Multi-territorial licensing of rights in music for online use: an early evaluation

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ABSTRACT

1. The impact of the 2014 Directive on Collective Rights Management Organisations (CMOs) and Multi-Territorial Licensing for online rights in music can hardly be underestimated. Now that the implementation deadline has passed, this paper aims to contribute to the legal discourse on collective rights management by examining whether the Directive's multi-territorial licensing has proven to be a useful innovation.

2. CMOs have for decennia held a natural if not legal monopoly position in their respective territories, justified by strong economic and socio-cultural arguments. They granted multi-repertoire licenses that were however mono-territorial. Technological changes challenged the system as it stood, and the Commission wanted to introduce a multi-territorial licensing policy corresponding to the ubiquity of the online environment. The subsequent 2005 Recommendation failed to produce the desired outcome. A binding instrument was deemed necessary, leading to the 2014 Directive. Several provisions in the Directive should safeguard both competition and cultural diversity, but it turns out that the early criticism on the Directive and its predecessors still holds today: The Commission ought to have taken the specificities of collective rights management better into account.

3. A selection of member states' implementation and market situation is discussed, one of them being Germany, where the legislator addressed a blind spot in the Directive. The scarce information on multi-territorial licensing in practice showed that most CMOs seem to have granted multi-territorial licenses for online music only for their own repertoire, thereby escaping the tag-on obligation and proving that already one of the safeguards has not had any practical effect. Most true multi-territorial licensing that is also multi-repertoire happens through a limited number of special licensing hubs involving collaborations between major publishers and a select number of big European CMOs that have significant market power.

4. Multi-territorial licensing for online rights in music was thus a useful innovation but for a number of stakeholders. It is doubtful whether commercial users -for whom initially the system was supposedly designed- are better off, as they are faced with an increased number of licensors and fragmentation of rights and repertoires. The Commission will review the CRM Directive in 2021; the profound criticism voiced over the years should be considered to achieve a balanced solution in which also the authors are not forgotten.

Chapter I. **INTRODUCTION**

1. CMOS IN THE DIGITAL AGE

5. A CMO (Collective rights Management Organisation)is an intermediary in a two-sided market, offering services to both rightholders and users.[2] For decennia, CMOs held a natural or even legal monopoly position in their respective territories, justified by strong economic and socio-cultural arguments.[3] Traditionally, economists see CMOs as an efficient way to overcome the problem of high transaction costs for administering copyright.[4] However, technological developments have influenced how rights can be managed collectively. Online services do not stop at the borders, yet the traditional CRM (Collective Rights Management) system of CMOs using RRAs (Reciprocal Representation Agreements) does.[5] Works can now more easily be licensed individually, and their monitoring can be automated: the gathering and processing of information is considerably easier.[6] HANDKE

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[2] E. AREZZO, "Competition and Intellectual Property Protection in the Market for the Provision of Multi-territorial licensing of Online Rights in Musical Works - Lights and Shadows of the new European Directive 2014/26/EU", *International Review of Intellectual Property and Competition Law* 2015, 548.

[3] J. DREXL et al., "Comments of the Max Planck Institute on the Proposal CRM Directive", 2013, 5.

[4] J. DREXL, S. NÉRISSON, F. TRUMPKE & R. HILTY, "Comments of the Max Planck Institute for Intellectual Property and Competition Law on the 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 COM(2012)372", Max Planck Institute for Intellectual Property and Competition Law Research Paper No. 13-04, 2013, 5, hereafter shortened as J. DREXL et al., "Comments of the Max Planck Institute on the Proposal CRM Directive", 2013; C. HANDKE & R. TOWSE, "Economics of Copyright Collecting Societies", *International Review of Intellectual Property and Competition Law* 2007, 939.

[5] Commission Staff Working Document SWD(2012) 204 final of 11 July 2012, impact assessment accompanying the 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, 13. RRAs allows a CMO to license in their own national territory a vast array of repertoires. While the license granted to users is mono-territorial, it is multi-repertoire. Each national CMO can then offer a license covering both reproduction rights and rights of communication to the public (or at least one of the two categories), in their own territory, for virtually the global repertoire (depending on the number of RRAs) - hence the name 'blanket license'. This license is granted for their own territory only, because the RRAs contained exclusivity clauses: ECJ 13 July 1989, C-395/87, Ministère Public/Jean-Louis Tournier, para. 19; S. F. SCHWEMER, *Licensing and access to content in the European Union: regulation between copyright and competition law*, Cambridge, Cambridge University Press, 2019, 54-56; M. HVIID, S. SCHROFF & J. STREET, "Regulating Collective Management Organisations by Competition: An Incomplete Answer to the Licensing Problem?", *JIPITEC* 2016, 258; E. ANTHONIS, "Will the CRM-directive succeed re-aggregating the mechanical reproduction rights in the Anglo-American music repertoire?", *International Journal of Intellectual Property Management* 2014, 152.

[6] C. HANDKE & R. TOWSE, "Economics of Copyright Collecting Societies", *International Review of Intellectual Property and Competition Law* 2007, 951-953. The Commission already knew this in 2002, stating in a rather simplified way that 'the crucial requirements in order to be able to monitor the use of copyright and related rights [in the online environment] are therefore a computer and an Internet connection. This means that monitoring can take place from a distance. In this context, the traditional economic justification for [CMOs] not to compete in cross-border provision of services does not seem to apply' : COMP/C2/38014 (IFPI - Simulcasting Decision), rec. 61. And in its Impact Assessment for the CRM Directive, the Commission holds that 'adapting to the new requirements has proven to be difficult for [CMOs] in terms of the required data identification, management capability and the aggregation of repertoire. The necessary improvements are often hindered by rightholders' insufficient influence over the decisions (costs, stakes and investments) taken by the [CMO] (...) and the lack of technological means':

& TOWSE already wrote about the potential influence of technological change 13 years ago; techniques have only become more advanced, and super-fast internet only more widespread. HVIID et al. argue that this 'undermines the CMOs justification for their monopoly status, as there are now real alternatives to them'[7].

6. However, one can argue that the socio-cultural justifications for CRM still hold. Authors still need protection and organisations defending their interests, now even more than before. CMOs make sure that authors are compensated for use of their works and can be seen as a 'union' for authors, an interest group that has sufficient bargaining power against the major users in the industry.[8] Indeed, they are best placed to defend the weaker bargaining party - being the *individual* author or the performer - against (commercial) users.[9] Furthermore, CMOs often support (local) culture in various ways and also play an important advisory and lobbying role. Authors and artists can continue to create works, partially thanks to CMOs representing them and defending their interests at different levels. That, in turn, leads to cultural progress. CMOs cannot simply be seen as 'just' undertakings without considering the important roles they play in protecting a region's creativity and culture.[10] The Commission is aware of CMOs' socio-cultural role, stating that 'CMOs play, and should continue to play, an important role as promoters of the diversity of cultural expression, both by enabling the smallest and less popular repertoires to access the market and by providing social, cultural and educational services for the benefit of their rightsholders and the public'[11]. The current system of MTLs (multi-territorial licenses for online rights in musical works) might however threaten exactly those smaller repertoires. Therefore, even when licensing practices change, CMO should continue to play their role as a 'union' for their rightholders. Yet however valid the socio-cultural argument is, it has not prevented the CRM market from evolving. In order to bring CRM into the 21st century, the Commission introduced a Recommendation in 2005 (the Recommendation), which was heavily criticised and did not produce the desired outcome. This resulted in the adoption of Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on

[7] M. HVIID, S. SCHROFF & J. STREET, "Regulating Collective Management Organisations by Competition: An Incomplete Answer to the Licensing Problem?", *JIPITEC* 2016, 260.
[8] F. GOTZEN, "Les licences multiterritoriales entre le juge et le législateur. Des affaires «CISAC» à la Directive 2014/6", *RIDA* 2014, 118; S. F. SCHWEMER, *Licensing and access to content in the European Union: regulation between copyright and competition law*, Cambridge, Cambridge University Press, 2019, 52-53 and references therein.
[9] J. DREXL et al., "Comments of the Max Planck Institute on the Proposal CRM Directive", 2013, 14.
[10] F. GOTZEN, "Les licences multiterritoriales entre le juge et le législateur. Des affaires «CISAC» à la Directive 2014/6", *RIDA* 2014, 116.
[11] Rec. 3 CRM Directive.

collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (the Directive).

Chapter II. **MAIN POINTS OF THE DIRECTIVE**

1. SCOPE AND SUBJECT-MATTER

7. In its Impact Assessment, the Commission explains that the problems related to MTL derive to a large extent from the inability of rightholders to access information and exercise real control over the CMO, which is why the governance and transparency provisions are to be read together with Title III. [12]

8. IMEs are not treated the same as CMOs: while they have to comply with certain information duties they are excluded from a number of other provisions.[13] Recital 15, however, specifies that 'to the extent that [IMEs] carry out the same activities as CMOs, they should be obliged to provide certain information to the rightholders they represent, CMOs, users and the public'. Recital 16 then lists what an IME is *not;* rests the question what an IME then is and with which provisions it must comply.

9. The Title on MTL (Title III) and art. 34(2) and 38 only apply to CMOs established in the Union managing authors' rights in musical works for online use on a multi-territorial basis. The 'relevant' provisions of the CRM Directive apply to entities directly or indirectly owned or controlled, wholly or in part, by a CMO, provided that such entities carry out an activity which, if carried out by the CMO, would be subject to the CRM Directive.[14]

2. PROVISIONS ON MULTI-TERRITORIAL LICENSES

1. Requirements for CMOs offering multi-territorial licenses

10. A multi-territorial license for online rights in musical works is a license which covers the territory of more than one Member State, for any of the rights of an author in a musical works provided for under articles 2 and 3 of the Copyright Directive which are required for

[12] Commission Staff Working Document SWD(2012) 204 final of 11 July 2012, impact assessment accompanying the 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, 14-15.
[13] Art. 2(4) CRM Directive; recital 15 CRM Directive; S. F. SCHWEMER, *Licensing and access to content in the European Union: regulation between copyright and competition law*, Cambridge, Cambridge University Press, 2019, 139.
[14] Art. 2(3) CRM Directive.

an online service.[15] Article 24 contains details on the capacity a CMO needs to have to in order to process MTLs.[16] CMOs targeted by Title III are furthermore obliged to be transparent about the online music repertoire they represent towards online service providers, to their rightholders and to other CMOs when one asks to do so via 'a duly justified request'.[17]

2. The European licensing passport

11. Following are the provisions establishing the mechanism previously known as the European licensing passport (the name did not survive the legislative process).[18] The mechanism allows CMOs that do not offer MTLs to 'tag on' their rights for those purposes to a different CMO that does.[19] Such agreements between a mandating CMO and a mandated CMO for granting MTLs must be of a *non-exclusive nature*, and the mandated CMO shall manage those online rights on a non-discriminatory basis. If this non-exclusive nature means that the same repertoire can be entrusted to more than one entity, it is likely that competition between several CMOs for the same repertoire could occur in one single territory.[20] An important limitation is that the requested CMO is required to agree to such request only if it is already granting (or offering to grant) MTLs for the *same category of online rights in musical works* in the repertoire of one or more other CMOs.[21]

12. If a CMO does not grant or offer to grant MTLs, or does not allow another CMO to represent those rights for such purpose, rightholders can decide to withdraw their online rights from that CMO in respect of all territories, without having to withdraw the online rights in musical works for the purposes of mono-territorial licensing.[22] Rightholders can then decide to either grant MTLs for their online rights in musical works themselves, through any other

[15] Art. 3(m), (n) CRM Directive. Here written without abbreviations for clarity.
[16] Art. 24 CRM Directive.
[17] Art. 25 CRM Directive.
[18] S. F. SCHWEMER, *Licensing and access to content in the European Union: regulation between copyright and competition law*, Cambridge, Cambridge University Press, 2019, 152.
[19] Art. 29 & 30 CRM Directive; S. F. SCHWEMER, *Licensing and access to content in the European Union: regulation between copyright and competition law*, Cambridge, Cambridge University Press, 2019, 152.
[20] Which is a situation disfavoured by the General Court in the CISAC case; F. GOTZEN, "Les licences multiterritoriales entre le juge et le législateur. Des affaires «CISAC» à la Directive 2014/6", *RIDA* 2014, 134. Other scholars hold that the non-exclusive mandate should ensure that CMOs can join different hubs for the MTL of their repertoire and that users seeking MTLs have the choice to obtain licenses from several licensing hubs: L. GUIBAULT & S. VAN GOMPEL, "Collective Management in the European Union" in GERVAIS, D. (ed.), *Collective Management of Copyright and Related Rights*, Alphen aan den Rijn, Kluwer, 2016, 169.
[21] Art. 30 CRM Directive;
[22] Art. 31 CRM Directive.

party they authorise or through any CMO complying with the provisions of Title III.[23] There is, however, no obligation for the requested CMO to 'on-board' those rightholders.

3. IMPLEMENTATION IN SELECTED MEMBER STATES

13. Several Member States missed the deadline of 10 April 2016 for implementing the Directive with Member States citing political difficulties, the technicality of the text and criticism of CMOs as reasons for the delay.[24] In the following paragraphs, the most interesting implementations are mentioned.

14. BELGIUM - The Belgian legislator had to introduce new definitions when transposing Article 3 of the Directive. CMOs *sensu lato* in Belgium take the legal form of a company (*vennootschap*), a for-profit association. The legislator left out the second criterion of art. 3(a) (being organised on a not-for-profit basis) for its definition of *beheersvennootschap* (art. I.16, §1, 4° WER) and introduced a new definition for collective management organisation (*collectieve beheersorganisatie*), clarifying that such organisation is then established in a different Member State and fulfils one of the two requirements (art. I.16, §1, 5° WER). We recall that the Directive does not require CMOs to adopt a specific form, but Member States should take appropriate measures to prevent the circumvention of its obligations.[25]

15. ITALY – The CRM Directive's adoption caused quite a stir in Italy, where Italian Authors Society SIAE (*Società Italiana Autori and Editori*) until shortly was the legal monopolist.[26]

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[23] Art. 31 CRM Directive.

[24] CRM Expert Group meeting 5 July 2017; Art. 43,1 CRM Directive; EG meeting 9 March 2018. The Commission lodged actions against Spain, Poland, Romania, Bulgaria and Luxembourg (action brought on 22 March 2018, C-207/18, European Commission v Kingdom of Spain. By now, Spain still hasn't notified the Commission of the implementation of the Directive, even though it has fully transposed the CRM Directive into its laws with several acts, the last one being passed on 1 March 2019: https://www.osborneclarke.com/insights/spanish-act-22019-approach-recent-modification-spanish-copyright-act/ (last accessed 15 August 2019); Action brought on 23 March 2018, C-206/18, European Commission v Republic of Ireland; Action brought on 14 February 2018, C-116/18, European Commission v Romania; Action brought on 16 January 2018, C-27/18, European Commission v Republic of Bulgaria; Action brought on 9 January 2018, C-20/18, European Commission v Grand Duchy of Luxembourg. Last updated 23 July 2019 via https://eur-lex.europa.eu/legal-content/NL/ALL/?uri=CELEX:32014L0026. For the other countries who were late or late in notifying as well, see European Commission Press Release 25 January 2018 - Collective Rights Management: Commission refers Poland to the Court of Justice and closes eight cases, https://europa.eu/rapid/press-release_IP-18-353_en.htm (last accessed 15 August 2019).

[25] Rec. 14 CRM Directive.

[26] SIAE was assigned the legal monopoly by art. 180 of the Italian Copyright Act in 1941. Rightholders were not obliged to license their works through SIAE, as longs as they licensed their works on an individual basis meaning without any intermediation; G. S. ALÌ, "Collective monopolies: SIAE v Soundreef and the implementation of Directive 2014/26 in Italy", *European Intellectual Property Review* 2018, 113-114; G. M. RICCIO & G.

One commentator notes that 'Italian legislative bodies were rather puzzled about the impact of art. 5 of the Directive on SIAE's monopoly. The necessity to clarify its meaning led to a delay in the implementation'[27], which in turn led to infraction proceedings lodged by the Commission. The lawfulness of SIAE's monopoly was examined by the Italian Constitutional Court on several instances .[28] SIAE was found to abuse its dominant position by imposing overly onerous royalties compared to other European CMOs in similar instances. [29] This created a welcoming climate for Soundreef, a company and self-proclaimed IME offering services similar to those offered by CMOs.[30]

16. The emergence of Soundreef in Italy seemed in clear violation with art. 180 Italian Copyright Act, which prohibits private corporations from acting as an intermediary in the licensing and collection of copyright royalties. Judges, interpreting the prohibition narrowly and in accordance with EU law, were not convinced that Soundreef's activities actually violated SIAE's monopoly.[31] On 12 December 2018, the Italian *Tribunale ordinario di Roma* lodged a request for a preliminary ruling (C-781/18), asking whether the CRM Directive should be interpreted as precluding national legislation that reserves access to the copyright intermediation market, or in any event the granting of licences to users, solely to entities which can be classified (…) as collective management organisations, to the exclusion of those which can be classified as independent management entities incorporated in that Member State or in other Member States. [32] Unfortunately, the Italian court withdrew its request.[33] Soundreef and SIAE seem to have settled the case.[34]

CODIGLIONE, "Copyright Collecting Societies, Monopolistic Positions and Competition in the EU Single Market", *Masaryk University Journal of law and Technology* 2013, 288-289.

[27] G. S. ALÌ, "Collective monopolies: SIAE v Soundreef and the implementation of Directive 2014/26 in Italy", *European Intellectual Property Review* 2018, 123.

[28] G. S. ALÌ, "Collective monopolies: SIAE v Soundreef and the implementation of Directive 2014/26 in Italy", *European Intellectual Property Review* 2018, 114-115.

[29] G. S. ALÌ, "Collective monopolies: SIAE v Soundreef and the implementation of Directive 2014/26 in Italy", *European Intellectual Property Review* 2018, 115-116. ALÌ explains SIAE's misconduct in great detail; despite the fact that the legal monopoly position was meant to protect authors, SIAE is said to have profited itself, more than anyone else

[30] G. S. ALÌ, "Collective monopolies: SIAE v Soundreef and the implementation of Directive 2014/26 in Italy", *European Intellectual Property Review* 2018, 118; https://soundreef.zendesk.com/hc/en-us/articles/203433491-Does-Soundreef-work-as-an-intermediary-for-other-collecting-societies-such-as-SACEM-BUMA-STEMRA-STIM-SIAE-SGAE-et-TONO- (last accessed 2 August 2019).

[31] G. S. ALÌ, "Collective monopolies: SIAE v Soundreef and the implementation of Directive 2014/26 in Italy", *European Intellectual Property Review* 2018, 120.

[32] 25 March 2019 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.

[33] Ordonnance du président de la cour dans l'affaire C-781/18, 16 July 2019.

[34] http://www.soundreef.com/blog/chiarezza-accordo-soundreef-siae-lea/ (accessed 13 August 2019).

17. UNITED KINGDOM – The UK implemented the Directive with the Collective Management of Copyright (EU Directive) Regulations 2016 which came into force on 10 April 2016. Instead of modifying the existing regulatory framework, the government chose to simply replace it and implemented the Directive entirely through copy out.[35] The UK Intellectual Property Office monitors and enforces compliance.[36] Given the abundance of CMOs and other licensing bodies on its territory, the UKIPO might play an even more important role than other supervising bodies.

18. GERMANY – Germany implemented the Directive with its Act on the management of Copyright and Related Rights by Collecting Societies of 24 May 2016. In part 1 (subject matter of the Act and definitions), the legislator chose to implement 'collecting *society'* (not *organisation* - yet still defined it as an organisation which is authorised by law or contractual arrangement and so on), but also a definition on 'dependent management entity' (hereafter: DME) in Section 3, right before the IME definition.[37] A DME is an 'organisation whose shares are at least indirectly or in part held by at least one collecting society or which is at least indirectly or in part controlled by at least one collecting society'.[38] 'In so far as the DME carries out the activities of a collecting society, the provisions applicable to those activities under the Act shall apply *mutatis mutandis*. The provisions referring to the management in section 21(1) and (2) shall apply *mutatis mutandis*, irrespective of which activities of a collecting society the DME carries out. (…)'[39].

19. This definition could catch the 'option 3 publishers'[40] and the licensing hubs that are apparent now, although no reference to these licensing entities was made in the explanatory statement of the draft for this Act.[41]. The website of the German Patent and Trade Mark

[35] Statutory Instrument 2016 No. 221, Collective Management of Copyright (EU Directive) Regulations 2016, *Statutory Instruments* (via legislation.gov.uk) 24 February 2016; UK Impact Assessment Collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market of 20 October 2015.

[36] https://www.gov.uk/government/publications/how-the-ipo-regulates-licensing-bodies/how-the-ipo-regulates-licensing-bodies#overview (last accessed 13 August 2019).

[37] The *Bundesministerium der Justiz un für Verbraucherschutz* provides a translation of the implementing Act on their website: https://www.gesetze-im-internet.de/englisch_vgg/englisch_vgg.html (last accessed 14 August 2019).

[38] Section 3(1) German Collecting Societies Act.

[39] Section 3(2) German Collecting Societies Act.

[40] These are 'large music publishers that have withdrawn the mechanical rights related to their Anglo-American repertoire from the [CMOs] and have started to license these rights directly': European Commission Press Release 16 June 2015 - Mergers: Commission approves joint venture for cross-border licensing of online music between PRSfM, STIM and GEMA, subject to commitments, http://europa.eu/rapid/press-release_IP-15-5204_en.htm, last accessed 24 July 2019.

[41] S. F. SCHWEMER, *Licensing and access to content in the European Union: regulation between copyright and competition law*, Cambridge, Cambridge University Press, 2019, 142.

Office DPMA, which is also the supervising authority of CMOs and Management Entities (whether DMEs or IMEs), lists both CMOs and Management Entities. The DPMA clarifies that 'in contrast to management organisations, dependent management entities are generally not required to obtain authorisation. However, to the extent that they manage copyright or related rights, they must notify the DPMA of their activities'[42]. Among the listed DMEs are ARESA, ICE and SOLAR.[43] The big licensing hubs of today's market are thus categorised not as CMOs nor as IMEs, but as DMEs.

Chapter III. **MULTI-TERRITORIAL LICENSING IN PRACTICE**

20. The Commission follows up on the implementation of the CRM Directive i.e. through an Expert Group (hereafter EG).[44]. During its second meeting, the EG discussed the application of Title III. Only half of the Member States had sent the required report to the Commission on the development of MTL in their territory.[45]. Interestingly, the reports the Commission *did* receive showed no examples of a CMO mandating another CMO to represent its repertoire for the purpose of granting MTLs.[46] Furthermore, there were 'not many' examples of withdrawal of rights for MTLs by rightholders.[47] There were also few examples of verification of CMOs' compliance with the minimum standards from Title III.[48] Projects in the area of MTL that were discussed included ARMONIA, ICE (for both: *infra*) and Mint Digital Services.[49]

21. The passport construction itself, it seems, is thus not used in practice. In as far as the EG meeting reports and presentations reflect reality, this is a bit surprising. In the 2012 Impact Assessment, the Commission gave the example of some CMOs already entrusting their rights to other CMOs for the purpose of multi-territory licensing of online services: Irish

[42] https://www.dpma.de/english/our_office/about_us/further_duties/cmos_copyright/supervision_of_cmos/index.html (last accessed 14 August 2019).
[43] *Liste der Verwertungseinrichtungen* on https://www.dpma.de/dpma/wir_ueber_uns/weitere_aufgaben/verwertungsges_urheberrecht/aufsicht_verwertungsges/listederverwertungseinrichtungen/index.html (last accessed 14 August 2019).
[44] According to article 41 of the CRM Directive, it needs to examine the impact of the transposition of the Directive on the functioning of CMOs and IMEs in the internal market, and highlight difficulties. It furthermore has to organise consultations on all questions arising from the application of the Directive and facilitate the exchange of relevant legislation. At the time of updating this section (February 2020), the third meeting report has not been made available yet.
[45] Art. 38(3) CRM Directive. Belgium was not one of them.
[46] Commission presentation 9 March 2018, Expert Group on the Directive 2014/26/EU, 6.
[47] Ibid., 6.
[48] Ibid., 6. Compliance should be enforced to make the system work to not have a dead letter law; in that sense, see also the comments in the section Belgium, *infra*.
[49] Ibid., 8.

society IRMO's rights were licensed by PRS, and Portuguese society PTA's rights were licensed by Spanish society SGAE.[50] It is not unlikely that these CMOs decided to stop doing so in order to not be subject to the tag-on obligation.

22. Indeed, most CMOs have seemingly only granted MTL for online rights in music for their own repertoire, escaping the tag-on regime. Little information available shows that CMOs in the Member States are mostly engaged in MTL licensing for online rights that is truly multi-repertoire through special licensing hubs such as ARESA and SOLAR. Both are co-operations between major publishers and CMOs, for the purpose of representing mechanical rights in the Anglo-American repertoire of those publishers.[51]

23. It is not always clear whether these new entities are merely administrative portals or true 'one-stop shops'. The most obvious feature that these might be missing compared to a CMO or an IME is that they do not manage copyright *on behalf* of *more than one* rightholder. Yet art. 2(3) states that relevant provisions of the CRM Directive apply to entities directly or indirectly owned or controlled, wholly or in part, by a CMO, provided that such entities carry out an activity which, if carried out by the CMO, would be subject to the provisions of this Directive. The Commission ought to have clarified this issue.

24. Other licensing entities are actually joint ventures between different CMOs instead of CMOs and major publishers. ARMONIA Online for example is a joint venture of nine national CMOs. They claim to be the first Pan-European hub licensing musical works digital music services worldwide, making online music licensing and processing simpler to ensure a fair deal for everyone.[52]

25. Another notable licensing hub is ICE Services (with ICE standing for International Copyright Enterprise), a joint venture between CMOs for which the Commission granted clearance in June 2015.[53] The Commission 'had concerns that the creation of the joint

[50] Commission Staff Working Document SWD(2012) 204 final of 11 July 2012, impact assessment accompanying the 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, 162.
[51] http://www.aresa-music.com/homepage_en.html; https://www.iceservices.com/bmg-extends-digital-licensing-pact-with-gema-to-48-more-territories/ (last accessed 9 August 2019); http://www.celas.eu/ (last accessed 2 August 2019).
[52] https://www.armoniaonline.com/ (last accessed 2 August 2019).
[53] European Commission Press Release 16 June 2015 - Mergers: Commission approves joint venture for cross-border licensing of online music between PRSfM, STIM and GEMA, subject to commitments, http://europa.eu/rapid/press-release_IP-15-5204_en.htm (last accessed 24 July 2019).

venture would make it more difficult for other collecting societies to offer copyright administration services by raising the barriers to entry and growth in this market'[54] but the submitted commitments addressed the Commission's concerns.[55] The company calls itself 'the world's first integrated processing hub'[56]. As ICE offers a whole range of services besides MTL, they are likely to grow bigger and attract even more repertoire. Ironically, the idea of having one overarching portal, with whom all CMOs would cooperate, was discarded by the Commission for violating EU competition law. It is not unlikely that the market still evolves in this direction.[57]

Chapter IV. **DISCUSSION**

1. THE DIRECTIVE DOES NOT TAKE INTO ACCOUNT THE SPECIFICITIES OF COLLECTIVE RIGHTS MANAGEMENT

26. Applying EU competition (law) concepts with full force on CRM practice, seems like using a sledgehammer to crack a nut. As mentioned earlier, CMOs are not economic entities *pur sang* pursuing a purely commercial purpose.[58] Besides, it is not wise to introduce competition in a two-sided market on one side only.[59] HANDKE & TOWSE remind us that if any industry is a natural monopoly, it is unlikely that a competitor will enter without regulatory intervention.[60] The current situation shows indeed that not many (new) actors play a role of importance in today's CRM market. DREXL *et al*. note that 'the Commission seems to fail to take account of the full legal framework and factual circumstances that have structured the current system of CRM'[61]. The Institute does not agree with the Commission's view that the effect of the Recommendation was unsatisfactory because of its non-binding character.[62] It argues instead that the consequences of the Recommendation are to be blamed (at least partially) on not considering the different traditions in CRM between

[54] Ibid.
[55] Regulation 1/2003 created a legal basis for what was previously only informal practice in competition proceedings.
[56] https://www.iceservices.com/ (last accessed 15 August 2019).
[57] In that sense, but more hopeful (at that time): C. HANDKE & R. TOWSE, "Economics of Copyright Collecting Societies", *International Review of Intellectual Property and Competition Law* 2007, 955.
[58] F. GOTZEN, "Les licences multiterritoriales entre le juge et le législateur. Des affaires «CISAC» à la Directive 2014/6", *RIDA* 2014, 116.
[59] E. AREZZO, "Competition and Intellectual Property Protection in the Market for the Provision of Multi-territorial licensing of Online Rights in Musical Works - Lights and Shadows of the new European Directive 2014/26/EU", *International Review of Intellectual Property and Competition Law* 2015, 548.
[60] C. HANDKE & R. TOWSE, "Economics of Copyright Collecting Societies", *International Review of Intellectual Property and Competition Law* 2007, 955.
[61] J. DREXL et al., "Comments of the Max Planck Institute on the Proposal CRM Directive", 2013, 1.
[62] J. DREXL et al., "Comments of the Max Planck Institute on the Proposal CRM Directive", 2013, 8.

Anglo-American (where publishers are fully in control of the mechanical rights of authors as they were fully assigned to them) and Continental repertoire.[63]

2. INCOMPLETE AND AMBIGUOUS PROVISIONS

27. The European legislator failed to clarify the role of the hybrid models that already developed after the Recommendation, leading to uncertainty. [64] However, the German legislator offers more clarity about option 3 publishers than the European one.

28. Next, The Directive defines a rightholder as any person or entity (other than a CMO) holding a copyright or related right or that is, under an agreement for the exploitation of rights or by law, entitled to a share of the rights revenue.[65] Authors are not mentioned in the Directive as such.[66] Not distinguishing the authors from derivative rightholders was a mistake, resulting in all rightholders being considered 'weaker parties' in the contractual relationship between themselves and a CMO even though some of them are in fact powerful actors, like the major publishers.[67]

[63] Commission Staff Working Document SWD(2012) 204 final of 11 July 2012, impact assessment accompanying the 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, 13 (hereinafter referenced as Impact Assessment CRM Directive); G. MAZZIOTTI, "New Licensing Models for Online Music Services in the European Union: from Collective to Customized Management", EU working paper 2011/14, European University Institute, 2011, 16-19; J. DREXL et al., "Comments of the Max Planck Institute on the Proposal CRM Directive", 2013, 8; E. ANTHONIS, "Will the CRM-directive succeed re-aggregating the mechanical reproduction rights in the Anglo-American music repertoire?", *International Journal of Intellectual Property Management* 2014, 151-152.

[64] E. AREZZO, "Competition and Intellectual Property Protection in the Market for the Provision of Multi-territorial licensing of Online Rights in Musical Works - Lights and Shadows of the new European Directive 2014/26/EU", *International Review of Intellectual Property and Competition Law* 2015, 546-548.

[65] Art. 3(c) CRM Directive.

[66] The word occurs in the CRM Directive, but only when talking about his rights in a musical work, e.g. in article 3(m): "'online rights in musical works' means any of the rights of an author in a musical work provided for under Articles 2 and 3 of Directive 2001/29/EC which are required for the provision of an online service."

[67] C. B. GRABER, "Collective Rights Management, Competition Policy and Cultural Diversity: EU Lawmaking at a Crossroads", i-call Working Paper no. 04 2012, 9; S. NÉRISSON, "L'article 5.7 de la directive 2014/26/UE, une introduction diabolique du droit des contrats dans le droit d'auteur de l'Union européenne" in S. VON LEWINSKI (ed.), *Remuneration for the use of works - exclusivity vs. other approaches*, ALAI Congress 2015/ Conference Proceedings, De Gruyter, Berlin, 2017, 259; J. DREXL et al., "Comments of the Max Planck Institute on the Proposal CRM Directive", 2013, 14. The big publishers are almost always subsidiaries of major record labels, who hold related rights, resulting in a concentration of a lot of rights revenue in essentially one party; see also S. NÉRISSON, "L'article 5.7 de la directive 2014/26/UE, une introduction diabolique du droit des contrats dans le droit d'auteur de l'Union européenne" in S. VON LEWINSKI (ed.), *Remuneration for the use of works - exclusivity vs. other approaches*, ALAI Congress 2015/ Conference Proceedings, De Gruyter, Berlin, 2017, 262; J. DREXL et al., "Comments of the Max Planck Institute on the Proposal CRM Directive", 2013, 14.

3. LICENSING PASSPORT CONSTRUCTION BASED ON WRONG ASSUMPTIONS

29. DREXL *et al*. point out that the passport construction would only work if the requesting CMO is the 'source society that holds the rights for all EU Member States'[68]. Secondly, they warn that this provision will not help if it is not clear whether the rights were first entrusted to a CMO by the author or by the publisher, and if the two have chosen different societies. The effectiveness of the requirement to agree to a tag-on request is also unsure, as a requested CMO only has to accept if it is already granting or offering to grant MTLs for the *same category* of works.[69]

4. THE CULTURAL DIVERSITY ARGUMENT

30. The Directive is likely to have a negative impact on cultural diversity in the Member States.[70] Already in 2005 during the Impact Assessment, stakeholders warned for the adverse impact on cultural diversity.[71] Naturally, the Recommendation was criticised for its potential negative effects on cultural diversity.[72]

31. A 2009 study commissioned by the European Parliament could not quantify the impact of the withdrawal of the majors' repertoires from the reciprocal representation network of CMOs for digital rights clearance.[73] However, it seemed 'reasonable to conclude that at least the Anglo-American repertoire represents a very important revenue source for the European [CMOs], whether these are of a large, medium or small size. Deprived of such repertoires, the profitability of medium-sized and small collecting societies, in particular, could be endangered, undermining their ability to cater for the interests of their members'[74]. Even

[68] J. DREXL et al., "Comments of the Max Planck Institute on the Proposal CRM Directive", 2013, 28.
[69] Art. 30 CRM Directive; E. AREZZO, "Competition and Intellectual Property Protection in the Market for the Provision of Multi-territorial licensing of Online Rights in Musical Works - Lights and Shadows of the new European Directive 2014/26/EU", *International Review of Intellectual Property and Competition Law* 2015, 554.
[70] C. B. GRABER, "Collective Rights Management, Competition Policy and Cultural Diversity: EU Lawmaking at a Crossroads", i-call Working Paper no. 04 2012, 11.
[71] Commission Staff Working Document SEC(2005) 1254 of 11 October 2005, impact assessment reforming cross-border collective management of copyright and related rights for legitimate online music services, 21-22.
[72] S. F. SCHWEMER, *Licensing and access to content in the European Union: regulation between copyright and competition law*, Cambridge, Cambridge University Press, 2019, 129.
[73] European Parliament, DG for internal policies, Study PE 419.110 of June 2009 on Collecting Societies and Cultural Diversity in the Music Sector, 97.
[74] European Parliament, DG for internal policies, Study PE 419.110 of June 2009 on Collecting Societies and Cultural Diversity in the Music Sector, 97. In 2009, the digital market still represented a relative immature market in Europe, but was expected to grow significantly. From that perspective, 'it could be argued that collecting societies in Europe - those not mandated by major music publishers for the digital licensing of their repertoires - will progressively start facing reduced turnovers. One could also not exclude the possibility of further repertoire withdrawals, even of categories of rights. Performing rights could be next, as commercial users favour the bundling of mechanical and performing rights but also music rights for offline exploitations' (97-98).

though the Directive contains an equal treatment safeguard for the repertoire transferred to another CMO, 'it is very likely that the system will in any case lead to the reinforcement of the position of the biggest organisations representing the most popular Anglo-American repertoire. This would in turn be detrimental to the repertoires with limited linguistic presence in the EU and would cause harm to the principle of safeguarding cultural diversity'.[75]

32. The 'tag-on' mechanism for small CMOs is introduced precisely to avoid that the repertoires they represent are not offered to commercial users. At the time of the Proposal, the Max Planck Institute advocated for an obligation to contract with rightholders which at the time already existed in several Member States.[76] Such obligation would enhance cultural diversity as CMOs could not refuse to administer rights 'solely on grounds of their cultural origin or background or of their limited economic value'[77]. Article 5(2) CRM Directive now only states that 'unless the CMO has objectively justified reasons to refuse management, it shall be obliged to manage such rights, categories of rights or types of works and other subject-matter, provided that their management falls within the scope of its activity'[78]. It does not seem unlikely that CMOs will argue the commercial potential of a repertoire or its linguistic importance to be an objectively justified reason to refuse management. Yet this fear has not materialised, judging from the reports to the Commission (*infra*).

33. The CRM Directive can thus also be seen to have a negative impact because of what it *does not* regulate. As the EESC noted in its Opinion on the Proposal, 'unequal contracts imposed by most music publishers and distributors will continue to apply and to prevent most copyright holders and other rightholders from receiving fair remuneration for their work. (…0 the draft law [is viewed] as incomplete for the purposes of genuinely promoting culture and literary and artistic works by remunerating authors and creators appropriately'.[79] All copyright(related) legislatve initiatives should keep in mind the author and the specificities the market.[80].

[75] Ibid.
[76] J. DREXL et al., "Comments of the Max Planck Institute on the Proposal CRM Directive", 2013, 7.
[77] Ibid., 7.
[78] Art. 5(2) CRM Directive.
[79] Opinion of the European Economic and Social Committee on the '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' COM(2012) 372 final — 2012/0180 (COD), 12 December 2012, section 4.4.
[80] Fortunately, fair remuneration in exploitation contracts of authors (and performers) has been addressed in chapter III of the 2019 Copyright in the Digital Single Market Directive. This is a positive development, and it

5. SUMMARY OVERVIEW FROM DIFFERENT STAKEHOLDERS' PERSPECTIVES

1. Rightholders

34. Authors benefit from the CRM Directive indirectly: a well-organised system of MTLs means that their music might reach new audiences, which could have been harder before. The UKIPO commented that 'rightholders will benefit from increased transparency, flexibility, and participation in decision making in CMOs'[81], which should help them to maximise the value of their rights. Yet MTL, it seems, has first and foremost helped major publishers and their top-selling authors in the Anglo-American repertoire.

35. However, authors who transferred or assigned their rights to smaller CMOs might be less fortunate, especially if their repertoire is less commercially interesting. If their CMO is not willing to mandate the online rights of its repertoire (as a whole) to a CMO capable of granting MTLs, those authors can of course withdraw their rights (*supra*). Yet the small author creating music with a small linguistic presence throughout the EU, who is member of a small CMO, suffers because of the decrease of total rights revenue for the CMO. The provisions in the 2019 Copyright Directive probably have a greater influence for authors (at least directly).[82]

36. Publishers, especially big publishers benefited already from the Recommendation, and thus also from the Directive: in their capacity of large rightholders with sufficient economic power, guaranteeing a strong bargaining position, they could renegotiate the terms of the collective rights administration of their rights -for the Anglo-American repertoire, those are at least the mechanical rights- with individual CMOs.[83]

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will be interesting to see how Member States implement the principle of appropriate and proportionate remuneration given their freedom to use different mechanisms and taking into account the principle of contractual freedom and a fair balance of rights and interests: Art. 18 Copyright in the DSM Directive. On protection for creators and the balancing of their rights with those of others, see the interesting chapter '3.3 Legal Interests at Stake and the Mantra of Balance' in C. LUCENO, *Collective Rights and Digital Content - The Legal Framework for Competition, Transparency and Multi-Territorial Licensing of the New European Directive on Collective Rights Management*, Cham, Springer International Publishing, 2015, 18-20.

[81] Explanatory Memorandum to the Collective Management of Copyright Regulations 2016, 3.

[82] See i.a. art. 18 Copyright in the DSM Directive, as discussed *supra*.

[83] J. DREXL et al., "Comments of the Max Planck Institute on the Proposal CRM Directive", 2013, 9.

2. CMOs

37. Several CMOs decided to work together to form licensing hubs for rights for online use in their combined repertoires, leading to a true multi-repertoire and MTL model.[84] Big names like PRS For Music, SACEM and GEMA are involved in special licensing entities together with publishers or are founding members of other licensing hubs. They seem to have acted upon the opportunities created by the law.

38. Small CMOs have to follow suit. Yet if they cannot use the tag-on regime because those licensing entities are not seen as CMOs, it is up to their negotiation skills to be included in one of these initiatives. It is unlikely that other CMOs will be considered for joint ventures with big publishers as those have already contracted with the big CMOs mentioned before. With the withdrawal of Anglo-American repertoire, small CMOs experience a drop in rights revenue while their costs have stayed the same, leading them to charge more for (mono-territorial) licenses that cover 'less' repertoire. This might put more pressure on 'non-efficient CMOs'. But CMOs should not be seen as normal undertakings. It would be advisable for the Commission to reconsider its stance and acknowledge CMOs' cultural role.

3. Users

39. The CRM Directive (unwillingly) created a further fragmentation of repertoires and rights.[85] Users effectively 'lost the advantage of the one-stop shop for multi-repertoire licenses and now have to acquire parallel licenses for separate repertoires'[86], and it has not become clearer whom users should approach to obtain a multi-territorial license for certain repertoire(s). The number of parties has increased, thus increasing the burden on the end of the users.

4. Individual consumers

40. At first glance, MTL of online rights in music seems of little importance for consumers. But access to more diverse and qualitative content depends on the underlying deals between

[84] S. F. SCHWEMER, *Licensing and access to content in the European Union: regulation between copyright and competition law*, Cambridge, Cambridge University Press, 2019, 58.
[85] E. AREZZO, "Competition and Intellectual Property Protection in the Market for the Provision of Multi-territorial licensing of Online Rights in Musical Works - Lights and Shadows of the new European Directive 2014/26/EU", *International Review of Intellectual Property and Competition Law* 2015, 549-550.
[86] J. DREXL et al., "Comments of the Max Planck Institute on the Proposal CRM Directive", 2013, 6.

licensors and licensees. A true one-stop shop system would have been advantageous to consumers who can then benefit from a wider range of varied music.[87]

PART II. CONCLUSION

41. MTL for online rights in musical works in the CRM Directive allows the licensing of one or more repertoires across several Member States without having to resort to mono-territorial (blanket) licenses. Hoping to mitigate the disaggregation of repertoire after the Recommendation, the Commission introduced several safeguards. CMOs that are not able to grant MTLs for online rights in music can mandate a CMO that has a 'licensing passport', which implies that the mandated CMO complies with all requirements for MTL and on the condition that said CMO has already granted MTLs for online rights in music works for more than one other rightholder. However, the available information showed that CMOs have not yet mandated other CMOs to represent their repertoire for the purpose of granting MTLs. Therefore, the 'tag-on'-mechanism is not yet used. In addition, there are few examples of withdrawal of rights for MTLs by rightholders in practice.

42. The market for CRM is characterised by natural monopolies in a two-sided market. By introducing competition in only one side of that market, without considering the very specific nature of CRM and the specific role of CMOs as actors in the cultural landscape, the Commission made a crucial mistake. Furthermore, the desired effects did not materialise. This could partially be explained by the Commission's failure to properly asses the differences between Anglo-American CRM and continental CRM, stemming from the old distinction between the copyright school and the *droit d'auteur* school.

43. Notwithstanding the criticism concerning the Directive's conceptual and practical shortcomings, the genie has been let out of the bottle. The disaggregation of repertoires is a fact and CMOs, users and publishers have to adapt to the new situation. Despite the Directive being five years old, it is early to fully assess its impact.

44. Information from Member States, CMOs and other players in the industry is not widely spread. Therefore, it is even harder to make evaluative comments or recommendations. From the information available, the market saw the emergence of specialised entities,

[87] F. GOTZEN, "Les licences multiterritoriales entre le juge et le législateur. Des affaires «CISAC» à la Directive 2014/6", *RIDA* 2014, 116.

granting licenses for a part of the repertoire of major publishers, and also only part of the rights - mostly the mechanical rights. These entities are mostly joint ventures between major publishers and big CMOs, while the others are joint ventures between different CMOs.

45. MTL for online rights in music was a useful innovation but for a number of players: first and foremost, the major publishers and secondly, a number of selected CMOs with whom they created customised licensing entities, used the mechanism to their advantage. It is doubtful whether the users, the online service providers for whom the system was actually introduced, think the current system is better. Instead of acquiring several mono-territorial but multi-repertoire licenses, they now have to deal with an increased number of licensors and fragmentation of rights and repertoires.

46. The Commission will review the CRM Directive in 2021 and will hopefully learn from the profound criticism of many legal scholars, whose suggestions should be considered to achieve a balanced solution in which authors are not forgotten.

PART III. ANNEXES

LIST OF ABBREVIATIONS

CMO(s)	Collective (rights) Management Organisation(s)
CRM	Collective Rights Management
RRA(s)	Reciprocal Representation Agreement(s)
(The) (2005) Recommendation	Commission Recommendation 2005/737/EC of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services
(The) (CRM) Directive	Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market
MTL	Multi-territorial licensing (for online rights in musical works)
MTLs	Multi-territorial licenses (for online rights in musical works)
IME(s)	Independent Management Entity (entities)
DME(s)	Dependent Management Entity (entities)

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