



The Consumer Voice in Europe

COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS AND MULTI- TERRITORIAL LICENSING OF RIGHTS IN MUSICAL WORKS FOR ONLINE

Proposal for a Directive

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Summary

The European Consumer Organisation (BEUC) welcomes the adoption of the long-awaited proposal on collective management of copyright, related rights and the multi-territorial licensing of rights for online musical works.

BEUC has identified a number of areas where further improvements are needed in order to establish a solid framework.

Supervision: the supervision of collecting societies should not be left to internal bodies, but should be entrusted to independent authorities;

Voting rights: the proposal introduces a two-tiered system of members with regards to voting rights which is against the GEMA I decision;

Financial management: the pay-out period should be reduced to three months from the moment the rights revenue was collected, while the 5-year grace period after which undistributed amounts will remain with the collecting society should be deleted and replaced by an obligation to provide the money to a fund managed by independent authorities;

Tariffs: tariffs should not be excessive in relation to the value of the service provided and they should be reasonable in relation to the economic value of the service provided;

Transparency: the same obligations should cover both off- and on-line uses and should not discriminate between users and right holders;

European licensing passport: the model put forward with regards to multi-territorial licensing of online uses is insufficient and will lead to further market consolidation;

Extended collective licensing: a system based on extended collective licensing has the potential to provide an appropriate way to solve the complexity of rights' clearance in mass-use situations to the benefit of right-owners, users and the society at large.

Reporting of online uses: the use of mechanisms to trace and keep record of the online use of music works must comply with data protection and privacy laws;

"Broadcasters exception": the exception for music licensing of audio-visual content should not be limited to broadcasters, but be extended to all audio-visual online service providers.

I. INTRODUCTION

The European Consumer Organisation (BEUC) welcomes the European Commission's proposal for a Directive on collective management of copyright, related rights and the multi-territorial licensing of rights for online musical works.

This long-awaited proposal is an essential component of the EU Digital Agenda¹, the EU IPR Strategy² and the Consumer Strategy³ and is expected to bring benefits to creators, commercial users and consumers. Inefficiencies of the management of collective rights currently deprive creators of the opportunities for further dissemination of their works and additional revenue, while limiting the free movement of goods and services and preventing consumers from enjoying access to wide diversity of content.

However, the proposal is rather weak when it comes to the establishment of effective mechanisms to ensure compliance and enforcement of the principles outlined by the European Commission. The scope of the section dealing with multi-territory licensing of online music only deals with authors' rights, despite the fact that the legitimate supply of online music services presupposes the clearance of both copyright and related ('neighbouring') rights, which are not addressed in the current proposal.

It is also important to recognise that the proposal is only a first step towards reforming copyright law in order to bring it in line with the reality of the 21st century. Further decisive steps must be undertaken, including the revision of the EU Copyright Directive⁴, the establishment of flexible and forward-looking copyright exceptions and limitations, the extension of the 'exhaustion' principle to digital products, the immunisation of copyright law against contractual restrictions, as well as concrete legislative proposals with regards to other types of creative content, namely audio-visual content.

Consumer interest in the proposal

Collective rights management facilitates the mass consumption of copyrighted content and consumer access to content. Mass use of copyrighted works is only cost-effective via collective rights management. Collecting societies are central to the use, performance and retailing of copyrighted works in film, television, education, hospitality and entertainment, as well as online and mobile commerce. Collective rights management enables copyright and related rights owners and users to jointly access lower transaction costs, the result of which increases the range of rights that are traded.

In most cases, consumer access to copyrighted content is not directly provided for by the copyright owner, but by licensees such as leisure and hospitality businesses, radio and TV broadcasters, online retailers and platforms. While the internet has opened up a global market, one which allows the cost effective sale and consumption of copyrighted content across national borders, collecting societies and copyright owners still insist that the exclusive rights conferred by copyright, and related rights, be licensed on a country-by-country basis.

¹ Communication 'A Digital Agenda for Europe' COM(2010) 245 final/2.

² Communication 'A Single Market for Intellectual Property Rights' COM(2011) 287 final.

³ Communication 'A European Consumer Agenda - Boosting confidence and growth' COM(2012) 225 final.

⁴ Directive 2001/29/EC of the European Parliament and of the Council of 22 May, 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

Online content providers must currently obtain a license from every collective rights management organisation in each territory of the EU in which the work is accessible, so as to avoid liability for copyright infringement.

When potential licensees are unreasonably refused a licence, or have unreasonable licence terms or rates imposed on them, it stifles competition and prevents the development of new products and services. Similarly, the high costs associated with obtaining licences, act as a barrier to the development of new digital business models.

There are many right-holders and rights that may be involved in a single transaction. A licence granted by a collective rights management entity for one form of exploitation does not mean that any other form of exploitation is authorised and so a separate licence must be sought from a different collective rights manager, i.e. an author society, a record production society or a performing rights society for any single transaction.

The Commission's proposal would make it easier for service providers to clear rights. This should facilitate the rolling out of new services, in particular in the online world across the single market. European consumers would thus benefit from access to a wider variety of creative content.

The proposal pursues two complementary objectives: to promote greater transparency and improved governance of collecting societies through strengthened reporting obligations and right holders' control over their activities, so as to create incentives for more innovative and better quality services. Building upon this – and more specifically – to encourage and facilitate multi-territorial and multi-repertoire licensing of authors' rights in musical works for online uses.

BEUC wants to see a digital economy characterised by competitive, dynamic and innovative markets in which consumers have meaningful access to a wide range of knowledge, information and cultural products on fair terms. We want to see a copyright culture that supports this by striking a fair balance between the rights of creators, investors and consumers. We want legal offers to flourish and creators to be fairly compensated for the use of their works.

Evidence as to the inefficiencies of collecting societies

BEUC and other stakeholders have long bemoaned the inefficiencies of collecting societies to respond to their mission. The Impact Assessment accompanying the proposal⁵ provides robust evidence that societies have not adapted to the digital environment and have repeatedly abused the lack of supervision of their financial accountability. Underperformance by a collecting society may mean lost licensing opportunities and less creative content being made available to consumers.

Lack of transparency and governance

First, certain rights holders are unable to properly exercise their rights. Despite the Commission's 2005 Recommendation⁶ and the antitrust case law of the European Court of Justice⁷, the principle of rights holder choice of collecting

⁵ 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, SWD(2012) 204 final.

⁶ Commission Recommendation 2005/737 on collective cross-border management of copyright and related rights for legitimate online music services.

⁷ Case 127-73, BRT v SABAM; Case 22/79, Greenwich Film Production v SACEM and Société des éditions Labrador; Case 7/82, GVL v Commission; Case 402/85, Basset v SACEM; Case 395/87,

society is not always available from some collecting societies, or is difficult to exercise⁸. Secondly, of 27 major national author societies, 6 do not make annual reports available online; 8 do not have any financial statements available online and 5 publish only incomplete or simplified financial statements online. In practice, this means that rights holders cannot obtain a verifiable indication of the income that 13 out of 27 collecting societies have distributed in a year.

Poor financial management

Collective societies are entrusted to collect royalties on behalf of their members and distribute them, after deduction of administrative costs. However, the lack of financial accountability and the absence of supervision results in money accumulating in the coffers of collecting societies. Thus, e.g. in 2010 major societies had accumulated €3.6 billion in liabilities to rights holders - for one million authors, that amounts to an average €3,600 each in revenue collected but not distributed.

There is also significant delay in the distribution of royalties: only 27% to 45% of collections are distributed within the same year of collection, while between 5% and 10% of collections are still not distributed to rights holders after three years. This delay is often perceived by authors as the fault of online services: for example Spotify is often accused that it delays payment for up to 3 years to authors for the use of their music. However, the blame lies in the practices of collecting societies. Money which is not distributed is "invested": for example the Italian society SIAE lost in excess of €30 million by way of bad investments.

Inability of collecting societies to deal with the digital, multi-territory environment

France's collecting society took in €9.3 million from online services, but the Commission estimates the potential of the royalty market to have been €80 million – evidence that a lot of services are not being licensed. In Germany, the authors' society collected €11.38 million against €72 million in the addressable royalty market⁹ (table 3).

Ministère public v Jean-Louis Tournier; Joined cases 110/88, 241/88 and 242/88, François Lucazeau and others v SACEM and others; Case C52/07, Kanal 5 Ltd, TV 4 AB v STIM.

⁸ Some music and book publishers claim that they cannot become members of some societies which administer their rights (music publishers in Greece and Poland cannot be members of authors' societies)

⁹ Table 3, Page 24 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, SWD(2012) 204 final.

II. BEUC COMMENTS ON SPECIFIC PROVISIONS

BEUC would like to provide its views on the specific provisions of the draft Directive, focusing on those issues where further improvement is required.

I. General Provisions

Subject matter (Article 1)

The provisions of the proposal dealing with multi-territory licensing only apply to authors' rights in musical works for online use. However, the legitimate supply of online music services presupposes the clearance of both authors' and related rights. To offer such services, commercial users need to deal with three layers of property rights (authors, recording producers, performing artists). By limiting the subject matter, the proposal will not succeed in simplifying the multi-territory and pan-European licensing of music works.

Definitions (Article 3)

"Collecting society"

The definition of "collecting society" in the proposal is drafted around member-owned or member-controlled organisations. A collecting society is defined as any *"organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement, by more than one rights holder, to manage copyright or rights related to copyright as its sole or main purpose and which is owned or controlled by its members"* (Article 3, point a). However, such a definition does not include other societies, such as collecting societies' subsidiaries, such as CELAS¹⁰, and PAECOL¹¹. Maintaining the definition as it currently reads would not lead to the creation of a level playing field between the different organisations who manage rights collectively. It should therefore be modified.

"User"

BEUC is concerned with the definition of "user", which includes the acts of legal and natural persons subject to compensation to right holders. The reference to compensation implies that compensation for private copying is also included in the scope of the proposal. It is unacceptable that private copying compensation has been included in the proposal without proper assessment of the impact of such and before the conclusion of the current mediation process on copyright levies under the responsibility of Mr Antonio Vitorino.

¹⁰ CELAS is jointly owned by PRS for Music in the UK and GEMA in Germany and represents a certain set of EMI Music Publishing's repertoire for online and mobile exploitation in Europe.

¹¹ PAECOL GmbH is a subsidiary enterprise of GEMA, representing the mechanical rights of the Anglo-American repertoire of Sony ATV Music Publishing for online and mobile exploitation in Europe.

II. COLLECTING SOCIETIES

Membership and organisation of collecting societies (Articles 4-9)

The relationship between collecting societies and their members has been the object of extensive scrutiny under the rules of EU competition law. The draft proposal aims to codify previous decisions of the European Commission in this area and to clarify certain aspects. Nevertheless, by limiting the supervision of societies' operation to internal supervisory bodies and by allowing the discriminatory treatment of certain categories of members, the European Commission has opened the door to potential abuses.

Rights of rights holders (Article 5)

According to the proposal rights holders have the right to mandate a collecting society of their choice with the administration of the rights of their choice in the Member State of their choice. This provision is in line with the case law of the European Court of Justice which ruled against the compulsory assignment of all rights or the assignment of unduly broad categories of rights, and reflects the Commission's intention to ensure collecting societies compete with each other in order to attract members. It goes without saying that the collecting society shall have the obligation to contract with the interested right holder on non-discriminatory grounds.

However, BEUC is concerned with the provision on termination of the authorisation to manage, which leads to an unnecessarily long commitment and waiting period for the right holder. We would therefore suggest that the right to termination be exercised every yearly quarter, instead of every six months as per Article 5.3.

General meeting (Article 7)

The proposal entrusts the general meeting of the societies' members with key responsibilities, including amending the statutes and membership terms, the appointment and dismissal of directors, as well as the policy regarding the distribution of royalties to rights holders. These provisions are welcome. BEUC strongly believes that such important decisions should be taken by the general meeting of the members. We would therefore oppose a number of derogations introduced for issues where the decision is taken by the internal supervisory body, including for issues related to the policy surrounding the distribution of royalties.

Lastly, BEUC suggests introducing more detailed provisions for the auditing of collecting societies. The proposal only refers to the possibility for the general meeting to decide on the appointment and removal of the auditor (Article 7.6), without further explanation as regards the circumstances that might require an external auditing. We consider it important to specify that external auditing may be decided by the general meeting in case of a reasonable doubt about the financial management of the collecting society. The result of the auditing shall be communicated to the supervisory authority.

Supervisory function (Article 8)

The draft proposal entrusts the supervision of collecting societies' compliance with their obligations to an internal body to be established by the societies themselves. This body will be entrusted with "at least" the powers to approve any acquisition of immovable property by the collecting society, approve the

setting-up of subsidiaries, acquisitions of other entities and approve the taking-out of loans, granting of loans and provision of security or guarantee for loans.

BEUC is strongly opposed to such internal functioning as the sole supervisory body, which removes any incentive for societies to comply with their obligations and fails to provide for effective monitoring and robust sanctions.

BEUC is also concerned with the absence of any safeguards with regards to the composition of the internal supervisory function. The only provision on this states that there shall be fair and balanced representation of the members of the collecting society in the body exercising this function in order to ensure their effective participation.

BEUC believes specific provisions should be introduced with regards to the criteria to be met by the members of the supervisory function, including possible conflicts of interest, the conditions for dismissal, their qualifications and duration of their term.

BEUC is also strongly opposed to the exception from the obligation to establish an internal supervisory function, provided for in Article 8.3 for certain collecting societies depending on their financial turnover or number of employees. Introducing thresholds opens the possibility for regulatory arbitrage and results in a two-tiered system of societies.

However, a system of strict supervision by independent authorities needs to be in place. The proposal does not foresee this possibility, but leaves it to Member States to decide the type of competent authority to be entrusted with specific tasks.

Obligations for societies' directors (Article 9)

BEUC welcomes the obligation for people managing the business of collecting societies and their directors to have no conflict of interest and to submit statements outlining their sources of remuneration and potential conflicts of interest. However, such statements should also be made available to the members of the collecting society and therefore the approval of the statement should be among the tasks of the members' General Meeting (Article 7). For reasons of transparency, the statement should also be submitted for auditing and approval to the independent regulatory authorities.

Management of rights revenue (Articles 10-12)

BEUC particularly welcomes the provisions that require the collecting society not to use rights revenue for its own account. As clearly demonstrated by the Commission's own Impact Assessment, there have been numerous instances of abusive financial management. It has been argued that the investment policies of collecting societies generate additional income¹²; nevertheless, this additional income comes at the expense of the royalties collected on behalf of creators, but not distributed to them and therefore cannot be accepted.

BEUC is concerned that the provisions on financial management only prescribe a general duty of diligence in the collection and management of rights revenue. However, the proposal allows collecting societies to use rights revenues for their own account if done in the best interests of their members (Article 10.4). In light of the absence of effective supervision of the societies' activities, such a provision opens the door to abuses.

¹² Position Paper by the Dutch Authors' Society Buma-Stemra on the Commission's proposal 1 October 2012.

We have also serious reservations with regards the timeline for the distribution of the amounts due to rights holders in Article 12. First of all, the pay-out period of 12 months from the end of the financial year in which the rights revenue was collected is disproportionately long. Taking into account that royalties represent the lifetime income of authors and that collecting societies are only trustees, we support a radical reduction of the payback period to three months.

The same concerns also apply to the 5-year grace period after which undistributed amounts will remain with the collecting society; such a period is unjustified and removes any incentive to identify the rights holder (Article 12.2).

Relation with users - Licensing (Article 15)

BEUC welcomes the provisions which require licensing negotiations to be conducted in good faith, including the provision of information on the society's services. It must however be clarified that such information must be provided *ex ante* in order to provide commercial users with predictability of licensing costs. The information should clearly distinguish between usage and administrative costs.

We would also suggest that when it comes to the criteria for the definition of the tariffs, Article 15.2 should be modified in order to reflect the case law of the European Court of Justice¹³, according to which prices should not be "excessive in relation to the value of the service provided" and that they should be "reasonable in relation to the economic value of the service provided".

Transparency and reporting (Articles 16-20)

BEUC welcomes the detailed provisions on transparency obligations. Increased transparency and regular reporting should be minimum obligations of societies in their role as trustees of their members' rights.

Nevertheless, BEUC regrets that the draft Directive discriminates between users and right holders, as well as between online and offline uses. First of all, while the information provided to rights holders (Article 16) and to other collecting societies (Article 17) is provided "at least once a year", information provided to users (Article 18) is only provided "on request". The information should be provided in all cases at least once a year and on request.

Similarly, there is much less information provided to users. For example, information about the deductions made for management fees in the period concerned and the deductions made for any purpose other than management fees, including those that may be required by national law for the provision of any social, cultural or educational services in the period concerned should only be provided to rights holders.

Furthermore, Article 16 on the information to be provided to right holders includes less information than the one established by Article 26.2 which applies to multi-territory licensing Article 26.2 requires collecting societies to provide information about the period and the territory in which music works is used online, as well a breakout of the amounts collected for each works, the deduction made and the amount actually distributed for such works. The draft Directive fails to extend these requirements to any other forms of exploitation of music works, including for live music, clubs/DJs, bars, events, etc.¹⁴

¹³ ECJ Canal 5 & Canal 5 vs. STIM vs. STIM case (C-52/07).

¹⁴ Updated analysis by Younison of the EU Directive proposal on collective management of copyright.

BEUC would also propose an obligation for the information to be provided in an easily accessible and intelligible format, using clear and plain language, especially with regards to the information provided to the societies' members and the users.

Lastly, the publication of an annual transparency report is a key component of accountability and should apply to all societies without exceptions. We therefore suggest that Article 20.5 is deleted.

III. Multi-territorial licensing of online rights in musical works by collecting societies

BEUC welcomes the willingness of the European Commission to address the challenges of multi-territory licensing of online rights in musical works. Currently, commercial users who want to provide online content services across the EU, have to seek a license in each of the 27 Member States. Such market fragmentation is contrary to the very notion of the internet as a borderless environment and goes against the objective of the European Commission to establish a Digital Single Market.

There is a clear consumer demand for diverse online content; however, consumers are unable to benefit from the establishment of a truly competitive Internal Market and access diversified online content.

The Impact Assessment of the European Commission has provided a clear picture of the poor legal offers provided to consumers. In some Member States, the vast majority of mainstream services are available while other Member States (e.g. in Eastern Europe) are served by only a few major providers. However, only one mainstream music service is available in 27 EU countries.

An empirical report conducted for the European Commission has estimated the EU consumer detriment amounts to €64 billion¹⁵ due to the most prominent problems consumers face with digital content:

With regards to the online dissemination of music, the main barriers relate to the multiple layers of ownership¹⁶, the division of rights between the mechanical reproduction rights and performing rights, both of which need to be cleared separately, as well as the complex and territory-based management of collecting societies.

The draft proposal will only deal with the management capabilities of collecting societies who wish to engage in multi-territory licensing. However, it will fail to address the remaining obstacles and therefore it is highly unlikely that it will help boost the development of cross-border music services.

European Licensing Passport system is insufficient

The European Commission has favoured the system of the European Licensing Passport, according to which the collecting societies who wish to license on a multi-territorial basis will have to comply with a set of conditions, including

¹⁵ Europe Economics (2011), 'Digital content services for consumers: Assessment of problems experienced by consumers' available at: http://ec.europa.eu/justice/newsroom/consumer-marketing/events/digital_conf_en.htm.

¹⁶ For example, authors and composers own the rights in their composition or the song, sound recording producers and performers own the "neighbouring rights" attached to a sound recording.

enhanced transparency standards towards rights holders and users, data handling and invoicing capabilities and the use of dispute resolution mechanisms.

There are 2 alternatives for a collecting society not wishing to engage directly in multi-territory licensing: the first is to outsource these services and the second is to conclude a representation agreement with another society mandating it to conclude multi-territory licensing (MTL) agreements for the first's repertoire on a non-exclusive basis and on non-discriminatory management terms. If the requested collecting society is already engaged in comparable multi-territory licensing agreements it will have an obligation to conclude such an agreement. A requested society in this position would thus be a "passport entity" to which other non-MTL Collective Management organisations (CMOs) would have a "right to tag on repertoire".

Collecting societies will be incentivised to participate by the requirement that, if a society does not offer multi-territorial licences for online rights either itself or through another society within one year after the transposition of the Directive, Member States have to permit rights holders to grant multi-territorial licences themselves or through another collecting society (Article 30).

The likely effect of these provisions is market consolidation, as the larger collecting societies (some of which already offer multi-territory licences in respect of some repertoires) take on more rights on behalf of the smaller societies which do not have such capabilities.

We do recognise that stricter governance and transparency rules of collecting societies are the first conditions for societies to be able to engage in multi-territory licensing. However, the Commission's proposal remains silent with regards to specific licensing mechanisms, the impact of which has not been thoroughly assessed. On the contrary, the Commission has favoured a solution which is based on voluntary measures by collecting societies.

Extended collective licensing

BEUC considers the promotion of extended collective licensing as a complementary mechanism to the conditions set in Articles 21-33 to be the most effective solution. A system based on extended collective licensing has the potential to provide an appropriate way to solve the complexity of rights' clearance in mass-use situations to the benefit of right-owners, users and the society at large.

This system removes the burden from commercial users to engage in costly research efforts in order to identify the right owner and conduct lengthy licensing negotiations. It also provides users with the certainty that they can offer content services without the risk of litigation for copyright infringement. An additional advantage of this system is that it puts those right holders that are not members of the collecting society granting the license on the same footing as the members in terms of distribution of remuneration collected¹⁷.

The extended collective licensing scheme would establish the presumption that each collecting society has the authority to grant "blanket" licences for online uses covering the entire repertoire ("extension effect of the licence") provided that the society is "representative". Individual rights holders and publishers could still exercise their exclusive rights individually or through another licensing

¹⁷ 'Creativity comes at a price, the role of collecting societies', published by the European Audiovisual Observatory.

entity but first they would have to actively "opt out" of the extension effect, by notifying each society thereof.

This would be combined with the establishment of a 'country of origin' principle applicable to the rights required for online exploitation of musical works so that a single licence with a society would suffice to cover the EU territory. An online service considered to be 'originating' from one Member State would only need to clear the rights for the territory of that Member State, instead of doing so in 27 Member States¹⁸.

This system would establish a real one-stop-shop for commercial users thus accelerating the conclusion of licensing negotiations and reducing the transactional costs. Commercial users need a flexible licensing scheme which fosters the development of innovative business models, which would be tested and then endorsed or rejected by consumers. Unless such a scheme is introduced, users will be unlikely to invest in terms of efforts and time to seek multi-territory licenses.

BEUC regrets that the European Commission has flatly rejected this option without in-depth analysis.

Multi-territorial licensing of online rights in musical works by collecting societies (Articles 21 - 33)

BEUC would like to raise a number of concerns with regards to the second part of the proposal with deals with the multi-territorial licensing of online rights.

In order for online music service providers to make an informed choice, collecting societies should be obliged to present the information with regards to the repertoire and the rights they represent in a widely used and comparable format (Article 23).

BEUC also regrets that the European Commission has only granted the right to object to content of multi-territorial repertoire information to rights holders (Article 24). The same right should be extended to online music service providers.

The introduction of specific obligations on invoicing and reporting are positive steps. However, we are seriously concerned with the provision allowing the establishment of monitoring mechanisms of the online use of works in Article 25 without any safeguards in terms of end-user fundamental rights to protection of personal data and privacy and the fundamental freedom of confidentiality of communications. The use of mechanisms to trace and keep record of the online use of music works inevitably raises data protection and privacy concerns – ones which the European Commission's proposal fails to address.

BEUC regrets the establishment of a dual system when it comes to payment of royalties to rights holders: Article 26 requires payment of royalties collected for the online use without delay, while Article 12 which deals with all uses, introduces a long and non-justified payment period that can go as far as twelve months from the end of the financial year in which the rights revenue was collected. We would suggest that the two provisions are aligned and that payment of royalties should be done without undue delay and no later than three months from the time when royalties are collected.

¹⁸ Commission Staff Working document, Impact Assessment accompanying the document Proposal for a Directive on collective management of copyright and related rights and multi-territory licensing of rights in musical works for online uses in the internal market.

As already explained, BEUC suggests that the more specific information requirements of Article 26.2 should be extended to all uses of works and should become the default rule for all collecting societies. Societies should be obliged to also provide information about the period in which works are used, as well as a breakout of the amounts collected for each works, the deduction made and the amount actually distributed for such works.

In order to achieve the degree of flexibility required to encourage the granting of licences to innovative online services, collecting societies should be allowed to grant such licences for a period of three years without being required to use them as a precedent for the purposes of determining the terms of other licences ([Article 32](#)). This provision would mean that whatever terms are agreed in this context, they cannot be considered for the purposes of the objective criteria – such as the economic trade value – to be taken into account when establishing tariffs for licensing of exclusive rights. BEUC supports this article, but we are concerned that the three year threshold has been defined in an arbitrary manner.

The Commission has introduced an exception for broadcasters for music licensing of audio-visual content ([Article 33](#)). Although the complexity of musical rights in audio-visual content justifies the exception, this should not be limited to broadcasters but be extended to all audio-visual online service providers.

IV. Enforcement measures

BEUC is concerned that the draft Directive relies on voluntary measures to be adopted by collecting societies, without establishing a system for effective monitoring of compliance, independent supervision and robust sanctions for failure to comply with the obligations set in the proposal.

Article 37 only foresees that Member States shall ensure procedures are established for users and interested parties to submit complaints to the competent authorities with regard to the activities of collecting societies which are covered by this Directive and that these authorities should be “competent” and “empowered to ensure compliance with the provisions of national law adopted pursuant to the requirements laid down in this Directive”.

BEUC strongly believes that the Directive should go a step further and impose an obligation on Member States to ensure the independent supervision of collecting societies.

BEUC calls for a system of prior authorisation and permanent supervision of collecting societies. Such a system is in place in Germany, according to which anybody wishing to undertake collective rights management must seek prior permission. Once authorisation is granted the collecting society remains under permanent supervision, so as to ensure that it does not abuse its powers in relation to members or users¹⁹.

A similar system has been established in Canada, which consists of a specialised authority for the supervision of all dealings between collecting societies, users and of a well-resourced Copyright Tribunal. According to the General Counsel for

¹⁹ Lucie Guibault and Stef van Gompel, *Collective Management in the European Union*, in Daniel Gervais ed., *Collective Management of Copyright and Related Rights*, Kluwer Law International, 2006.

the Copyright Board for Canada, this approach has facilitated the expansion of collective rights management in Canada and helped it gain legitimacy²⁰.

BEUC is also concerned that the provision on administrative sanctions (Article 38) is extremely vague. Without robust sanctions and effective enforcement, it will be extremely difficult to ensure compliance by collecting societies, which are in most cases extremely powerful monopolies.

Lastly, the proposal will not solve the problem of jurisdiction in disputes over multi-territorial licensing. Multi-territory licensing requires the establishment of specific jurisdiction adapted to cross-border disputes.

END

²⁰ Consumer Focus, 'Competition, copyright and collective rights management, a consultation on growth and innovation in the creative and digital technology industries'.