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SOUTH-EAST ASIA

Collective Rights Mamagement in the EU

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Panorama of Collective Management in EU

- More than 250 Collective Management Organisations (CMOs) in the EU

- In general, 1 CMO represents all or some of the rights of a category of right holders in a given Member State (authors / record producers / audiovisual producers / performers, etc.). In some cases, CMOs may manage the rights of more than one category of right holders. In few cases, competing CMOs represent the same category of right holders in the same country.

- CMOs collect around 6 billion Euros in the EU annually (most of this income is managed by approximately 70 EU CMOs managing author's rights (for over one million authors).

- The use of the rights in the music sector accounts for about 80% of the total revenue collected by CMOs.

Raison d'être of collective management

- **Collective negotiation with users**
  Beaumarchais ; 1777; SACD

- **Professional forum; representation of authors' interests**Balzac, Dumas, Victor Hugo, 1837, SGDL

- **Full collective management of rights**
  Henrion, Parizot, Bourget, 1847-1850, SACEM

Main fields of collective management

- Authors' musical „performing" rights
- Authors' musical „mechanical" right
- Performers' and producers of phonograms' right to single equitable remuneration concerning broadcasting and communication to the public of phonograms published for commercial purposes
- Interactive right of making available to the public in musical works and concerning the rights of performers
- Cable retransmission right
- Public performance right in dramatic works
- Reprographic reproduction right
- Right to remuneration for private copying
- Authors' and performers' „residual" right to remuneration after the transfer of their rental right to producers
- Resale rights (*droit de suite*)

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EC Assessment on the Functioning of Collective Management before EU Directive on Collective Management

- No legal framework at EU level on the functioning of CMOs: Most copyright *acquis* deals with substantial copyright.
- Important principles on the governance and transparency of CMOs developed by the CJEU and EC decisions on grounds of competition law but these principles are not uniformly applied in the EU.
- Disparities between Member States' approaches to the regulation of CMOs + Need for more control on CMOs' functioning.
- Territorial fragmentation of repertoires in the EU: difficulty for online service providers to secure a multi-territory license (MTL) of the aggregate repertoire (entire music repertoire) in order to launch their services.
- MTL: cumbersome + time-consuming + costly + restricts the territorial scope of online services, particularly for small users
- Small and medium CMOs not equipped to manage MTL: need for capacity and technical resources + risks of double invoicing for users + delays for right holders
- Legal uncertainty for users

Objectives of the EU Directive *2014/26/EU of 26 February 2014 on collective rights management and multi-territorial licensing of rights in musical works for online uses.*

- To ensure the contribution of CMOs to the development of the Single Market, through a coherent and efficient governance and transparency framework for CMOs - *irrespective of the category of right holders they represent or the category of rights they manage* –
- Encouraging and facilitating the multi-territorial licensing of the rights of authors in their musical works by CMOs representing authors
- Improve consumers' access to a wider variety of cultural goods and services
- Facilitate users' access to licenses or the provision of music services throughout the EU and foster the legal offer for such services
- Maximize right holders earnings by widely promoting their works
- Foster cultural diversity by the availability of a large and diverse repertoire

Key Measures to Improve the Governance of CMOs

Measures related to membership in CMOs *(Chapter 1)*:

- Right holders should be free to choose a CMO to manage their rights (or categories of rights or types of works) regardless of the country of establishment of the CMO or of their own residence (Art. 5 par. 2)
- Right holders should be free to terminate the authorisation they gave to a CMO for the management of their rights or withdraw only some of their rights (Art. 5 par. 4)
- CMOs should not discriminate between right holders

Measures related to the General Meeting of CMOs (Art. 8):

- The General Meeting of the members of a CMO should decide on the key matters within the CMO.
- Members should elect and dismiss the directors of the CMO
- Members should decide on key policies such as the distribution and the investment of the collected revenue and on the rules on deductions from the collected revenue

Key Measures to Improve the Financial Management of CMOs

Chapter 2 : Management of rights revenue

- Need for CMOs to establish **sound financial management practices**, as they collect and handle revenue that ultimately belongs to right holders: *e.g.* keep and manage these amounts separately from their own assets and not use them for their own account (Art. 11)
- CMOs should ensure sufficient **transparency on any deduction** they make and assure members and right holders fair access to any social, cultural or educational services, if funded by deductions (Art. 12)
- CMOs should **regularly and diligently pay royalties to right holders**, without undue delay – no later than one year from the end of the financial year in which the amounts were collected – and make **efforts to identify right holders** (Art. 13)

Transparency Towards Right Holders and Users

Chapter 3: Management of rights on behalf of other CMOs

➢CMOs should provide right holders and other CMOs on whose behalf they manage rights under a representation agreement, with detailed information on the collected revenue and the deductions:

- Non-discrimination requirement for the management by a CMO of rights on behalf of another society pursuant to a representation agreement (Art. 14)
- No possibility of deducting the amounts which are due to another society without the latter's express consent and payments should be made accurately to other societies (Art. 15)

Chapter 4: Relations with users

➢CMOs and users should conduct negotiations in good faith (Art. 16)

➢Tariffs should be based on objective criteria and reflect the value of the rights in trade and of the actual service provided by the CMOs

➢CMOs shall Improve transparency towards users; in particular they should be able to receive information on standards licensing contracts, the applicable tariffs and the repertoire a CMO represents

➢Users shall provide a CMO, within an agreed or pre-established time and in an agreed or pre-established format, with such relevant information at their disposal on the use of the rights represented by the CMO as is necessary for the collection of rights revenue and for the distribution and payment of amounts due to rightholders (Art. 17).

Transparency and Reporting

Chapter 5: Transparency and reporting

- **CMOs would have to comply with the following level of disclosure towards right holders:**
  - Amounts collected and paid, management fees charged and other deductions made (Art. 18)
  - Information to other CMOs on the management of rights under representation agreements (Art. 19)
  - Information to right holders, other societies and users on request (Art. 20) made available, at least once a year, by electronic means
- **CMOs would have to make public on their website information on their structure and their financial management:**
  - Information made public on the organisation and functioning of the CMOs (Art. 21). In particular, as regards their structure, they would have to publish their statute, the membership terms, the available dispute resolution mechanisms, etc.
  - As regards financial management, they would have to draw up and publish an **annual transparency report**, including detailed accounts, financial information and a special report on the use of the **amounts deducted for purposes of social, cultural and educational services** (Art. 22)

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Dispute Settlement Mechanisms

Dispute resolution for members and right holders:

Member States shall ensure that CMOs make available to their members and right holders effective and timely procedures for dealing with complaints and for resolving disputes in particular in relation to authorisation to manage rights and termination or withdrawal of rights, membership terms, the collection of amounts due to right holders, deductions and distributions (Article 33).

Dispute resolution for users:

Member States shall ensure that disputes between CMOs and users concerning the existing and proposed licensing conditions, tariffs, and any refusal to grant a license can be submitted to a court, and if appropriate, to an independent and impartial dispute resolution body (mediation or arbitration) (article 35).

On the other hand, due to specificities of multi-territorial licensing, the proposal foresees the submission of related dispute to alternative dispute resolution bodies (such as arbitration) (article 34 par. 2). This does not prevent parties from going to courts.

The Licensing Model Proposed by the EU Directive

Title III on the multi-territorial licensing of online rights in musical works by CMOs

In order to be able to grant MTL for online rights in musical works, a **CMO would need to comply with minimum quality standards**:

- Be able to **accurately identify** to the service providers the music repertoire it licenses on a per-work basis;
- **Rapidly invoice** online service providers on a per-work basis;
- **Pay the amounts due to each right-holder on time,**
- Capacity to **appropriately and accurately handle data electronically** (Art. 23-28)

***i.e.* MTL of online rights in musical works reserved to CMOs with the appropriate ICT equipment and data processing (databases, etc.)**

Safeguards To Ensure Cultural Diversities Of Repertoires

- CMOs which do not comply with the requirements to offer MTL of online rights in musical works *("MTL passport")* may continue to grant **national licenses** for their **own repertoire** and/or national licenses for the **repertoire of other CMOs** through **reciprocal agreement**.
- Such CMOs shall have the **possibility to mandate another CMO to grant MTL for the online rights in musical works in its own repertoire** on a non-discriminatory and non-exclusive basis for the purpose of MTL (Art. 29)
- The CMOs receiving the request from such society may not refuse if it is already representing the repertoire of one or more CMOs for the same purpose (***"tag-on" obligation***) (Art. 30)
- Following a transitional period, right holders may grant licenses (either directly or through another intermediary) for their own online rights if their CMO does not grant MTL and if it does not refer to a CMO (Art. 31).

Compliance of CMOs with the requirements of the Directive (Art. 36)

- No prior authorisation or licensing system for CMO required to Member States

- Member States would appoint relevant **competent authorities** to continuously monitor compliance with the requirements of the Directive by CMOs established in their territory

- National competent authorities shall be **empowered to administer complaints, procedures, and effective, proportionate and dissuasive sanctions**

Status of CMOs and provisions of competition law

- CMOs can be constituted under different legal forms, such as associations
- They must be not-for-profit organisations.
- **CMOs' de jure monopoly position** in 8 EU MS (Austria, Belgium, Czech Republic, Denmark, Hungary, Latvia and the Netherlands); designation by the State for the management of the same category of rights and the same group of right holders.
- In practice, in all EU MS apart from Spain, authors' societies generally benefit from a **de facto monopoly** on the national territory irrespective of the monopolistic status granted by the legislation. Competition between CMOs in practice more common for performers and producers CMOs
- In all EU MS CMOs subject to the jurisdiction of the competent antitrust authority as regards the possible infringement of competition rules, in particular for cases of abuse of dominant position.

Supervision/Monitoring

- **Authorisation**. In order to start functioning, CMOs sometimes need authorisation from a national public authority, usually a ministry, but also a communication authority, copyright board or national IP Office. There is a regime of prior authorisation to exercise operations in 19 EU MS
- **Supervision of operations.** In most EU MS, CMOs subject to supervision from public authorities or publicly appointed bodies with regard to the management of their operations. The scale of powers of the supervisory authority varies across different Member States.
- The administrative control of the operations of CMOs is justified by the protection of **general interest.**

Factors in deciding the approval of the establishment of CMOs

- Legal form.
- Suitability of the statutes of the CMO to ensure appropriate management.
- Reliability of the persons entitled to represent the CMO.
- Availability of the necessary repertoire and of financial resources.
- Representativity of the right-holers.

Regular supervision of key elements

- A check before the approval is not a sufficient guarantee.
- Competent authorities shall not interfere unnecessarily with management of the rights but should regularly supervise certain key elements.
- Key elements of supervision:
  - Whether the activities correspond to the approved statutes.
  - Whether fair rules of collection and distribution of royalties exist. Whether distribution in fact takes place as prescribed.
  - Whether the administrative costs of management of the rights are reasonable.
  - Several laws prescribe that CMOs shall be subject to independent financial auditing.

Government supervision to prevent possible abuses of CMOs' monopoly position

- In theory three cases of abuse of CMOs' monopoly position may exist.
  - Refusal to license certain uses without any valid reason.
  - Unreasonable discrimination between users in the same category.
  - Setting tariffs and other licensing conditions in an arbitrary way

- Supervision is done by national and EU competent competition authorities under anti-monopoly legislation special rules.

Exchange of information between competent authorities (Art. 37)

•Where a competent authority considers that a collective management organisation established in another Member State but acting within its territory may not be complying with the provisions of the national law of the Member State in which that collective management organisation is established which have been adopted pursuant to the requirements laid down in this Directive, **it may transmit all relevant information to the competent authority of the Member State in which the collective management organisation is established, accompanied where appropriate by a request to that authority that it take appropriate action within its competence**. The requested competent authority shall provide a reasoned reply within three months.

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Extended collective management

- Extended collective management is based on voluntary collective management**. The effect of licenses granted by the collective management organization on behalf of the owners of rights represented by it is extended by law also to those who are not represented.**

- In the case of exclusive rights, extended collective management is **in accordance with the international norms**
  - **if collective management is the normal way of exercising the right concerned;**
  - **if the repertoire of the organization is sufficiently representative; and**
  - **if the owners of rights may „opt out”** (leave the collective system) **under reasonable conditions.**

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CJEU judgement in *Soulier and Dove*

Judgment of the CJEU in Case C-301/15 of 16 November 2016 (*Marc Soulier and Sara Doke* v *Premier ministre, Ministre de la Culture et de la Communication*):

Article 2(a) and Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as **precluding national legislation**, such as that at issue in the main proceedings, **that gives an approved collecting society the right to authorise the reproduction and communication to the public in digital form of 'out-of-print' books**, namely, books published in France before 1 January 2001 which are no longer commercially distributed by a publisher and are not currently published in print or in digital form, **while allowing the authors of those books, or their successors in title, to oppose or put an end to that practice, on the conditions that that legislation lays down**. (Emphasis added.)

- The judgment **not sufficiently clear**, **but** it seems that **fortunately it has not followed certain findings of the Advocate General that could be interpreted as opposing extended collective management (ECL) in general**.
- **The problem**: **the CMO Directive does not establish conditions of ECL**.

Directive 2019/790 CHAPTER 2 Measures to facilitate collective licensing
Collective licensing with an extended effect

- **Article 12 of the Directive 2019/790 on copyright and related rights in the Digital Single Market** contains an option for Member States to provide for extended collective licensing. This is where a collective management organisation enters into a licensing agreement for the use of works, such an agreement can be extended to apply to the rights of rightsholders, who have not authorised that collective management organisation to represent them, or the organisation has a legal mandate or is presumed to represent rightsholders who have not authorised the organisation accordingly.

- The collective management organisation must be subject to the national rules implementing the EU Directive on Collective Rights Management (2014/26/EU). Under that Directive a collective management organisation must be authorised by law to manage copyright on behalf of more than one rightsholder, i.e. by way of assignment, licence or other contractual agreement.

Directive 2019/790
Number of safeguards to protect the interests of rightsholders.

- Article 12.2 thus limits the possibility for Member States to introduce provisions on ECL to **situations where individual licensing or collective licensing based on individual authorisation (mandates) is impossible** or almost impossible. i.e. situations that can be described as market failure
- Rightholders whose rights are covered by the extended effect may **at any time easily and effectively exclude their works or other subject matter from the licensing mechanism ("opt out")** (article 12.3.c)
- All rightholders are to be **treated equally**, including in relation to the terms of the licence (article 12.3.b).

Directive 2019/790
Areas of use/transparent and non-discriminatory treatment

Recital 47 clarifies that mechanisms of collective licensing with an extended effect can only apply in **well-defined areas of use, where obtaining authorisation from rightsholders on an individual basis is typically onerous and impractical.** The mechanisms should be **transparent and non-discriminatory as regards the treatment of rightsholders**, **including** rightsholders who are **not members** of the collective management organisation.

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Directive 2019/790
Representativity/Opt-out

- Recital 48 provides that Member States should determine the requirements to be satisfied for collective management organisations to be considered sufficiently representative, taking into account the category of rights managed by the organisation, the ability of the organisation to manage the rights effectively, the creative sector in which it operates, and whether the organisation covers a significant number of rightsholders in the relevant type of works or other subject matter who have given a mandate allowing the licensing of the relevant type of use, in accordance with Directive 2014/26/EU.
- Recital 48 also clarified that rightsholders should be given the opportunity to exclude the use of their works from any licensing mechanisms, including before the conclusion of a licence and during the term of the licence.

Conclusions

- National implementations of article 12 can provide an **incentive for rightholders to organize themselves in representative organizations**
- Effective and balanced solution to some of the licensing challenges posed by article 17. **Obligation on the intermediary to enter into licensing agreements with rightholders to avoid liability for infringement**. In practice, it can be difficult for the intermediary to obtain licenses that cover all the material that is made available via the platform.
- **ECL** can also be of use **in case of "out-of-commerce" work. Article 8** provides for a regulatory framework that allows collective management organisations to conclude licences with cultural heritage institutions for the digitisation of out-of-commerce works that are in the permanent collections of the institutions, provided the use is for non-commercial purposes.

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