultaneously with or after their initial broadcast as well as any online material produced by the broadcaster which is ancillary to the initial broadcast of its radio or television programme. This provision is explained in recital 35 as being needed because broadcasters generally rely on a licence from a local collecting society for their own broadcasts of programmes which include musical works. What is envisaged here is that the society which grants the broadcasting licence should also be able to grant a multi-territorial online licence for simultaneous or delayed transmissions online of television and radio broadcasts, even if that society does not meet the requirements set out in this part of the draft Directive.

3. Enforcement measures

- (a) Collecting societies will be required to make available to their members effective and timely procedures for dealing with complaints and for resolving disputes, for instance as to withdrawal of rights, deductions and distributions.
- (b) Member States must ensure that disputes between collecting societies and users concerning licensing conditions and tariffs and any refusal to grant a licence can be submitted to a court and if appropriate to an independent and impartial dispute resolution body (such as the UK's Copyright Tribunal).
- (c) In respect of multi-territorial licensing, alternative dispute resolution bodies are to be available as a means of recourse in respect of disputes between collecting societies and actual or potential online music service providers, between collecting societies and rightsholders, and as between collecting societies.
- (d) Complaints procedures are to be set up for members of collecting societies, rightsholders, users and other interested parties to submit complaints to competent authorities with regard to the activities of collecting societies.
- (e) Administrative sanctions that will be 'effective, proportionate and dissuasive' are to be available.
- (f) Administrative authorities are to ensure that the requirements of the Directive in relation to multi-territorial licensing of musical works are complied with by collecting societies when granting such licences.
- (g) Finally, the draft Directive requires exchanges of information between the competent authorities of Member States and the Commission on the development of multi-territorial licensing and requires the Commission to hold regular consultations with stakeholders. The Commission is required to assess whether further steps are needed to address any identified problems.

¹ Commission Recommendation 2005/737/EC on collective cross-border management of copyright and related rights for legitimate online music services.

² Case COMP/C2/38.968 – CISAC. Appealed, CISAC v Commission (T-442/08)

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