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Proposal for a Directive on Collective Rights Management and (some) Multi-territorial licensing. (Part I)

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On July 11 the European Commission published its first official draft of the 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" (the "**Proposal**"). According to the Commission's Press Release, the Proposal's two complementary objectives are those of promoting "greater transparency and improved governance of collecting societies through strengthened reporting obligations and rightholders' control over their activities"(thus incentivizing the creating of superior services) and encouraging and facilitating "multi-territorial and multi-repertoire licensing of authors' rights in musical works for online uses in the EU/EEA." This is intended to be a "minimum harmonization" legislative piece, thus allowing Member States to impose more demanding requirements on Collective Management Organizations ("**CMOs**").

The Proposal includes not only a draft version of the Directive, but also the traditional Explanatory Memorandum and two Annexes on transparency related information for CMOs (Annex I) and explanatory documents to be provided by Member States accompanying the implementation (Annex II). The Commission also made available MEMO/12/545 with answers to FAQs on this Proposal. A near 200 page Impact Assessment analysis (with an executive summary) should provide sufficient reading for those collective rights management fans out there. With laudable symmetry, the draft itself is composed of a 44 Recitals preamble and an identical number of articles (is this a Catch 44 or is the Commission obsessed with this "mysterious stranger"?), making it the longest existing Directive in the field of copyright, if approved in its current format.

Given the length of the Proposal, this post will be divided in two parts: Part I will address background, provide an overview of the Proposal, and look at its general rules on subject matter, scope and CMOs; Part II will address the hot topic of multi-territorial licensing ("**MTL**") and enforcement measures.

Background

The EU CMO market is composed of 250 collecting societies managing around 6 billion euro in every year, the majority of which is controlled by 70 authors' rights CMOs where 80% of income results from musical creations. Harmonization of collective rights management in the EU has been on the Commission's agenda as far back as 1995, being subject to consideration in the Green Paper

Copyright and Related Rights in the Information Society. EU-wide activity in this field has been noteworthy ever since, with a community framework on collective rights management being discussed, inter alia, in the 2004 Community Framework Resolution, the 2004 Communication of the Management of Copyright, the 2005 Study on Cross-border Collective Management of Copyright and the 2005 Commission Work Programme.

These documents bring to the forefront concerns with issues of transparency, efficiency, a functioning market for authors and users and, within the context of the single market, membership and MTL. The latter have been the focus of a body of Commission decisions testing the potential anticompetitive behaviour of CMOs under (now) arts. 101 and 102 TFEU – as exemplified in Santiago Agreement, CISAC (still pending decision in the General Court) and IFPI Simulcasting –, as well as of several Commission and European Parliament documents, namely the (in)famous 2005 Online Music Recommendation (with small corrections,) and criticism thereof in European Parliament Resolutions of March 2007 and September 2008. The Recommendation in particular is mentioned several times throughout the Proposal, with the Explanatory Memorandum reminding its non-binding nature and classifying its voluntary implementation as "unsatisfactory".

The balance of the above decisions and documents points toward a concern to secure effective cross border licensing of (mostly musical) works and the inability of the CMO market thus far to efficiently implement MTL. Following what seems to be a coherent policy direction, the Commission identified this as a main area requiring EU action in 2009 and has repeatedly mentioned (in the IPR Strategy the Communication on a Single Market Act, the Green Paper on Online Distribution of Audiovisual Works, and the Communication on E-commerce and Online Services) that it would propose legislative action to create a collective rights management framework enabling MTL on a pan-European level.

Overview

The draft Directive is best understood if read in the context of its dual objective of **(1)** governance/transparency and **(2)** MTL, as most of its structure and provisions are aimed at providing solutions at both these levels. To be sure, the Commission's policy options resulting from an impact assessment analysis and implemented in the draft Directive to achieve both objectives are different:

• For objective **(1)**, the Proposal seeks to implement a **governance and transparency framework**", as opposed to retaining the status quo, seeking better enforcement or codification of existing principles;

• For objective **(2)**, the Proposal adopts what it terms as an "**European Licensing Passport**".

The latter option comes at the expense of alternatives such as parallel direct licensing or a combination of extended collective licensing and the country of origin principle. It is the Commission's hope that this choice will "foster the voluntary repertoire aggregation for online uses of musical works at EU level and the licensing of rights through multi-territorial licensing infrastructures… [laying]down common rules for all collective licensors throughout the EU and… [creating] competitive pressure on societies to develop more efficient licensing practices".

It should also be noted that, under the guise of the principle of proportionality enshrined in art. 5(4) TEU, the proposed rules are somewhat limited vis-à-vis the above identified objectives. Whilst

from the governance/transparency perspective, the draft mostly codifies ECJ/CJEU competition case-law and Commission decisions (e.g. Tournier, Lucazeau & Others v Sacem and CISAC), from the MTL perspective, its scope is narrowed to the collective management of **author's rights in musical works**, as this was understood to be the only area giving rise to difficulties requiring legislative intervention. Structurally, the draft Directive is organized into five Titles, containing General Provisions (I), rules on CMOs (II), MTL (III), Enforcement Measures (IV), and Reporting and Final Provisions (V).

Subject matter and scope

Title I provides a set of 13 definitions and an indication of the subject matter and scope. The draft Directive applies to management activities of all CMOs (irrespective of sector of activity) but, in what concerns MTL, its scope of application is much narrower, being limited to online licensing of musical works by author's rights' CMOs involving at least the territory of 2 Member States.

Collecting societies

Title II is of horizontal application to all CMOs, containing organisational and transparency framework rules governing the relationship of CMOs with (i) members and rights holders, (ii) other CMOs and (iii) (commercial) users.

(i) Relationship with members and rights holders

In what concerns relationship with members, the Proposal sets forth a general principle of good faith for CMOs, minimum standards in what concerns rights of members (including freedom of choice of CMO within the EU and of termination with 6 months prior notice, as well as express written consent for each right fragment license), membership rules (refusals must be based on objective and publicized criteria, and representation and participation must be guaranteed), general meeting powers, the supervision and control of management by a specific (but merely internal) body, as well as obligations of the effective managers of CMOs. It should be noted that the Proposal does not detract from the general default rule of full individual management, a point stressed in its Recital 9, which illustrates with to the possibility that individual rights holders allow for non-commercial uses of their works, e.g. through private ordering models such as creative commons.

Further provisions on financial management prescribe a general duty of diligence in the collection and management of rights revenue by, e.g., imposing its clear separation from other CMO income sources. The draft contains specific rules on deductions for management fees and social, cultural or educational services, as well as on the hot topic of distribution of amounts due to rights holders. In general, CMOs have an obligation of regular and diligent distribution and payment (including equal treatment of all categories of rights holders), no later than 12 months from the end of the financial year of collection; this rule is subject to a limited exception for cases where the identification and location rights holders is not possible, which however does not affect the latter's right to claim such amounts from the CMO. Undistributed amounts can only be used after a 5 year "grace period" and pursuant to a general meeting or supervisory body decision. However, the length of the grace period, the low threshold for identification and location obligations and its unclear articulation with the general meeting provisions may give raise to problems of the very nature the proposal is attempting to solve (see MEMO/12/545, point 9).

(ii) Relationship with other CMOs

In the context of representation agreements, the draft Directive provides for an obligation of non-discriminatory treatment in relation to covered non-member rights holders, as well as for a formal requirement of express consent of the counterparty CMO for any deductions other than management fees on said non-member's rights revenue.

(iii) Relationship with users

Negotiations with users shall be based on the principle of good faith and on objective criteria, with tariffs for exclusive rights having to reflect both the economic trade value of the rights and the service provided. The "economic trade value" standard is also to be observed by a CMO in establishing the license fee/tariff when national law does not establish the applicable amount for rights of remuneration or compensation.

(iv) Horizontal obligations on transparency and reporting

The Proposal further contains a chapter on transparency and reporting that imposes on CMOs minimum levels disclosure vis-à-vis rights holders, other CMOs and users, as well as minimum public disclosure information, including an annual transparency report, which must contain the information listed in Annex I.

Follow this link for Part II *of this article: multi-territorial licensing and enforcement measures.*

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