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COMMISSION STAFF WORKING DOCUMENT

Report on the application of Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market

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REPORT ON THE APPLICATION OF DIRECTIVE 2014/26/EU ON COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS AND MULTI-TERRITORIAL LICENSING OF RIGHTS IN MUSICAL WORKS FOR ONLINE USES IN THE INTERNAL MARKET

1. Introduction

Article 40 of Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (the CRM Directive" or "the Directive") requires the Commission to assess the application of the Directive and submit to the European Parliament and to the Council a report on the application of that directive.

This Staff Working Document ('SWD') responds to this requirement and reports on the application of the Directive, including, as required byArticle 40, the impact of this directive on the development of cross-border services, cultural diversity, the relations between collective management organisations ('CMOs') and users and the operation in the Union of CMOs established outside the Union, and, if necessary, the need for a review.

This report is based on information from various sources available to the Commission services, including (i) two studies conducted for the Commission in support of this Report, one on selected issues with the application of the Directive, including governance, transparency, and tariff-setting (the VA study), and one on emerging issues on collective licensing practices (the Ecorys/Ivir study)[1]; and (ii) contacts with relevant stakeholders, including Member States authorities[2] and the expert meetings[3] held following the deadline for transposition of the Directive.[4] This report will be submitted to the European Parliament and the Council. This report is published alongside the Commission Report on the use of collective licensing mechanisms with an extended effect under Article 12(6) of Directive 2019/790/EU on copyright and related rights in the Digital Single Market.

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The Directive was adopted in February 2014 and had to be implemented by 10 April 2016[5]. Its overall objective is to improve the functioning of CMOs across the EU.[6] It also aims to facilitate the multi-territorial licensing of rights in musical works for online use.

The Directive sets out in particular obligations on CMOs, with the objective to improve their governance and transparency standards. They need to, among others, (i) ensure adequate participation of rightholders in the decision-making process; (ii) ensure adequate financial management of the revenues collected; and (iii) increase their transparency towards rightholders, other CMOs and users. This is key given the role played by CMOs, in particular in "enabling rightholders to be remunerated for uses which they would not be in a position to control or enforce themselves, including in non-domestic markets"[7], (but also as "promoters of the diversity of cultural expression, both by enabling the smallest and less popular

1 SMART 2019/0024 Study on selected issues relating to the application of the CRM Directive – Vigie 2020-0658, carried on out by Visionary Analystics (hereater the 'VA study'), and SMART 2018/0069 Study on emerging issues on collective licensing practices in the digital environment (hereafterthe 'Ecorys/Ivir study').

2 The services met with associations representing collective management organisations, rightholders, users, and independent management entities (IMEs).

3 Article 41 of Directive 2014/26/EU.

4 The expert meetings were held on 05/07/2017, 09/03/2018, 28/05/2019 and 26/03/2021.

5 For the timeline of the transposition of the Directive across the EU, – see Annex 1 to the VA study.

6 See in particular recitals 6, 8 and 9.

7 Recital 2

repertoires to access the market and by providing social, cultural and educational services for the benefit of their rightholders and the public".[8] The importance of CMOs' role in the European copyright market is further reflected in the recent modernisation of the copyright legal framework (Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and Directive (EU) 2019/789 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes: collective management is directly required by a number of provisions of the new legal framework and is expected to play an important role in the practical application of the new rules.[9]

Regarding the multi-territorial licensing of authors' rights in musical works for online use, CMOs offering such licences are subject to several requirements, e.g. enhanced capability to process large amounts of data, accurate identification of the works used by service providers, fast invoicing to service providers and timely payment to right holders.

In addition to the obligations on CMOs, the Directive imposes certain obligations on users of copyright-protected content and other subject matter licensed by CMOs. These concern in particular reporting obligations on the use of works and other subject-matter as well as obligations in the context of multi-territorial licensing.

A limited number of provisions also apply to organisations known as "independent management entities" ('IMEs')[10] established in the European Union.

Five years after the transposition deadline and taking into consideration the late transposition by several Member States, this report aims to highlight various issues and focuses on those that have given rise to most discussions and exchanges with interested stakeholders – rightholders, CMOs, IMEs, users as well as public authorities.

2. The implementation of the CRM Directive

After the Directive was adopted in February 2014, the Commission organised three transposition workshops during the implementation period in order to present and explain to Member States in more detail the various provisions of the Directive.

The deadline for the transposition of the Directive ended on 10 April 2016. After this date, the Commission organised four meetings with Member States in the context of the expert meeting group established by Article 41 of the Directive. The last meeting took place in March 2021.

Only five Member States transposed the Directive on time, by April 2016. As a result, the Commission opened infringement proceedings against 23 Member States in May 2016.[11] This was followed by reasoned opinions in February 2017 against five Member States that had not

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8 Recital 3

9 Directive (EU) 2019/790 for example provides a general framework on collective licensing with an extended effect (Article 12), subject to specific conditions. It provides specific provisions to facilitate online cross-border access to out-of-commerce works in the collection of cultural heritage institutions through extended collective licences (Articles 8 and 9). Collective licensing is also expected to play a role in the application of Article 17 of the Directive. Furthermore, it may be used for the application of the new rules on illustration for teaching under Article 5.
Directive (EU) 2019/789 extends the mandatory collective management scheme that was introduced in Directive 93/83/EEC for cable retransmission to all types of retransmission technologies (Article 2(2) and 4). Moreover, Member States may also decide to use collective management to implement the new rules on direct injection (Article 8).

10 See section 3 and section 4.1.

11 The Commission sent letters of formal notice to all EU Member States, except Denmark, Estonia, Ireland, Slovakia and the UK (which was then part of the EU).

incorporated the directive into their national laws by then.[12] In December 2017, the Commission referred four remaining Member States to the Court of Justice of the European Union. None of these cases gave rise to a Court decision given that the national implementing measures in these Member States have been adopted in the meantime.

Since the deadline for transposition of the Directive, the Commission has received complaints against Member States relating to the Directive. Some of them are still pending and will be further investigated. Their subject-matters relate to various areas, amongst which the freedom for rightholders to choose an entity to represent them, the distribution of revenues to rightholders and more generally market access issues. In some cases, the issues raised are not specifically related to the Directive, but touch more broadly upon the freedom to provide services (of CMOs) enshrined in Article 56 Treaty on the Functioning of the European Union (TFEU), and, in some cases, the complaints also refer to competition law.

So far, the European Court of Justice has not issued rulings interpreting the provisions of the Directive. However, the Court referred to the Directive in Cases C-392/19[13] and C-372/19[14]. Even though the preliminary rulings concern respectively the interpretation of Article 3(1) of Directive 2001/29/EC and of Article 102 TFEU, the Court referred in its reasoning to Article 16 of the CRM Directive, more specificallyArticle 16(1) on good faith negotations[15] in the first Case and Article 16(2) on objective and non- discriminatory criteria for licensing terms in the second Case[16]. Case C-781/18[17] concerned market entry of IMEs and was withdrawn by the referring court before a decision of the Court of Justice.

3. The collective management market and market players other than EEA-based CMOs

This section aims to report on the entities present in the EEA collective rights management ("CRM") market other than EEA-based CMOs in order to gain a full overview of this market. Prior to the adoption of the CRM Directive, there was no definition in EU secondary law of the entities active on the CRM market. Indeed, there was no regulation of the CRM market in EU secondary law. However, the CRM market is subject, among others to Articles 56, 101 and 102 of the Treaty.[18]

The Directive defines two categories of players ─ CMOs and IMEs.

As explained in the introduction, the Directive focuses mainly on the regulation of CMOs established in the European Union. Article 3, (a) defines CMOs as "any organisation which is 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 rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which fulfils one or

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12 The Commission sent reasoned opinions to Bulgaria, Spain, Luxembourg, Poland and Romania.

13 Case C-392/19 preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany) in the proceedings VG Bild-Kunst v Stiftung Preußischer Kulturbesitz, concerning the refusal of VG Bild-Kunst to conclude with SPK a licence agreement for the use of its catalogue of works unless the agreement contains specific provisions (see §2 of the ruling).

14 Case C-372/19 preliminary ruling under Article 267 TFEU from the Ondernemingsrechtbank Antwerpen in the proceedings Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Weareone.

15 In Case-392/19, as the German court pointed out, the CMO refused to grant a licence (§34).

16 World BVBA and Wecandance NV complained about the royalties collected by SABAM for the use of musical works in its repertoire at festivals organised by W.W and WCD.

17 Case C-781/18: Request for a preliminary ruling from the Tribunale ordinario di Roma (Italy) lodged on 12 December 2018 — Società Italiana degli Autori ed Editori (S.I.A.E.) v Soundreef Ltd

18 See Case C-351/12.

both of the following criteria: (i) it is owned or controlled by its members; (ii) it is organised on a not-for-profit basis".

The original Commission proposal for a Directive only applied to 'collecting societies' (in essence a synonym of CMOs). The reason was the traditional and often exclusive role played by collecting societies as the main actor on the market. They often took up a dominant position on their national markets,[19] when providing services to rightholders.[20] During the legislative process, the co-legislators decided to apply a limited number of specific provisions of the Directive also to some organisations defined as IMEs.

At the time of the Commission proposal other organisations active in collective rights management were less well-known and in general less regulated at national level.[21] Today, these other players such as IMEs – which are analysed below - are increasingly active in certain areas of the market, alongside other organisations that navigate close to the CRM market.

3.1. Independent Management Entities

Article 3, (b) defines an IME as *"any organisation which is 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 rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which is: (i) neither owned nor controlled, directly or indirectly, wholly or in part, by rightholders; and (ii) organised on a for-profit basis"*.[22] Despite the Directive's definition, the evidence gathered in preparing this report indicates that it is not always easy to categorise a given entity as an IME and that the boundaries of this definition may not always be clear-cut.[23]

The Directive makes IMEs subject to various obligations, although these are still fewer than those applicable to CMOs. This reflects the limited role that IMEs played in the CRM market at the time of the passage of the Directive.[24] As indicated under Article 2(4), IMEs are subject in particular to the Directive's rules on transparency as well as to good faith negotiations with users.[25]

As the VA Study suggests[26], the business model of CMOs and IMEs is very different. CMOs act in the interest of all rightholders (Article 4) on equal and non-discriminatory basis (Recital 11). They often work by aggregating rights, making it easier to license to users. For their part, IMEs have the flexibility and freedom to choose rightholders and may set tariffs freely, which, according to the VA study, allows price strategies such as selecting rightholders or lowering prices on less attractive repertoires.[27]

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19 The Impact Assessment underpinning the Commission Proposal for a Directive indicated that In general (but not always), there is only one collecting society representing all or some of the rights of a category of rightholders in a given territory. As a result, collecting societies have often been considered by competition authorities, whether the Commission or national competition authorities, as holding a dominant position within their respective product and geographical markets. See impact assessment, p.11.

20 See Commission Proposal for a directive (COM(2012) 372 final) – 'Commission proposal'.

21 Discussions with stakeholders.

22 Recital 16 indicates that the definition of IME excludes audiovisual producers, record producers, broadcasters and publishers. Managers of authors and performers also fall outside the scope of the definition.

23 Discussions with stakeholders.

24 According to the VA study, this still is the case as "only 3.6% of all the surveyed rightholders had ever mandated their rights to an IME" (VA Study page 69).

25 Article 2(4) provides that "Article 16(1), Articles 18 and 20, points (a), (b), (c), (e), (f) and (g) of Article 21(1) and Articles 36 and 42 apply to all independent management entities established in the Union"

26 VA Study, section 7, page 68

27 VA Study, attractiveness to rightholders, page 77

Available evidence[28] indicates that IMEs are active mainly in the music and audiovisual sectors, where they compete with CMOs to represent rightholders. In recent years, more IMEs have started to appear on the market. Some of them focus on the production or licensing of background music.[29] Others also provide multi-territorial licences to online music services.[30] Representatives of IMEs generally consider that the Directive has allowed them to operate more easily on the market simply by recognising that IMEs have a role in the CRM market.[31]

In many cases Member States appear to have regulated IMEs in their national laws going beyond the scope of the provisions applicable to these entities pursuant to Article 2(4) of the Directive.[32] These Member States have put in place additional obligations on IMEs, for example notification or registration requirements, with the claimed objective to more easily supervise the activity of the companies that operate on their respective territories. Some Member States have indicated that they consider it important to further supervise IMEs in the future.[33]

The findings of the Ecorys/Ivir study[34] suggest that the difference in regulation is not an issue in the short term as currently CMOs still seem to enjoy the benefits of the incumbent position they traditionally held on their national market and do not face very strong competition from other entities, such as IMEs. However, the application of different rules to different entities active in the CRM market may become an issue in the long term if the market shares of IMEs[35] were to significantly increase, according to the study.[36]

On the multi-territorial licensing of musical works, some stakeholders surveyed by the studies (CMOs as well as music service providers) have expressed concerns about the application of different rules to licensing entities competing on the same market.[37] In addition, different Member States may apply different rules to IMEs operating on their territory[38]. This may pose challenges for IMEs, particularly if operating in multiple MS. This factor, according to the VA study, minimises the potential advantage that these entities may have from being subject to less stringent rules under the CRM Directive compared to CMOs. In certain cases, as a result of national law, IMEs may not be active in a given national market[39] or may be excluded from specific activities (mandatory collective management or private copying).

More generally, the diversity in national rules and the fact that the management of certain rights is reserved to CMOs may make their market entry difficult and this may explain why, despite enjoying a lower administrative burden and a greater flexibility on tariff-setting, some IMEs complain about an unlevel playing field compared to CMOs in the law of some Member States. IMEs have in some instances claimed that the difference in regulation may make their

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28 VA study, Box 7

29 VA study. The term 'background music' is for example used to capture the use of music for background in a video created by a user on a website or the use of music by a shop.

30 Ecorys/Ivir study – section 2.a.f., p.49.

31 Discussion with stakeholders.

32 VA study– see section 7. Independent management entities, p.68; *b. Regulation of IMEs across the EU,* p.71

33 Discussions between Member States on this matter took place in the Commission's expert group. For example, there have been suggestions to establish an IME registry, just like the CMOs registry, in each Member State. This would create clarity for competent authorities on the place of establishment of the various entities operating on the EEA market and allow greater cooperation between authorities of the Member States.

34 The Ecorys/Ivir study, page 8

35 The VA Study, Box 7 suggests a 3.6% market share for IMEs, based on a survey

36 The Ecorys/Ivir study, page 9

37 The Ecorys/Ivir study, page 8

38 See the VA study page 72 for an overview

39 This has been conveyed to the Commission through the VA study results, but also by complaints to the Commission since the transposition of the Directive.

services less attractive to rightholders in the sense that they may appear as entities that cannot be held accountable in the same manner as CMOs.[40]

Overall, as indicated by these findings, there are some tensions in the market due to the different business models and regulatory approach on CMOs and IMEs. This goes in both directions. On the one hand, the more regulated actors, the CMOs, as well as some national authorities, may consider it insatisfactory that IMEs and other players benefit from a lighter regulatory regime and therefore do not compete on equal grounds in the market. On the other hand, the less regulated actors, the IMEs, argue that they occasionally face market access limitations due to divergent rules that may be applied at national level.

At this stage there does not seem to be any compelling evidence collected to prepare this report that points to the need to intervene in this area by making changes to the Directive. The Commission will further monitor of the CRM market to see how these interactions evolve in the future.

3.2. Other entities active in the CRM market

In addition to CMOs and IMEs -i.e. organisations specifically defined and regulated in the Directive-, other market players are active in/or close to the CRM market. This is partly due to the evolution of business models in the online environment or to the way the CMOs organise their activities.

For example, the VA study showed that organisations such as royalty-free vendors of music[41] for users or representative agencies are operating around the CRM market.[42] They do not manage rights, but acquire or are transferred the rights to a given work from individual rightholders that have withdrawn their rights from their CMOs or have previously been managing them individually. The study also identified entities owned or controlled by CMOs that perform some of the tasks that are usually performed by CMOs. This is the case for example with organisations that only distribute the collected royalties to the parent CMOs.[43]

The information available on this point is not exhaustive given that there may be many entities organisations that have various relations with rightholders beyond managing their rights. The applicable regulation at national level is not always clear as there may be uncertainty about the exact scope of activities of such organisations.

3.3. CMOs established outside the Union and operating in the Union

Article 40 of the CRM Directive states that the Commission's report should among others assess the impact of the Directive on the operation in the Union of CMOs established outside the Union ('third country CMOs').

The evidence gathered on this matter indicates that CMOs established in third countries only very rarely operate in the Union directly. In most cases, third country CMOs are present on the EU market through representation agreements with other CMOs, or through subsidiaries established in the EEA.[44] As regards the licensing of musical works on a multi-territorial basis (see section 6 below), it appears that the repertoires of third country CMOs are mostly

[40] See VA study, section 7, p.78.

[41] Royalty-free music vendors are companies that offer users fixed subscription fees under which they can use the musical works. The vendor, for its part, acquires the rights to songs via lump-sum payments from rightholders or receives a nonexclusive transferable license with the right to sublicense from them

[42] For a list of those other organisations that do not seem to fit the IME or CMO definition, see VA study Annex 6 page 198

[43] See VA study – section 8 a).

[44] VA study - section 6.

available in the EEA through traditional mono-territorial reciprocal representation agreements or through agreements mandating EEA-based CMOs to grant multi-territorial licences ('MTLs'). It is only in rare situations that third country CMOs grant MTLs themselves on the European market. The Ecorys/Ivir study found that only two CMOs established outside the EEA grant MTLs in the internal market.[45]

The regulation of third country CMOs in national law varies across Member States. In this context, Recital 10 of the Directive states that "Nothing in this Directive should preclude a Member State from applying the same or similar provisions to collective management organisations which are established outside the Union but which operate in that Member State".

Some Member States apply the same or similar provisions to third country CMOs as those applicable to EEA-based CMOs. Other Member States do not have specific rules for regulating third country CMOs. Their national laws implementing the Directive only appear to apply to national or EEA-based CMOs.

In certain instances, it is not fully clear whether national rules implementing the Directive also apply to third country CMOs active in a given Member State.[46] As regards the multi-territorial licensing of musical works online, the studies indicate that in at least one third of Member States, licensing entities established outside the EEA (i.e.not only CMOs, but also IMEs or other entities) were not required to comply with national law transposing Title III of the CRM Directive when operating within their jurisdiction. In contrast, in almost half of the Member States compliance was required in all or only in some cases for non-EEA licensing entities.[47] Moreover, according to the Ecorys/Ivir study, it seems that licensing entities established outside the EEA are not able to provide their services in some EEA countries.[48]

The VA study suggests that the application of different regulatory provisions to EEA-based and third country CMOs may have various effects. For example, it could allow third country CMOs, assuming they are less regulated, to attract more European rightholders and gain competitive advantage over EU-based entities. In contrast, the absence of explicit regulation of third country CMOs might be seen as weakening their position in the eyes of rightholders.[49]

However, there is no evidence that a possible difference in regulation has played a major role or significantly affected competition between EU-based CMOs and third country CMOs.[50] Moreover, information gathered from stakeholders as part of the study does not provide any strong evidence that third country CMOs affect competition in the European CRM market in a

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45 Ecorys/Ivir study - section 2. Multi-territorial licensing of online rights in musical works, *Non-EEA-based CMOs granting MTLs*, p.36; The CMOs mentioned in the study are AMRA (USA) and SOKOJ (Serbia). AMRA which was acquired several years ago by Kobalt licenses AMRA publisher members' Anglo-American repertoire to digital service providers that operate in multiple territories and collects the writer's share of public performance revenue on behalf of AMRA writer members. Sokoj manages the rights of music authors, lyricists, arrangers, and other holders of copyright in musical works of all genres.

46 VA study - section 6 b).

47 The results of the survey conducted as part of the study on MTL licensing shows that out of 24 responding national authorities, 10 (42%) reported that licensing entities established outside the EEA were not required to comply with national law transposing Title III of the CRM Directive when operating within their jurisdiction. The other 14 (58%) confirmed that compliance was required for non-EEA licensing entities. Of these 14, four reported that this only applied 'in some cases'. See also section 5 of this report.

48 Ecorys/Ivir study – section 2 Multi-territorial licensing of online rights in musical works, p.91.

49 VA study page 63

50 VA study- section 6.

significant way, nor that the *status quo* has any impact on the attractiveness of EEA-based CMOs for the rightholders.[51]

4. Governance of CMOs

4.1. Rights of rightholders

Article 5 of the Directive lays down several rights that rightholders benefit from as regards their relationships with CMOs. This section reports on the main aspects of the application of this provision, namely Article 5(2) and Article 5(4).

Article 5(2) and (4) require Member States to ensure that rightholders benefit, in particular, from the rights to (i) authorise a given CMO for the territory of its choice, for any rights, categories of rights or types of works; (ii) terminate the authorisation; or (iii) withdraw any right, category of rights or type of works from a CMO.

Article 5 aims[52] to strengthen the position of rightholders, giving them the required flexibility to choose the best performing CMO, in turn boosting competition among collecting societies in the online environment. Recital 19 of the Directive recognises that this freedom of rightholders to deal with their works and other subject-matter has to be balanced with the ability of the CMO to manage the rights effectively.

The evidence gathered from the VA study indicates that, overall, CMOs appear to have put in place effective mechanisms[53] to enable rightholders to authorise a CMO of their choice and to withdraw their rights or categories/types of rights from CMOs as well as to terminate their authorisation.

The vast majority of rightholders surveyed in the study stated that they have not withdrawn or sought to withdraw their rights from their CMO over the past four years[54]. The study suggests that most rightholders are satisfied overall with the services provided by their CMO: this may at least in part explain why rightholders do not seem to be particularly willing to withdraw rights from their CMO[55].

When it comes to rightholders that have been willing to exercise their right to withdrawal, most of them claim that this was an easy process overall[56]. However, some rightholders have reported difficulties and have even, in some cases, claimed that they have not been able to withdraw their rights in practice. The main difficulties reported[57] relate to (i) the length of the process and (ii) the lack of alternatives in the market.

As regards (i) the timing of the process, Article 5(4) of the Directive provides that rightholders shall have the right to terminate the authorisation to manage rights or withdraw the rights, categories of rights or type of works of their choice from a CMO, upon serving reasonable notice not exceeding six months. The CMO may decide that such termination or

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51 VA study, section 6

52 Commission Staff Working Document, Impact Assessment accompanying the document: Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, SWD(2012) 204 final, pp. 12, 14, 151-152.

53 According to the Visionary Study, effectiveness depends on whether the mechanisms are in place and how long it takes to terminate, withdraw and authorise management of rights. See section 4 b), p.28.

54 In turn, 3% of rightholders have claimed to have withdrawn all of their rights and 6% to have withdrawn some of their rights but have remained members of their CMOs. The reasons for withdrawal are related to either a preference for managing the rights individually or concerns related to the governance of CMOs.

55 According to the Visionary Study, rightholders are overall satisfied with the way their revenue is managed by CMOs with 74% of them stating that their CMO acts in the best interests of rightholders when collecting and distributing royalties.

56 Recital 19 of the CRM Directive requires that 'rightholders should be able easily to withdraw' rights from a CMO.

57 Visionary Study, Ecorys Study, own analysis

withdrawal is to take effect only at the end of the financial year. According to the VA study as well as information gathered from stakeholders, the effective withdrawal of rights/termination of the authorisation depend on the CMOs and Member States and can vary in practice from one to three working days up to more than one year from the submission of a request. Most CMOs require more than three months of prior notice and, in practice, the termination or withdrawal does not take effect immediately after the period of notice has been served. Nearly half of the CMOs responding to the survey[58] indicated that rightholders can effectively withdraw at the end of the financial year and not earlier. Some rightholders expressed dissatisfaction with the length of this process, and argued that they need to be vigilant when it comes to the withdrawal process. For example, they need to keep in mind the automatic extension of mandates at a given point in the year or specific dates during the year before which they should request a withdrawal.[59]

As regards (ii) the difficulties stemming from the lack of realistic (or perceived as such) alternatives in the market for rightholders willing to withdraw their rights from a given CMO, both the VA and Ecorys/Ivir studies show that, in some instances, rightholders were not able to choose a different entity because of the market structure in the given Member State.[60] The VA study shows that, in certain Member States, there is only one CMO that manages certain types of rights. Both domestic and non-domestic entities may have difficulties entering and getting established on the market due to the presence of one or several (large) CMOs. Some national authorities pointed out that rightholders are used to these long-established actors on the market. In addition, the VA study shows that it is also not common for rightholders to choose a foreign CMO.

Moreover, the Ecorys/Ivir study found out that, where CLEE or MCM are in place, certain Member States typically designate one single CMO (by means of legislation or a decision by a national competent authority) to operate in a specific domain.[61] In other cases, a CMO may be granted an exclusive role under national law to collect compensation under an exception or limitation.[62]

As the study shows, such a situation does not necessarily mean that there is only one CMO in the Member State or even that a single CMO is operating in a domain[63]. For instance, even where several CMOs operate in MCM domains within the same Member State (notably retransmission of broadcasts), each of these CMOs usually manages rights of different types of rightholders[64].

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58 VA study, chapter 4 b), p. 29.

59 Some stakeholders have complained for example about alledged unreasonable notice periods for withdrawals by rightholders, in particular in the area of live performance, but also about delays in sending the notice for effective withdrawal or, in some instances, indemnity fees asked for such withdrawal.

60 The impact assessment, which preceded the adoption of the Directive, recognised this situation by referring to *'important market (quasi-monopoly) power that most CS [collecting societies] enjoy within their domestic markets'* (see Impact Assessment, p. 16).

61 For example, in Denmark, according to the preparatory works of the Copyright Act and practice, only one CMO per domain can be approved by the Ministry for Culture to enter into extended collective licensing agreements. In Belgium, Royal Decrees authorised a single CMO for some domains, when collective mandatory management is used to collect the compensation provided for under exceptions or the remuneration due under remuneration rights provided in EU law (Ecorys/Ivir study p.177). The Commission is publishing a report on CLEE as required by Article 12 of Directive 2019/790 on Copyright in the DSM alongside this report on the CRM Directive.

62 For example, in Belgium, Reprobel is the sole representative organisation to collect the remuneration under the reprography exception, including a sui generis right to remuneration for publishers as well as under the exception for education and scientific research and for the lending right (Ecorys study, p. 163-164)

63 Ecorys Study, p. 162

64 Ecorys/Ivir study, p.193.

A monopolistic situation that benefits a given CMO in a Member State may in some instances be due to the legal framework in place but may also result from a *de facto* market situation. Such a situation could occur for various reasons, ranging from regulatory practice to a lack of interested eligible organisations.[65]

While a limited number of players on the market restricts the ability of rightholders to choose a preferred CMO, this situation is also often regarded positively by some stakeholders as it can bring practical benefits both to rightholders and users.[66] On the one hand, the existence of multiple types of organisations means more alternatives for rightholders as the VA study points out. On the other hand, it may also make the repertoire more fragmented and therefore reduce the efficiency of licensing and the negotiating power of those organisations in relation to certain large users, to the detriment of rightholders.[67]

The Commission has received complaints about alleged legal monopolies i.e. by operation of law in certain Member States and the possible related market barriers for new entrants. Analysis is still pending for some of these complaints.

4.2. Governance

Title II of the Directive lays down a number of provisions related to the good governance of CMOs. These provisions (Articles 6 to 22) aim to ensure that the CMOs act in the best interests of the rightholders they represent. They set out minimum standards to ensure a proper functioning of these entities in terms of their organisation, management of rights revenue, accountability and transparency.[68]

One of the key problems identified in the impact assessment, which preceded the adoption of the Directive, concerned poor financial management of CMOs. Taking this into account, the analysis of the application of the Directive in terms of good governance will focus, after a general overview, mostly on Articles 11 and 13 of the Directive (collection and use of rights revenue as well as distribution of amounts due to rightholders).

The VA study indicates that the rightholders surveyed express mixed views in general on the governance of their CMOs. While the majority of rightholders agree that they are able to participate in the decision-making process, and that they have sufficient information allowing them to do so, only around half of those surveyed are positive about the overall perception of transparency, accountability and their ability to impact on CMOs' decision-making[69]. On transparency, some of the rightholders indicated that they lack information, in particular on how their CMO is managed – they would like for example to receive clearer information so they can better understand better how their revenues are calculated. On accountability, the VA study shows that rightholders may sometimes lack sufficient knowledge on how to hold their CMOs accountable[70]. According to the evidence collected both from the study and stakeholders, some rightholders have also raised certain issues with the decision-making process of their CMOs. This includes the board making important decisions without

65 Ecorys/Ivir study, p.193.

66 VA study, p.31 and 34, discussion in expert group meeting IV.

67 VA study, p.31.

68 As indicated in Recital 9, Member States are not prevented from maintaining or imposing, in relation to CMOs established in their territories, more stringent standards than those laid down in Title II of the Directive, provided that such more stringent standards are compatible with EU law.

69 VA study, p. 37.

70 According to the study, the issue has a rather specific educational angle and is linked to a general lack of knowledge about financial, legal and administrative matters. In essence, it seems that some rightholders are not aware of their rights and do not sufficiently understand what rules apply to CMOs in terms of governance and transparency, which in turn may not allow them to hold them accountale for certain decisions taken, for example.

consulting individual members.[71] Another reported example is the issue of voting rules that allegedly may limit the effect of smaller members' votes.[72]

On the collection and use of rights revenues (Article 11), the VA study states that rightholders are in general satisfied with management – i.e. collection and use - of their revenues.[73] The level of satisfaction is slightly lower with regard to administrative charges and investments made by CMOs.

On the administrative charges applied by CMOs, some rightholders raised concerns about the transparency of the calculation methods applied by their CMOs. According to the study, rightholders would welcome more detailed information about management fees, and distribution policies among CMO members. More generally, some of the rightholders surveyed considered that the information provided by CMOs could be provided in a more personalised and simplified manner. Finally, some rightholders surveyed raised doubts as to whether investments made by their CMOs were made in their best interests.[74]

As regards the distribution of revenues, Article 13(1) of the Directive requires Member States to ensure that CMOs distribute the amounts due to rightholders no later than nine months from the end of the financial year in which the rights revenue was collected, unless there are objective reasons. According to CMOs surveyed for the VA study, less than half of them claim to have distributed more than 90% of the amounts due to rightholders within the period of nine months. Some issues have been raised regarding the correct identification of the rightholders, insufficient amounts of royalties collected on time from users, lack of necessary information from users in a timely manner, difficulties with data processing and obtaining necessary documentation from foreign rightholders.[75] Difficulties in paying on time also arise when CMOs manage the rights of foreign rightholders on behalf of other CMOs. The VA study suggests, however, that these delays do not seem to be a major concern for rightholders themselves, who appear to be satisfied overall with the timeframe in which CMOs distribute the rights revenues.[76]

According to Article 13(4) of the Directive, when the rights revenues cannot be distributed after three years from the end of the financial year in which the collection of the rights revenue occurred, those amounts are deemed to be non-distributable provided that CMOs have taken all the necessary measures to identify and locate the rightholders. The Directive also provides that the general assembly of CMO's members should decide on the use of non-distributable amounts.[77] Member States may limit or determine the permitted uses of non-distributable amounts, inter alia, by ensuring that such amounts are used in a separate and independent way to fund social, cultural and educational activities for the benefit of rightholders. The Commission received complaints, currently under analysis, from stakeholders that considered that, in some cases, national law restricts the spending of dedicated amounts to some rightholders only, based on discriminatory criteria.[78]

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71 See VA study, p.37, last paragraph.

72 Case reported to the Commission related to the music sector.

73 Article 11 of the Directive.

74 This may be related to an insufficient (or perceived as such) inclusion of these rightholders in the decision-making process regarding such decisions See VA study, p 38,40. Also, a case related to issues with voting rules was reported in the sector of music.

75 VA study, p. 40.

76 VA study, p.40; see to this extent Figure 4-14. Rightholders' satisfaction with revenue management by CMOs.

77 Article 13(5) and (6).

78 Discussion with stakeholders and complaints received by the Commission's services.

4.3. Transparency of CMOs

Chapter 5 of Title II of the Directive lays down a number of key provisions (Articles 18 to 22) concerning transparency and reporting. In particular, these provisions require CMOs to: (i) provide information to rightholders on the management of their rights (Article 18); (ii) provide information to other CMOs on the management of rights under representation agreements (Article 19); (iii) provide information to rightholders, other CMOs and users on request (Article 20); (iv) disclose information to the public (Article 21); and (v) publish the annual transparency report in line with the requirements laid down in the Annex (Article 22).[79] This section focuses on specific issues with Articles 19, 21 and 22, corresponding to the points that have been frequently raised in discussions with the various stakeholders and analysed as part of the studies.

Pursuant to Article 19 of the Directive, CMOs are required to provide information to other CMOs on the management of rights under representation agreements. The majority of CMOs surveyed in the context of the VA study claim that they receive all or most of the information they need on the rights revenue attributed to their rightholders. Most CMOs receive all or most of the necessary information on deductions made in respect to management fees and deductions other than management fees. However, only half of the CMOs claim to receive all or most of the information related to relevant general assembly resolutions or licensing related information.[80]

Pursuant to Article 21 of the Directive, CMOs are required to publish various information, including their statutes, membership terms, standard licensing contracts and standard applicable tariffs, including discounts. National authorities surveyed in the context of the VA study consider that most CMOs make all necessary information publicly available. Instances where the information listed in Article 21 of the Directive is not provided are rather sporadic. In line with the information gathered from the national authorities and rightholders, the information is sometimes published with delays but this does not seem to be a significant issue for any of the stakeholders.[81] The Ecorys/Ivir study shows, specifically in relation to the publication of standard applicable tariffs, that CMOs mostly publish this information.[82]

More issues have been reported concerning the annual transparency reports (Article 22). In general, according to the available evidence, the annual reports are published on the CMO's websites, in line with the Directive. They, however, sometimes differ as regards the level of detail of the information provided. This, in turn, may not allow to sufficiently compare the annual reports, which may make it more difficult for rightholders and the national authorities to easily gain access to data and to compare the activities of different CMOs.[83]

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79 Apart from the provisions on transparency which are the focus of this section, the Directive contains other obligations applicable to CMOs which complement the general ones and contribute further to the overall aim of enhanced transparency, such as Article 25 (transparency of multi-territorial repertoire information), Article 12 (obliging CMOs to provide the rightholders with information on management fees, other deductions from the rights revenue and from any income arising from the investment of rights revenue), Article 11 (requiring that amounts collected and due to right holders be kept separately in the accounts from any own assets of the organisation).

80 VA study, p.42-43.

81 VA study, p.44; 4.g. Transparency of CMOs.

82 The Ecorys/Ivir only researched about the publication of the tariffs for online rights in musical works. As regards specifically CMOs' subsidiaries created for multi-territorial licensing, the study found that subsidiaries commonly do not publish their tariffs and related to that, some online music services have also flagged issues as regards the transparency of the fees offered to them by such entities. (Ecorys/ Ivir study section 2.b.d Private stakeholder's experiences with CMOs' compliance with Title III of the CRM Directive; Publication of standard applicable tariffs (Article 21(1)(c) and (2)), p.86).

83 Discussion with stakeholders, VA study p.44.

5. **Relations between CMOs and users**

Chapter 4 of Title II of the Directive (Articles 16 and 17) lays down provisions applicable to the relations between the CMOs and users. The application of these provisions is analysed in this part of the report together with the application of Article 35 of the Directive, which relates to the resolution of disputes between CMOs and users.

5.1. Licensing negotiations, tariff-setting and dispute resolution

As indicated in Recital 31, fair and non-discriminatory commercial terms in licensing are particularly important to ensure that users can obtain licences for works and other subject-matter in respect of which a CMO represents rights, and to ensure the appropriate remuneration of rightholders[84]. With this objective in mind, Article 16 provides that CMOs and users should conduct licensing negotiations in good faith (paragraph 1), and apply licensing terms based on objective and non-discriminatory criteria (paragraph 2).

Article 16(2) further provides that rightholders shall receive appropriate remuneration for the use of their rights. In this context, this provision indicates that tariffs for exclusive rights and rights to remuneration shall be reasonable in relation to, inter alia, the economic value of the use of the rights in trade taking into account the nature and scope of the use of the work and other subject-matter, as well as in relation to the economic value of the service provided by the collective management organisation. Moreover, the Directive provides that CMOs shall inform the user concerned of the criteria used for setting those tariffs.

Accurate and timely information is of the essence in such licensing agreements both at the time of licensing negotiation and when exploiting the works. To this end, Articles 16 and 17 lay down a number of requirements concerning the reciprocal information obligations of CMOs and users concerning the licensing negotiations, the criteria used for setting tariffs, the licensing offers and the users' use of the rights represented by CMOs.

In practice, in most cases, CMOs and users, often with the involvement of associations of users[85], negotiate licensing conditions, including tariffs and other conditions on the use of rights they represent[86]. Users' associations may sometimes help smaller players negotiate licences, often as part of a global license, usually determining the standard applicable tariffs[87]. In specific cases, for instance when there is no representative association of users or for some secondary uses such as private copying, the tariffs may be decided differently than through a negotiation between CMOs and users, possibly unilaterally[88]. In some cases public authorities intervene to assist in the negotiation and/or settle disputes (see below).

Member States have set tariff criteria in their law. CMOs must take these parameters into account when setting tariffs (the price or the price formula) for using works. The national provisions on tariff criteria must comply with the criteria set out in a general manner in Article 16(2)[89]. For instance, typical tariff criteria applied under Member State law are the economic income from the use[90] of the work and other subject matter, and the purpose,

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84 See also recital 31

85 For instance, associations grouping small users (concert halls, shops, ..).

86 VA Study, analysis of the tariff-setting practices in the Member States, see table 5-1 and section 5 page 48.

87 See report of the French senate http://www.senat.fr/lc/lc30/lc30_mono.html (last accessed 30/06/2021).

88 See also VA Study, section 10.

89 Examples: Sections 39 and 54 of German Copyright law

90 For instance, Hungarian law article 165 (1) "the amount of remunerations shall be fixed in principle as a percentage of the income or earning from such use". We understand that similar criteria are also applied in other Member States, notably at least in Germany, Poland, Czech Republic, Romania, Bulgaria, Latvia, Slovenia and Croatia.

nature, frequency, and extent of the use of the work as long as this affects the economic value[91].

Quantifying the economic value of works may not be straightforward in practice. In a recent SABAM decision (C-372/19)[92], which concerned a case of alleged abuse of a dominant position under Article 102 of the TFEU, in relation to the application of a flat rate tariff system to the organisers of a music festival, the Court of Justice recognised that CMOs enjoy a margin of manoeuvre in setting tariffs for the use of the works they represent.

* * * *

Article 16[93] is closely related to Article 35, on dispute resolution, which provides that *"Member States shall ensure that disputes between collective management organisations and users concerning, in particular, existing and proposed licensing conditions or a breach of contract can be submitted to a court, or if appropriate, to another independent and impartial dispute resolution body where that body has expertise in intellectual property law"*[94] .

The evidence collected for the preparation of this report indicates that Member States have set up various mechanisms to ensure good faith negotiations and implement Articles 16 and 35 (see also recitals 31 to 33), with varying degrees of intervention when it comes to the state supervision of licensing. For instance, in some Member States, national law provides that licensing negotiations are facilitated by a committee[95] set up by the competent authority, which also decides its membership, to facilitate the negotiation process[96].

Another example of public intervention relates to the requirement to notify tariffs to competent public authorities. Under the national law of some Member States, CMOs may be required to notify the competent authority of changes to tariffs or contracts passed with users or associations of users[97] or be required to approach a designated council of experts for a non-binding opinion on the tariffs negotiated with users.[98] In some Member States, national law

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91 In several judgments CJEU Lucazeau, Case 395/87 Tournier [1989], STIM v Kanal, C-177/16 AKKA/LAA, C-351/12 "OSA", C-52/07 "Kanal 5", SENA C-245/00 that predate the entry in force of the Directive, the Court of Justice clarified the notion of economic value and what trade-offs can be legitimately made, in the interest of rightsholders and in compliance with competition law

92 The case concerned a CMO that had applied a flat-rate tariff in order to determine, among the musical works performed in a concert, the part thereof which is taken from the repertoire of this collecting society. Such a flat-rate system was disputed by the complainant for various reasons, including the availability of technologies that can help identify and quantify more precisely the use of these works.The court recognised that it can be difficult to "objectively determine the specific elements that would be unrelated to the musical works performed, and, thus, the part of the collective management society", as well as to quantify objectively the "economic value of these [musical works], as well as their impact on the revenue from the sale of tickets to the festivals in question". According to the court's decision, such a case needs to take into account the availability and reliability of the data provided as well as the existing technological tools, without however involving a disproportionate increase in costs incurred for the purposes of contract administration and monitoring the use of copyrighted musical works

93 In two cases, the European Court of Justice referred to Article 16 in its reasoning: cases C-392/19 and 372/19. See also section 2 of this report.

94 Recital 49 also provides that it is appropriate to provide, without prejudice to the right of access to a tribunal, for the possibility of easily accessible, efficient and impartial out-of-court procedures, such as mediation or arbitration, for resolving conflicts, and that it is appropriate to require that Member States have independent, impartial and effective dispute resolution procedures.

95 As an example of a national law that rules on a Committee, for audiovisual works, see Art. XI.282 and Art. XI.227/2 of the "Code de droit économique" in Belgium

96 Ibid. The composition of the Committee is set in law for audiovisual works in Belgium. See also https://economie.fgov.be/fr/themes/propriete-intellectuelle/institutions-et-acteurs/conseil-de-la-propriete

97 For example in Spain changes to tariffs or new contracts have to be notified to the Ministry of Culture

98 For instance, Hungary, see art. 162 and 163 on the council of experts

may go as far as requiring competent authorities to approve the tariffs under certain conditions, for instance with the aim to avoid abuse of a dominant position[99].

Article 35 gives a certain margin of manoeuvre to Member States to ensure that disputes can be submitted to a court, and, if appropriate, to another independent and impartial dispute resolution body. Member States have incorporated mechanisms in their law in support of dispute resolution, such as mediation. For instance, in some Member States, if the negotiation on tariffs is not successful, the parties may approach a mediation board, usually appointed by the competent authority[100]. The board may assist parties in the negotiations and is entitled to present a proposal for the contractual agreement. Proposals by the mediator are in all cases non-binding for the parties in a tariff dispute. Only if the parties accept the proposal of the mediator does it become binding and enforceable. Eventually, if mediation fails, parties may in any event go to the court, which may set the tariff.

As an example of such an intervention, a copyright council or a similar authority may set the tariff on request of any interested party to facilitate negotiation when there is no collective agreement and prior mediation has failed. Such a tariff would remain in force until an agreement is reached, possibly with the assistance of a mediation committee[101].

Disputes may be arbitrated by a competent authority, or directly by a court. In some Member States, a request regarding the tariff dispute would be presented to the court only after the proceedings before the mediation board have been completed unsuccessfully. The court then issues a decision that replaces the contractual agreement and the tariff.

The VA study suggests that legal disputes between CMOs and users are more frequent than between CMOs and rightholders[102]. Most of the disputes take place between CMOs and users and, often, concern either the lack of payment due to alleged users'taxation evasion practices[103], or tariff-setting procedures[104].

Overall, the evidence collected to prepare this report did not identify significant issues regarding the licensing negotiations between CMOs and users. While there are legal disputes around tariffs[105], according to the VA study, users broadly agree that the licensing terms follow objective and non-discriminatory criteria[106].

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99 For instance, Malta, L.N. 239 of 2016, Copyright Act (CAP. 415), Title II, Chapter I, article 8 (2) (e) describes the rules for approval of a CMO, including "acceptable" tariffs that have to be submitted to the Board

100 Ibid.

101 Typically, if the parties agree expressly or tacitly, depending on national law, this proposal replaces the collective agreement. If not, they would request the copyright council to set temporary tariffs.

102 VA Study, section 10

103 This is an illegal practice based on hiding your assets to avoid tax.

104 VA Study section 10. The study suggests that there are not many disputes but one important recurring reason for disputes reported by users seems to be a lack of information or lack of negotiation. According to the VA study, some users complain about information ahead of negotiations related to: the criteria used by CMOs for calculating tariffs, licensing conditions and administrative requirements. In addition, users feel that unilateral tariff-setting, when used, may lead to a higher number of disputes. When users are not involved in tariff-setting, it appears that disputes are more likely to occur and disagreements over tariffs are pushed towards ex-post dispute settlement mechanisms, which users report may be a deterrent.

105 see next section for a discussion and annexe 5 of the VA Study for examples

106 VA Study, survey: eight out of ten users surveyed replied that CMOs apply objective and non-discriminatory criteria

5.2. Users' information obligations

Under Article 17, "users should provide a collective management organisation, within an agreed or pre-established time and in an agreed or pre-established format, with relevant information at their disposal on the use of the rights represented by the collective management organisation, as is necessary for the collection of rights revenue and the distribution and payment of amounts due to rightholders".

According to the VA study[107], most of the CMOs surveyed appear to be reasonably satisfied with users' reporting and acknowledge the positive impact of the Directive. However, some of them called for better accuracy and timeliness of user reporting and raised important issues in this respect. In particular, for one-third of the CMOs surveyed by the VA study, the accuracy and timeliness of user reporting are insufficient[108]. The issues raised range from insufficient information to identify usage at an appropriate level of detail to a lack of accuracy, delayed reporting, and data format issues. Reportedly[109], this lack of precise and accurate usage reporting by users results in difficulties when distributing royalties to their rightsholders. Moreover, based on discussions with CMOs, some users may not provide any usage reporting at all.

6. Multi-territorial licensing of musical works online by CMOs (Title III)

The aim of Title III of the Directive is to set common standards for the multi-territorial licensing by authors' CMOs of online rights in musical works and thereby facilitate the availability of legal offer of online music.[110]

The requirements for CMOs relate among others to the capacity to process MTLs, as well as to timely invoicing and distribution (Articles 24-28). Where CMOs cannot or do not wish to offer MTLs themselves, they can conclude a representation agreement with another CMO that is engaged in this activity (Article 29). In certain cases, the latter CMO is obliged to represent CMOs for MTL (Article 30).[111] As to rightholders, they have the right to withdraw their rights only for MTL from their CMOs, while keeping these rights for mono-territorial licensing. This applies when their CMO does not grant or offer to grant MTLs or is not represented by another CMO for that purpose (Article 31).

According to the Ecorys/Ivir study, the market for MTL has developed positively since the adoption of the Directive. Virtually all the repertoires of EEA-based CMOs are available for MTL, either directly or through representation agreements.[112] The same applies to the repertoires of other licensing entities, such as IMEs and publishers. Some licensing entities have come together to form so-called 'licensing hubs' that allow users to negotiate with a single entity for several repertoires and conclude a 'multi-repertoire MTL'. The latter type of MTLs appear to be quite common on the CRM market today as opposed to mono-repertoire MTLs. Such cooperation has the potential to reduce the number of licences a user needs to obtain and can therefore be seen as a means to increase the efficiency of multi-territorial

107 Ibid. VA study chapter 5

108 VA study – figure 5.1 p.42

109 VA Study section 10 and discussions with stakeholders.

110 This section of the report aims to assess the application of Title III of the Directive, in line with Article 38(4) of the Directive.

111 Ecorys/Ivir study.

112 Representation agreements are said to be used as they feature benefits for the mandating CMO, such as cost reduction or increased bargaining vis-à-vis users. This is particularly the case for smaller CMOs. There are also considerations for not mandating other CMOs, such as loss of control of the repertoire featured in the MTL or issue of status.

services by exploiting economies of scale and scope.[113] Despite the availability of the repertoires for licensing, the information gathered to prepare this report suggests that the market remains to some extent complex and fragmented in the sense that users have to conclude various licences with many licensing entities to offer their services on the EEA market.[114] This is notably due to (i) the emergence of novel licensing entities; (ii) rights withdrawals from CMOs and the related fragmentation of repertoires offered by CMOs; and (iii) the continuous availability of some repertoires through mono-territorial licences. As a result, the overall economic costs for a music service to operate appear to have increased in the recent years.[115] There is however no evidence that the licensing costs would have undermined the variety of works supplied via online music services, nor the proportion of 'small European repertoires' featured on these services.[116] From the perspective of cultural diversity in the EEA, the cross-border availability of repertoires via online music services seems to have had a positive effect according to the assessment of CMOs, though this has not been translated to better prices.[117]

According to the results of the Ecorys/Ivir study, the CMOs surveyed generally consider that the MTL market has evolved in the right direction. While it has been costly for some of them to implement the rules stemming from the Directive, they also consider that the recent developments have been positive in terms of innovation and demand for their repertoires. They however flag certain concerns about their level playing field in relation to entities that may not be regulated, or are less regulated compared to EEA-based CMOs.[118]

As to rightholders, the study found that they appear to be increasingly satisfied with the MTL services they receive from CMOs. While the fees charged to rightholders for these services have not decreased, the quality of services delivered by licensing entities seems to have increased in the eyes of many rightholders.[119] Nonetheless, the available information suggests that smaller rightholders in particular have limited knowledge of their rights and how to exercise them. Under Article 31 of the Directive, rightholders may decide to withdraw their rights for MTL from their CMO while keeping the rights for mono-territorial licensing with that same CMO. The Ecorys/Ivir study shows that this right is rarely exercised. Where this occurs, it appears to be exercised by publishers especially. Reflecting on the complexity of the market for users mentioned above, the available information suggests that there could be drawbacks from such withdrawals in specific circumstances, in particular when big rightholders leave a given CMO.

The supervision of CMOs engaged in MTL, as well as other licensing entities that may be regulated at national level, is carried out by national competent authorities. The available information suggests that the procedures to monitor CMOs, including those that aim to check compliance with the requirements under Title III of the Directive, vary across Member States. In many Member States, authorities rely on self-assessments and periodic reports from CMOs on their compliance with the law. Moreover, where they are used, ex post notifications to the

113 Ecorys/Ivir tudy –pages 37 and 38..

114 This includes both mono-territorial and MTL (which may cover a single repertoire or multiple repertoires).

115 Ecorys/Ivir study, page 10-11 executive summary

116 Ecorys/Ivir study page 11 - Executive summary.

117 Ecorys/Ivir study page 108, based on a survey.

118 Ecorys/Ivir study page 67-68 and discussion with stakeholders. According to the study, in some EEA countries, only CMOs may license musical works, including through MTL; .independent management entities and non-EEA-based licensing entities may not. Moreover, there are some uncertainties regarding the application of provisions of some national laws transposing Title III of the CRM Directive to CMOs' subsidiaries. However, according to the national authorities and the regulated licensing entities (CMOs and/or IMEs), there seem to be relatively few regulatory obstacles for EEA-based licensing entities to provide MTL services in other EEA Member States.

119 Ecorys/Ivir study, section on recent changes in the quality of MTL, pages 115 and 118

national competent authority of alleged non-compliance (Article 36(2) of the Directive) are viewed as a part of the supervision system.[120] In this respect, users consider that further improvements are still needed to ensure that the requirements imposed on CMOs are effectively complied with.[121] In particular, some users point to issues relating to the capacity of certain CMOs to process multi-territorial licences as well as to issues with timely and quality invoicing. On their side, CMOs report that the issues with invoicing are due to the quality of usage reports received from online music service providers.

Finally, Article 34(2) of the Directive provides that disputes between a CMO that grants or offers to grant multi-territorial licences for online rights in musical works on the one hand and users, rightholders or CMOs on the other hand can be submitted to an independent and impartial alternative dispute resolution procedure ('ADPR') set up by each Member States. The available information suggests that such procedures, which already existed in certain Member States prior to the Directive, are rarely used. For example, only three national authorities out of nineteen (that responded to the survey and that have them in place) reported that such procedures had actually been used since the CRM Directive was incorporated into national law.[122] From the perspective of licensing entities and online music services[123] that were consulted in the context of the Ecorys/Ivir study, there seems ample scope to develop and improve the existing procedures.

7. The role of national competent authorities in enforcement and their cooperation to facilitate the monitoring of the application of the Directive

National competent authorities play a key role in the application of the Directive and in monitoring compliance. Pursuant to Article 36, national authorities should "be capable of addressing in an effective and timely manner any concern that may arise in the application of this Directive [..]. Moreover, it should also be possible for members of a collective management organisation, rightholders, users, collective management organisations and other interested parties to notify a competent authority in respect of activities or circumstances which, in their opinion, constitute a breach of law by collective management organisations and, where relevant, users".

Under Article 36(3), "Member States shall ensure that the competent authorities designated for that purpose have the power to impose appropriate sanctions or to take appropriate measures where the provisions of national law adopted in implementation of this Directive have not been complied with. Those sanctions and measures shall be effective, proportionate and dissuasive". In accordance with Article 36(3), the Commission maintains a list of the competent authorities, which is based on the notifications by Member States.[124]

Article 37(1) of the Directive regulates the exchanges of information between national competent authorities, with regard to the activities of their respective CMOs. It requires each Member State to "ensure that a [duly justified] request for information received from a competent authority of another Member State, designated for that purpose, concerning matters

120 Nonetheless, it appears that such procedures regarding possible non-compliance with Title III are rarely used by the relevant stakeholders, with only a few notifications reported by national competent authorities. See Ecorys/Ivir study, section 1.3.2.

121 Ecorys/Ivir study –. Users complain in particular about small CMOs in this regard.

122 Ecorys/Ivir study – see section 1.5.

123 Some uncertainty was expressed by a few users on the relevant jurisdiction for settling disputes regarding MTLs concluded between users and entities managing rights on a MTL basis. See Ecorys/Ivir study, section 1.5.5.

124 https://ec.europa.eu/digital-single-market/en/news/publication-collective-management-organisations-competent%20authorities-collective-rights-management-directive

relevant to the application of this Directive, in particular with regard to the activities of collective management organisations established in the territory of the requested Member State" is answered without undue delay.

Based on the available evidence[125], national authorities rarely exchange in a formal manner and exchanges often take place in an informal, ad hoc manner. In practice, exchanges of information may concern measures to monitor CMOs and IMEs established on the Member State's territory[126], including the regime of declaration, notification and authorisation.

While some national authorities surveyed[127] suggested a stronger and more formalised mechanism, most authorities seem satisfied with the status quo and have not used the mechanism because they have not encountered a need to use it. Some authorities surveyed called for structured exchanges of information or possibly a common database, in particular in relation to multi-territorial licenses and the supervision of IMEs with cross-border activities[128].

Article 37(2) of the Directive addresses notifications between national competent authorities when a CMO "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".

According to the available information, there have been very few such notifications.[129] As regards MTL in particular, over the last five years, only two of 22 NCAs responding to the survey in the context of the Ecorys/ivir study had notified their counterpart in another EEA Member State about possible non-compliance of licensing entities established in that Member State with national legislation implementing Title III of the CRM Directive.[130] Most interviewed NCAs stated that they wish to have more cooperation with their counterparts in other Member States. A majority of them expected that over the next five years, it will be important for effective regulation that competent authorities in EEA countries notify each other about possible non-compliance.[131]

8. Conclusion

Some five years after the transposition deadline, the CRM Directive has proven to have had a positive effect on the market, providing a benchmark for CMOs operating across the EU and beyond. Based on available evidence from the studies and the stakeholder consultations, at this stage there is no need for a review of the Directive.

The Commission will continue to monitor the application of the Directive. It will take into account market developments, discuss its application with national competent authorities in the expert group and investigate complaints alleging a violation of EU law.

125 Ibid. Visionary – chapter 9
126 Expert Group meeting
127 Ibid. Visionary section 10
128 Ibid. Visionary section 10
129 VA study, section 9.
130 Ecorys/Ivir study p.92-95
131 Ecorys/Ivir study p.92-95