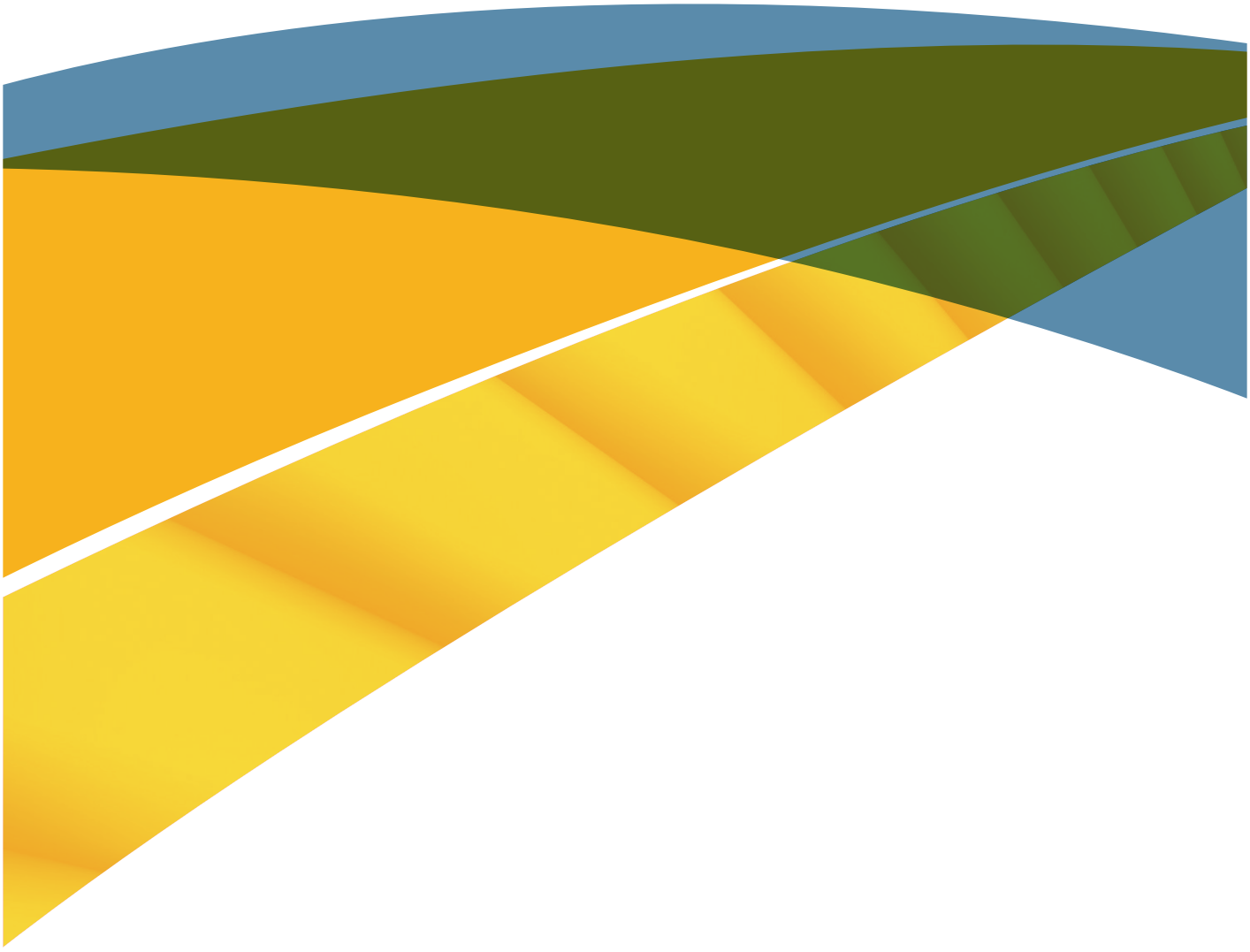
Intellectual Property Office

Collective rights management in the Digital Single Market

Consultation on the implementation of the EU Directive on the collective management of copyright and multi-territorial licensing of online music rights in the internal market: summary of responses to technical review



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Contents

Introduction

The EU Directive on the collective management of copyright and multi-territorial licensing of online music ("the Directive"[1]), published on 26 February 2014, entered into force on 10 April 2014 and must be transposed into national law by 10 April 2016.

The policy underpinning the Directive is part of the European Commission's 'Digital Agenda for Europe'[2] and the 'Europe 2020 Strategy[3] for smart, sustainable and inclusive growth.' It is one of a set of measures aimed at improving the licensing of rights and the access to digital content. These are intended to facilitate the development of legal offers across EU borders of online products and services, thereby strengthening the Digital Single Market.

Policy aims of the Directive

The Directive's main objective is to ensure that collective management organisations ("CMOs") act in the best interests of the rightholders they represent. Its overarching policy aims are to:

- Modernise and improve standards of governance, financial management and transparency of all EU CMOs, thereby ensuring, amongst other things, that rightholders have more say in the decision making process and receive accurate and timely royalty payments.
- Promote a level playing field for the multi-territorial licensing of online music.
- Create innovative and dynamic cross border licensing structures to encourage further provision and take up of legitimate online music services.

The Directive sets out the standards that CMOs must meet to ensure that they act in the best interests of the rightholders they represent. It establishes some fundamental protections for rightholders, including those who are not members of CMOs. These include detailed requirements for the way in which rights revenues are collected and paid, how the monies are handled, and how deductions are made.

The Directive provides a framework for best practice in licensing, including obligations on licensees around data provision. It also creates scope for the voluntary aggregation of music repertoire and rights with the aim of reducing the number of licences needed to operate a multi-territorial, multi-repertoire service.

All these measures are underpinned by detailed requirements to ensure effective monitoring and compliance, overseen by a national competent authority (NCA). Those requirements include ensuring that proper arrangements are in place for handling complaints and resolving disputes.

1 http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2014:084:0072:0098:EN:PDF

2 http://ec.europa.eu/digital-agenda/

3 http://ec.europa.eu/europe2020/index_en.htm

Structure of the Directive

The Directive is in four parts. Title I outlines its scope and definitions. Title II focuses on the rights of and protections for rightholders, underpinned by minimum standards of governance and transparency that are required of all EU CMOs. Title III sets out the standards that EU CMOs which choose to engage in multi-territorial licensing of online musical rights must meet. Title IV covers the requirements for enforcement of all the measures in the Directive, including the procedures for handling complaints and settling disputes.

Domestic regulation

The Directive's provisions for improved transparency and governance complement existing domestic legislation for the regulation of CMOs. The Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014[4] (the "2014 Regulations") require UK CMOs to adhere to codes of practice that comply with minimum standards of governance and transparency under those Regulations. There is also provision for regular, independent reviews of compliance and access to an Ombudsman who acts as the final arbiter in disputes between a CMO and its members or licensees. UK CMOs self-regulate in the first instance, but Government has a reserve power to remedy any problems in self-regulation and to impose sanctions where appropriate.

The 2014 Regulations were developed and implemented against the backdrop of the Directive. When the Directive was announced in 2012, work on the 2014 Regulations was well underway.[5] The question of whether to continue was carefully considered, and Government decided to carry on with the domestic work, given that there was no guarantee that the Directive would be agreed. Even if it were, it would be a number of years before transposition during which time rightholders and licensees would be without the protections they had been promised.

Scope of the Directive

The scope of the 2014 Regulations does not currently extend to those organisations that also collectively manage rights but which have a different legal form to CMOs. The Directive calls these organisations "independent management entities" (IMEs).

In general terms, UK CMOs tend to be constituted as companies limited by guarantee, (a form usually adopted by most incorporated charities, public benefit bodies, clubs, and membership organisations). They typically describe themselves as "not for profit" organisations and are owned and controlled by their members, the rightholders. IMEs, by contrast, are for-profit commercial entities that are not owned or controlled by rightholders. Under the Directive they will have to comply with certain provisions; broadly summarised, these oblige them to provide information to the rightholders they represent, CMOs, users and the public.

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

5 In fact, the Government had already consulted on codes of practice for collecting societies in its Copyright Consultation of 2011, and had published minimum standards at the end of 2012.

Online music

There is no specific provision in UK law for the regulation of the multi-territorial licensing of online musical works. The Directive introduces new provisions in Title III to ensure that cross border services meet certain standards, including transparency of repertoire and accuracy of financial flows related to the use of the rights.

The technical review

The Government consulted on its approach to implement the Directive in February 2015, and published its response in July 2015. These documents are available at: https://www.gov.uk/government/consultations/implementation-of-the-collective-rights-management-directive

Subsequently, the Government developed draft Regulations, and published these for a short technical review in October 2015. The review sought views on whether the draft Regulations effectively and properly implemented the approach set out in the July consultation response.

The Government received 17 written responses to the consultation. In addition, officials at the Intellectual Property Office conducted 4 workshops on the review, attended by representatives of CMOs, IMEs, rightholders, and users. The Government thanks all those who participated in the review process.

This document summarises the responses received, and sets out the main steps that Government has taken to respond to them.

Responses to review questions

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

Most responses agreed that the draft Regulations were an appropriate implementation of the Directive. Various respondents used this question to raise drafting points on specific sections of the Regulations, or to raise particular areas of concern. For example, several responses argued that the Government should separate those sections of the Regulations which were designed to implement domestic policy, as opposed to those which directly implemented provisions in the Directive.

Some CMOs also argued that the draft Regulations imposed certain obligations on them – such as a requirement to ensure that a member did make a proxy appointment resulting in a conflict of interest – which they could not guarantee could be met.

One CMO argued that the drafting of Regulation 15(2) and 15(4) placed an inappropriate requirement on CMOs regarding the outcome of negotiations on tariffs, which they argued were a commercial negotiation between parties. This response also argued that the Regulations effectively placed a requirement on the National Competent Authority to consider whether the terms and conditions of a tariff (and the remuneration it provided to rightholders) was appropriate – matters which are currently within the scope of the Copyright Tribunal.

2. *Do you agree that the approach taken in the draft Regulations is consistent with that set out in the Government's response to the recent consultation?*

Most responses agreed that the Government's response was consistent (subject in some cases to specific drafting points raised in response to other questions). Some responses were critical of the Government's intention to import a sanctions system similar to that used in relation to the 2014 Regulations – this was because those respondents felt the availability of sanctions as part of a direct regulatory system (rather than as a backstop to self-regulation) created additional risk.

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

Responses to this question generally sought more clarity or guidance on the inter-relationship between the various definitions in this Regulation and other legislation. One response argued that qualification as a CMO for the purposes of these Regulations should not automatically mean that a body was considered a "licensing body" for the purposes of the 1988 Copyright, Designs and Patent Act. Other asked for more guidance on the definition of "CMO" and whether the Regulations would apply to all the acticivites of a body meeting the definition (even if some of those activities were outside the scope of the Directive).

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

All respondents who expressed a view supported the Government's implementation of this section. In particular, those CMOs who were interested in making use of the discretionary provisions allowed by the Directive (which give CMOs more flexibility about their decision-making processes) responded positively to the inclusion of equivalent provisions in the Draft Regulations. Some CMOs used this response to

highlight their concern with provision in Regulations 7(1)(h) regarding the appointment of proxies (see summary of Question 1).

5. *If you consider that you are a CMO or may be a CMO in the future, would you consider making use of the discretionary provisions in Regulation 7 (5-11)?*

Two CMOs stated that that they would consider making use of the discretionary provisions (of a total of 8 responses, representing 10 CMOs). Another respondent (which is in the process of establishing a CMO) also indicated potential interest.

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

One respondent was concerned that particular voting or decision-making arrangements could prevent fair representation of rightholders represented by a trade association or other similar body. In this event, they indicated that they would pursue a complaint to the NCA citing Regulation 6.

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

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

Responses from CMOs were critical of this provision (which relates to providing staff with training regarding conduct compliant with the Regulations). Their concerns included:

- The view that the requirement was disproportionate (because it could be read as requiring CMOs to provide training on aspects of the Regulations that were not relevant to the employee's role)
- That this requirement would create an additional burden on UK CMOs by comparison to their counterparts in Europe
- That it would be difficult for a CMO to demonstrate compliance in the event of a complaint
- That making this an obligation which could lead to sanctions against the CMO was not justified by evidence, including the relatively low level of complaints about CMOs under the current domestic regime.

Responses from some rightholders and licensees (including evidence gathered at workshops during the consultation period) indicated that an obligation on CMOs to provide training about appropriate conduct was seen as an important protection by those who worked with them. However, these groups also acknowledged that it would be appropriate for any such requirement to be proportionate.

Some responses (including evidence gathered at workshops) suggested that the proposed obligation could be re-worked to include a direct reference to proportionality, or alternatively that it should be removed from the draft Regulations entirely in favour of references to appropriate training in accompanying guidance.

9. *Does regulation 15 (5) (d) provide an effective mechanism to oblige CMOs to maintain good standards of behaviour in their relations with licensees, such as those usually found in their existing codes of practice?*

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

Some responses suggested that it would be important to define what was meant by 'good faith' in this context if the provision was to be a) effective and b) proportionate. Some responses suggested that it would be preferable to use the language in the equivalent section of the current specified criteria for CMO codes of practice (which requires CMOs to include a commitment to treat licensees "fairly, honestly and impartially". One response argued that the exemption for micro-business in relation to this requirement should not apply.

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

Responses by CMOs to question 11 raised concerns around the 'reasonableness' of tariffs. In particular concerns were raised that the regulations are seen to imply obligations to ensure reasonable tariffs are in place, and that concerns were around how CMOs would ensure they are reasonable.

It was also argued that sufficient safeguards exist within current codes of conduct to deal with other issues.

12. *Do you agree that regulations 31-32 of the draft Regulations provide for a suitable complaint process for members, users, and other parties dealing with CMOs?*

Although there was a common view that CMOs already provide sufficient access to complaint procedures, some CMOs were particularly concerned about the type of complaints which could be raised under Regulation 31, including instances where complaints are made about issues that are not be relevant to the complainant.

Some responses suggested that guidance should set out some principles about how complaints by CMOs should be dealt with, including vexatious complainants. In addition, it was suggested that guidance would be needed to clarify the status of rightholders who are not members of a CMO, but who might be deemed to have a "direct" legal relationship with a CMO.

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

Responses to question 13 highlighted the importance of the option of submitting disputes to independent and impartial dispute resolution procedures. However, some responses also outlined the importance of exhausting appropriate internal or other legal dispute resolution procedures before submitting disputes to independent ADR.

Some responses from CMOs contended that the current drafting could create a requirement to offer ADR in a wider set of circumstances than required under the 2014 Regulations (which related solely to complaints that could not be solved by a CMOs own internal complaints procedure). These respondents were concerned that this could create new costs, particularly in relation to disputes regarding tariffs and licensing.

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

Generally responses to the review welcomed the sanctions regime, and responses felt that they should act as an appropriate deterrent. However, there were concerns raised around the applicability of these sections of the Regulations to officers and managers, and what is meant by this. As such, responses ask that the government provides some clarity within any guidance they issue to accompany the Regulations.

Some responses to question 14 outlined the need for there to be guidance available to enable parties to understand the relationship between Regulation 38(2) and the provisions under company law, particularly in the instances where Directors may also be members.

In workshops, some participants suggested that the sanctions provisions should be amended to clarify that sanctions should be proportionate to the breach, and to amend the threshold that should be met before a sanction could be issued.

15. *Do you agree that the Government should retain an exemption for micro-businesses for those provisions which are not explicitly required by the Directive?*

Some responses argued that providing micro-businesses with an exemption from some obligations within the Regulations would run counter to one of the purposes of the Directive, which aims to put CMOs on a level playing field nationally and at an international level. It was suggested that there was limited evidence for maintaining the exemptions that exist under the 2014 Regulations.

16. *Based on the mechanisms for dispute resolution, complaints and enforcement set out in the draft Regulations, has your assessment of the likely workload of the NCA changed since the publication of the original consultation and Impact Assessment?*

Responses to this question were limited. One response suggested there could be a significant increase of workload, related to the visual arts sector. The Government's stated intention to fund the NCA in the first instance was welcomed.

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

Overall responses to question 17 generally agrees to the suggested amendments to the ECL Regulations and that they capture the Government's stated intentions.

18. *Do the suggested amendments leave any misalignments between the draft Directive Regulations and the ECL Regulations, particularly with regard to protections for non-member rightholders?*

A range of views were received in the responses to question 18. Some stated that the amendments left no misalignments between the draft Regulations and the ECL Regulations. Other responses indicated there was some misalignment. In particular, draft Regulation 2 and Regulation 19 of the ECL Regulations were cited. There was also a suggestion that procedures for amounts due to right holders in the ECL Regulations did not align with the process for declaring income undistributable in the draft Regulations.

Finally, some respondents queried why some sections of the ECL regulations have been removed.

Next steps

The Government thanks all those who provided written responses to the technical review, or who have comments at workshops run by the Intellectual Property Office during the review period. In response to the comments received, we have made a number of changes to the final Regulations:

Staff training (Regulation 9 (4)): The Regulations have been amended to clarify that the obligation is to provide training on conduct that is appropriate.

Licensing and tariffs: We have amended the Regulations to clarify that the obligation on CMOs in relation to tariffs relates to tariffs it has determined.

Alternative Dispute Resolution: The Government has amended the final Regulations to ensure that the requirement to offer access to ADR does not apply to certain provisions of the Regulations unless certain circumstances apply. Guidance will provide additional information about the ADR provision CMOs will be expected to make.

Sanctions and Enforcement: The Government has changed the provision relating to compliance notices so as to ensure that the notice specifies what is considered to be the breach. The Government will use guidance to further clarify its approach to sanctions and enforcement.

Miscellaneous: The Government received a number of comments which looked to address perceived drafting issues with the Regulations. We have made a number of changes in response to ensure the Regulations have the intended effect.

Guidance: Other issues raised during the technical review, such as the definition of “officer” and “manager”, and CMOs responsibilities in relation to proxy appointments, will be dealt with through guidance. The IPO has been working with CMOs and other stakeholders to develop guidance which will be published before the Regulations come into effect.

Annex A: list of respondents

PRS for Music

Phonographic Performance Ltd

NLA Media Access

Copyright Licensing Agency/Publishers Licensing Society/Author's Literary Collecting Society

Design and Artist's Copyright Society

Educational Recording Agency

British Equity Collecting Society

Directors UK

Music Publishers Association

British Copyright Council

British Institute of Professional Photography

British Association of Picture Libraries and Agencies

British Association of Songwriters, Composers and Authors

Association of Learned and Professional Society Publishers

Ombudsman Services Ltd

British Broadcasting Corporation

Sky

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