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

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Important dates regarding the Directive 2014/26/EU on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Use in the Internal Market in chronological order:

- **2012, July 11** – Proposal adopted by the Commission;[1]
- **2012, December 12** – Common position adopted by the Council;[2]
- **2014, February 04 –** Approval by the European Parliament;[3]
- **2014, February 26** – Signed by the European Parliament and the Council;

* All links correct as at 24 March 2016.

1 2012/0180 (COD).

2 COM/2012/372.

3 TA/2014/56/P7.

- **2014, March 20** – Publication in the Official Journal;[4]
- **2016, April 10** – Directive should be implemented by the Member States.

10.1 INTRODUCTION

10.01 'The EU suffers from a lack of innovative and dynamic structures for the cross-border collective management of legitimate online music services. This affects the provision of legitimate online music services.'[5]

10.02 The recognition of this issue, from the point of view of a complex collective management system underpinning an out-dated collective licensing structure[6] appeared to be one of the main aims behind the coming into being of Directive 2014/26 EU on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Use in the Internal Market (hereinafter CRM Directive). Recognising and responding to the above issue, which was initially identified by the European Commission in 2005,[7] the CRM Directive was formulated as part of a broader framework of initiatives of the European Commission including the need to facilitate the emergence of a European single market for the exploitation of musical works in digital format.[8] The main policy argument underpinning the CRM Directive was the European Commission's Digital Agenda for Europe and the Europe 2020 Strategy for smart, sustainable and inclusive growth.[9] As such, one of the key aims of the CRM Directive is to ensure the introduction of a better and more effective streamlined process of licensing, through an improved collective management structure in relation to the online use of musical works.[10]

4 OJ L 84/72, 20.3.2014.

5 European Commission, Study on a Community Initiative on the Cross-Border Collective Management of Copyright (7 July 2005), available at: http://ec.europa.eu/internal_market/copyright/docs/management/study-collectivemgmt_en.pdf p. 6. According to the Study, an online music service includes any music service provided on the Internet such as simulcasting, webcasting, streaming, downloading, online 'on-demand' service or provided to mobile telephones.

6 C.B. Graber, 'Collective Rights Management, Competition Policy and Cultural Diversity: EU Lawmaking at a Crossroads' (2012) 4(1) *The WIPO Journal*, pp. 35–43.

7 European Commission, n. 5.

8 Ibid.

9 European Commission, Study on A Strategy for Smart, Sustainable and Inclusive Growth: Europe 2020 (3 March 2010) at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF.

10 Ibid. The Commission proposed five measurable EU targets for 2020 that will steer the process and be translated into national targets: for employment, for research and innovation, for climate change and energy, for education and for combating poverty.

10.03 These initiatives originally set out by the European Commission in 2005[11] laid the foundation for the CRM Directive, which ultimately came into force almost a decade later, in 2014. The Directive consisting of 58 recitals and 45 Articles was published on 20 March 2014 and came into force on 9 April 2014. Its main features include the comprehensive coverage of the regulation of Collective Management Organisations (CMOs) followed by a shorter section on multi-territorial licensing for online musical works.[12] Over and above the initiative to improve the governance and transparency of CMOs, among others, the CRM Directive was compelled to complement Directive 2006/123/EC of 12 December 2006 on services in the internal market,[13] which aims to create a legal framework to ensure the freedom of establishment and the free movement of services between Member States.[14] This also explains why the CRM Directive places such extensive obligations on CMOs. While this may certainly be a valid reason for the extensive obligations on CMOs, its level of accountability and transparency have been brought into question in recent times, with calls for improvements to its structure.[15]

10.04 Therefore, the twin aims of dealing with the modernisation of copyright collective management on the one hand and multi-territorial licensing of musical works in the digital era on the other, in the same Directive, appeared logical. After all, the historical reasons for the creation of collecting societies stemmed from the music industry.[16] For example, during the fifteenth, sixteenth and seventeenth centuries, composers attempted to reach out to the public with their compositions, rather than attempting to protect their music. However, as technology advanced, composers found that they had to protect their work as well as reaching out to the public, and 'use-for-all' became 'protection-from-all'.[17]

10.05 While the historical reasons for merging collective licensing with music are clearly compelling, this chapter begins by charting the development from

11 European Commission, n. 5.

12 *See* section 10.3, 'A new model for CMOs and the introduction of multi-territorial licensing – an overview', below.

13 Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ L 376, 27.12.2006).

14 *See,* European Commission, 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 Use in the Internal Market (11 July 2012) (COM 2012, 372), pp. 4–5.

15 *See,* M. Ficsor, *Collective Management of Copyright and Related Rights* (Geneva: World Intellectual Property Organisation; 2002); Ch. 2; D. Mendis, *Universities and Copyright Collecting Societies* (Hague: T.M.C. Asser Press; 2009), Ch. 5.

16 Mendis, ibid., pp. 3–4.

17 George Dyson, *The Progress of Music* (London, New York, Toronto: Oxford University Press; 1938).

2005[18] in an attempt to provide an understanding and analysis of the CRM Directive and how it came about. The chapter begins with a short discussion on why the Directive was needed and in providing an insight into the reasoning, highlights problems with the traditional collective licensing model as identified by the European Commission Study in 2005. The chapter will then move on to a discussion of the CRM Directive itself, its provisions and its coverage of the twin aims before embarking on an analysis of the Directive in considering its implications for both CMOs and rights holders.

10.06 It should be noted that the UK is in the process of implementing the CRM Directive. In February 2015, a Consultation on the Implementation of the Collective Rights Management Directive was published[19] and following 27 individual responses, the Government published its response.[20] In October 2015, the Government carried out a technical review[21] and published 17 individual responses including its own response on 3 March 2016.[22] In the meantime, the UK Intellectual Property Office published Guidance on the UK Regulations implementing the Collective Rights Management (CRM) Directive in February 2016[23] The Directive was implemented in the UK in the form of the Collective Management of Copyright (EU Directive) Regulations 2016 on 10 April 2016.[24]

18 European Commission, n. 5.

19 The Consultation, published on 4 February 2015, closed on 30 March 2015. *See,* https://www.gov.uk/government/consultations/implementation-of-the-collective-rights-management-directive.

20 Intellectual Property Office, *Collective Rights Management in the Digital Single Market* (Government Response) (London: Intellectual Property Office; July 2015) at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/446772/response-crm-directive.pdf.

21 The Technical Review, published on 14 October 2015, closed on 10 November 2015. *See,* https://www.gov.uk/government/consultations/collective-rights-management-directive-technical-review.

22 Intellectual Property Office, *Collective Rights Management in the Digital Single Market* (Technical Review of Draft Regulations-Response) (London: Intellectual Property Office; March 2016) at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/467778/Collective_rights_management.pdf. For an excellent discussion of the UK implementation of the CRM Directive, *see,* A. Ross, 'The New Regulatory Regime for Collective Rights Management – the Government Consults on How to Implement' (2015) 26(4) *Entertainment Law Review*, pp. 130–33; A. Ross, M. Curran-Whitburn, 'EU Directive on the Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Use in the Internal Market: The UK Consultation and Government Response' (2016) 27(2) *Entertainment Law Review*, pp. 51–6.

23 Intellectual Property Office, Guidance on the UK regulations implementing the Collective Rights Management (CRM) Directive (London: Intellectual Property Office; February 2016) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/503421/Guidance_on_CRM_Directive_implementing_regulations.pdf

24 Collective Management of Copyright (EU Directive) Regulations 2016 is divided into four parts and can be accessed through http://www.legislation.gov.uk/uksi/2016/221/contents/made.

10.07 While this is a significant development in UK law, it is not the aim of this chapter to consider and analyse the UK implementation of the CRM Directive. Rather the aim, as set out above, is to explore and discuss the coming into being of the Directive itself, its provisions, impact and implications for CMOs, rights holders and users in relation to the management and licensing of musical works for online use.

10.2 WHY WAS THE DIRECTIVE NEEDED? PROBLEMS WITH THE TRADITIONAL COLLECTIVE LICENSING MODEL

10.08 In order to understand the CRM Directive and the need for its implementation, it is equally important to recognise how the structure of collective management of copyright works across national borders, which existed prior to the CRM Directive.

10.09 Quite simply, the practice of CMOs involves facilitating and establishing a unified method for collecting and distributing royalties while negotiating licensing arrangements for works. However, distributing royalty payments and licensing are not the only objectives of CMOs. Over the years, CMOs have evolved to oversee copyright compliance, fight piracy and perform various social and cultural functions.[25] Another interesting feature of CMOs is that they value all works in their repertory on 'the same economic footing, which may be unfair to those who create works that may have a higher value in the eyes of users'.[26] In response to this feature, the more popular rights holders have been allowed to use the power of 'collective bargaining' in order to obtain more for the use of their work and negotiate on a less unbalanced basis with large multinational user groups.[27]

10.10 The present author will return to these characteristics in the discussion of the Pan-European Passport and individual collective management, below.

25 *See,* Ficsor, n. 15, Ch. 2; M. Kretschmer, 'Copyright Societies Do Not Administer Individual Property Rights: The Incoherence of Institutional Traditions in Germany and UK' in R. Towse, *Copyright in the Cultural Industries* (Cheltenham UK, Massachusetts USA; Edward Elgar Publishing: 2002) pp. 140–64; D. Gervais, 'Collective Management of Copyright: Theory and Practice in the Digital Age' in D. Gervais (ed.) *Collective Management of Copyright and Related Rights* 2nd ed., (Netherlands: Kluwer Law International; 2010), Ch. 1.

26 Gervais, ibid., p. 5.

27 Ibid.

10.11 Furthermore, experts in the field such as Daniel Gervais have highlighted the antiquated structure of CMOs and the need for them to evolve in the digital age.

10.12 Although CMOs were initially promoted as an efficient way to collect and disburse monies to compensate right holders for copyright works, increasingly the structure of CMOs, at both national and international level, has raised questions about their efficiency. In addition to those significant structural issues, the market conditions and business trends of copyright owners are changing, and CMOs must adapt.[28] Although this does not necessarily diminish the role of CMOs, it highlights the need to reform the existing CMO structure to justify their continued existence on one level and to alleviate the problems stemming from the fragmentation of both copyright rights proper and rights clearance. This is not to say that the role and justification of CMOs is vanishing. It is that they are changing.[29]

10.13 Reviewing the traditional structure of CMOs and understanding their benefits as well as their shortcomings, the 2005 European Commission Study established that the core service elements of 'cross-border grant of licences to commercial users' and 'cross-border distribution of royalties' do not function in an optimal manner and ultimately hampers the development of an innovative market for the provision of online music services.[30]

10.14 As such, the Commission identified that the main issue lay in the fact that border management of rights, including the practice of so-called 'blanket licences', traditionally granted by national collecting societies, appeared outdated in a technological era where digital rights management tools provide for a more accurate mechanism for the distribution of royalties.[31]

10.15 Recital 5 of the CRM Directive expressly states that problems with the functioning of CMOs lead to 'inefficiencies in the exploitation of copyright and related rights across the internal market, to the detriment of the members

28 Ibid.

29 Ibid., p. 27.

30 European Commission, n. 5, p. 9.

31 *See* European Commission, Impact Assessment, 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 Use in the Internal Market (11 July 2012), section 3.2.3, p. 27. *See also*, E. Steyn, 'Collective Rights Management: Multi-Territorial Licensing and Self-Regulation' (2014) 25(4) *Entertainment Law Review*, pp. 143–4; 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' (2015) 46(5) *International Review of Intellectual Property and Competition Law* pp. 534–64, p. 537.

of collective management organisations, rights holders and users'.[32] Similarly, Recital 38 explains that 'the complexity and difficulty associated with the collective management of rights in Europe has … exacerbated the fragmentation of the European digital market for online music service'; a situation which is 'in stark contrast to the rapidly growing demand on the part of consumers for access to digital content and associated innovative services, including across national borders'.[33]

10.16 As such, the traditional model was seen to be a barrier to the development of the single digital market, which in practice, is translated in the following manner. Under the traditional model, providers of new online music services are compelled to buy packages of multi-repertoire licences *en bloc*, even though they may not be interested in distributing all the works in that repertoire and then negotiate a large number of licences with different national collecting societies to obtain the permission needed to provide the desired service for all the works in that repertoire.[34]

10.17 In recognising this gap, CMOs were urged to modernise their operations to meet the challenges of a fast-evolving digital economy. An underlying problem was the manner in which insufficient transparency and control of the way collecting societies were managed.[35] In this context, the Commission noted that the functioning of some collecting societies had raised concerns in relation to their transparency, governance and the handling of revenues collected on behalf of right holders.[36] Furthermore, cases of risky investment of royalties by certain collecting societies that should have gone to rights holders highlighted the lack of oversight and influence of rights holders on the activities of a number of collecting societies, contributing to irregularities in their financial management and investment decisions.[37]

10.18 For these reasons, it was seen as a necessity for CMOs to provide a more efficient service to rights holders and users (service providers) alike including better collection and redistribution of revenue, accurate invoicing and granting of multi-territorial licences for aggregated repertoire.[38]

32 CRM Directive, Recital 5.
33 For a discussion of the CRM Directive and path to its implementation, *see*, Arezzo, n. 31.
34 Arezzo, ibid., p. 537.
35 *See,* European Commission, n. 14, p. 2.
36 Ibid., pp. 2–3.
37 Ibid.
38 Ibid., p. 2.

10.19 The Commission's intervention brought to the forefront the anticompetitive nature of the CMO clauses leading to the existence and preserving of territorial barriers within the EU market. This in turn highlighted the existence of national monopolies, which appeared no longer justifiable in light of the cross-border circulation of works in digital format and new technologies permitting a remote monitoring of the actual use of such works.[39]

10.20 It is under these circumstances and for these reasons that the CRM Directive came into being. The next part of this chapter will consider the Directive which came into being from the Commission's Study, impact assessments etc., and will also explore whether the CRM Directive, in its current format achieved the various aims as proposed by the European Commission.

10.3 A NEW MODEL FOR CMOS AND THE INTRODUCTION OF MULTI-TERRITORIAL LICENSING – AN OVERVIEW

10.21 Nine years after the Commission's initial recommendations, the CRM Directive consisting of 58 recitals and 45 Articles was published on 24 March 2014 and came into force on 9 April 2014.[40] It 'introduces a completely new set of provisions that are not directly related to the subject of cross-border management of online rights in musical works'.[41]

10.22 This is because the CRM Directive consists of two parts that can be viewed as being independent of each other. Part I, including Titles I, II, IV and V introduces a comprehensive set of regulations relating to the governance of collecting societies.[42] This Part of the Directive also establishes well-defined rules with regard to information duties and transparency obligations,[43] as recommended by the Commission in 2005.[44] For example, the Directive sets out the standards that CMOs must meet to ensure that they act in the best interests of the rights holders they represent as well as providing protection for rights holders, including those who are not members of CMOs.[45] In meeting these objectives, the Directive sets out a number of Articles, detailing specific

39 Graber, n. 6, p. 35; Arezzo, n. 31, p. 536.
40 The text of the Directive can be accessed here: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0026&from=EN.
41 Arezzo, n. 31, p. 539.
42 CRM Directive, arts 1–25; 33–43.
43 For a discussion and overview of the Directive, *see,* Ross, n. 22.
44 European Commission, n. 5.
45 CRM Directive, arts 1–10.

requirements regarding collection, deduction and distribution of rights revenue;[46] measures relating to transparency and reporting[47] and procedures in relation to dispute resolution and complaints.[48]

10.23 The Directive is therefore comprehensive in its coverage of regulations for CMOs and as Arezzo stipulates, ensures that the provisions are horizontally applicable to all kinds of collective management societies regardless of the nature of the associates and of the kind of rights mandated.[49]

10.24 Part II, Title III of the CRM Directive – a much shorter section – moves on from the regulation of collecting societies and their governance and need for transparency to the regulation of multi-territorial licensing of online rights in musical works. The complex issue of multi-territorial licensing is covered in about ten articles.[50] However, it does deal with important issues such as: 'Agreements between collective management organisations';[51] 'Obligation to represent another collective management organisation for multi-territorial licensing':[52] 'Access to multi-territorial licensing';[53] 'Derogation for online music rights required for radio and television programmes';[54] and 'Co-operation for the development of multi-territorial licensing'.[55]

10.25 The main difference with Parts I and II is that, while Part I applies to all kinds of collective management societies regardless of the nature of the associates and of the kind of rights mandated, Part II is only applicable to the collecting societies that will manage the online rights in musical works.[56] Also, it is in the context of musical works that multi-territorial licensing is set out. Articles 23–32 focus on how CMOs should adapt to multi-territorial licensing to allow for the management of online rights in musical works while giving rights holders the option to remain with the existing CMO, choose another CMO of their choice (through a European licensing passport model) or manage their rights individually, as discussed below.[57]

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46 Ibid., arts 11–32.
47 Ibid., arts 18–22.
48 Ibid., arts 33–43.
49 Arezzo, n. 31, p. 539.
50 CRM Directive, Title III, arts 23–32; and Title IV, art. 38.
51 Ibid., art. 29.
52 Ibid., art. 30.
53 Ibid., art. 31.
54 Ibid., art. 32.
55 Ibid., art. 38.
56 *See,* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0026&from=EN Title III 'Multi-Territorial Licensing of Online Rights in Musical Works by Collective Management Organisations', arts 23–32.
57 *See* in particular, CRM Directive, arts 29–31. Article 5 is also relevant in this context.

10.26 A reading of the CRM Directive, therefore, demonstrates the distinctive separation between CMOs and multi-territorial licensing and the dominance of the Articles pertaining to the regulation of CMOs, which has led to the opinion that the Directive 'could have formed two distinct legislative documents'.[58] However, it is the shorter and second part of the Directive dealing with multi-territorial licensing, which has raised a number of questions.

10.27 Before moving on to an analysis of the Directive, particularly in relation to some of the multi-territorial licensing provisions, a full summary of the articles of the CRM Directive, has been set out in Table 10.1, for ease of reference.

Table 10.1 Table of Articles (CRM Directive)

Article	Title	Summary
1.	Subject matter	Proper functioning and requirements for multi-territorial licensing by collective management organisations of authors' rights in musical works for online use.
2.	Scope	Directive applies to CMOs and independent management entities.
3.	Definitions	Defines 'collective management organisation', 'Independent management entity', 'rights holder' and 'user'.
4.	General principles	Ensures that CMOs act in the best interests of the rights holders whose rights they represent and that they do not impose on them any obligations which are not objectively necessary for the protection of their rights.
5.	Rights of rights holders:	1. paras 2 and 8 apply 2. Can choose CMO irrespective of nationality 3. Grant licences for non- commercial use 4. Can terminate the management 5. Receive royalties owed before termination 6. CMO cannot restrict the exercise of 4 and 5 7. Give consent specifically for each right or category of rights or type of works and other subject matter, which the rights holder authorises the CMO to manage. Any such consent shall be evidenced in documentary form 8. CMO must inform rights holder of their rights.
6.	Membership rules	
7.	Rights of rights holders who are not members	Article 6(4), Article 20, Article 29(2) and Article 33 apply in respect of rights holders who have a direct legal relationship by law or by way of assignment, licence or any other contractual arrangement with them but are not their members.

58 Arezzo, n. 31, p. 539.

Table 10.1 (continued)

Article	Title	Summary
8.	General assembly of members of the CMO	Organising General Assembly.
9.	Supervisory function	CMO must monitor the activities and the performance of the duties of the persons who manage the business of the organisation.
10.	Obligations of the persons who manage the business of the CMO	Requirement to manage business of the CMO in a sound, prudent and appropriate manner, using sound administrative and accounting procedures and internal control mechanisms.
11.	Collection and use of rights revenue	CMOs shall be diligent, keep separate accounts, not use rights revenue for any other purpose than distribution to rights holders.
12.	Deductions	Provide rights holder with management fees.
13.	Distribution of amounts due to rights holders	CMO should regularly, diligently and accurately distribute and pay amounts due to rights holders.
14.	Rights managed under representation agreements	CMO should not discriminate against any rights holder.
15.	Deductions and payments in representation agreements	CMO should not make deductions, other than in respect of management fees.
16.	Licensing	CMOs should conduct negotiations for the licensing of rights in good faith. Licensing terms shall be based on objective and non-discriminatory criteria. Rights holders shall receive appropriate remuneration for the use of their rights, reply without undue delay to requests from users.
17.	Users' obligations	Provide relevant information on the use of the rights.
18.	Information provided to rights holders on the management of their rights	CMO must make available annually to all rights holders: 1. Contact details of rights holder; 2. Revenue attributed to rights holder; 3. Amounts paid; 4. When the use of the work took place; 5. Deductions in management fees; 6. Any other deductions; and 7. Any outstanding revenues due.
19.	Information provided to other CMO on the management of rights under representation agreements	CMO must make available annually to other CMOs: 1. Rights revenue attributed, the amounts paid; 2. Deductions in management fees; 3. Other deductions; and 4. Resolutions adopted by the general assembly of members.

Article	Title	Summary
20.	Information provided to rights holders, other CMO and users on request	On request CMOs must provide: 1. The works or other subject matter it represents, the rights it manages, directly or under representation agreements, and the territories covered; or 2. Works or other subject matter cannot be determined, the types of works or of other subject matter it represents, the rights it manages and the territories covered.
21.	Disclosure of information to the public	CMO to publish and keep up to date on its public website: 1. Its statute; 2. Membership terms; 3. Standard licensing contracts; 4. List of managers (Article 10); 5. General policy on distribution; 6. General policy on management fees; 7. General policy on deductions; 8. List of the representation agreements; 9. General policy on the use of non-distributable amounts; 10. The complaint handling and dispute resolution procedures.
22.	Annual transparency report	Draws up and makes public an annual transparency report, publish on website and remain for at least five years.
23.	Multi-territorial licensing in the internal market	CMOs to comply with the requirements of this Article when granting multi-territorial licences for online rights in musical works.
24.	Capacity to process multi-territorial licences	Member States shall ensure that a CMO, which grants multi-territorial licences for online rights in musical works has sufficient capacity to process electronically, in an efficient and transparent manner, data needed for the administration of such licences, including for the purposes of identifying the repertoire and monitoring its use, invoicing users, collecting rights revenue and distributing amounts due to rights holders.
25.	Transparency of multi-territorial repertoire information	CMOs should disclose on request in relation to multi-territorial licences for online rights in musical works: 1. The musical works represented; 2. The rights represented wholly or in part; and 3. The territories covered. CMOs may take reasonable measures, where necessary, to protect the accuracy and integrity of the data, to control their reuse and to protect commercially sensitive information.
26.	Accuracy of multi-territorial repertoire information	Allow requests for a correction of the data referred to in the list of conditions under Article 24(2) or the information provided under Article 25.

Table 10.1 (continued)

Article	Title	Summary
27.	Accurate and timely reporting and invoicing	CMOs must monitor the use of online rights in musical works, which it represents, wholly or in part, by online service providers to which it has granted a multi-territorial licence for those rights.
28.	Accurate and timely payment to rights holders	Distribute amounts due for licences accurately and without delay.
29.	Agreements between CMO for multi-territorial licensing	Agreements between CMOs must be of a non-exclusive nature.
30.	Obligation to represent another CMO for multi-territorial licensing	Where a CMO requests another CMO to enter into a representation agreement to represent those rights, requested CMO is obliged to accept.
31.	Access to multi-territorial licensing	Where CMOs does not grant/offer multi-territorial licences for online rights in musical works … rights holders can withdraw.
32.	Derogation for online music rights required for radio and television programmes	The requirements under this Title shall not apply to CMOs when they grant a multi-territorial licence for the online rights in musical works required by a broadcaster to communicate or make available to the public its radio or television programmes simultaneously.
33.	Complaints procedures	CMOs to establish effective and timely procedures for dealing with complaints.
34.	ADR procedures	Disputes between CMOs, members of CMOs, rights holders or users regarding the provisions of national law adopted pursuant to the requirements of this Directive can be submitted to a rapid, independent and impartial ADR procedure.
35.	Dispute resolution	Ensure that disputes between CMOs and users concerning, in particular, existing and proposed licensing conditions or a breach of contract can be submitted to a court, or if appropriate, to another independent and impartial dispute resolution body where that body has expertise in intellectual property law.
36.	Compliance	Establish procedure to notify breach of CMO Directive.
37.	Exchange of information between competent authorities	Information exchange between Member States.
38.	Cooperation for the development of multi-territorial licensing	Commission will conduct Information exchange, consultations, etc.
39.	Notification of CMO	In April 2016 Member States must provide list of CMOs.
40.	Report	In April 2021 there should be a report of application of this Directive.

Article	Title	Summary
41.	Expert group	Established to examine the impact of this Directive.
42.	Protection of personal data	CRM Directive is subject to Directive 95/46/EC.
43.	Transposition	Member States must comply with the CRM Directive by April 2016.
44.	Entry into force	20 days after publication.
45.	Address	Strasbourg

10.4 CHALLENGES AND OPPORTUNITIES PRESENTED BY THE CRM DIRECTIVE: DOES THE DIRECTIVE ACHIEVE ITS AIMS? – AN ANALYSIS

10.28 The 2012 Proposal for the CRM Directive[59] identified the following three aims as needing attention: (1) improve the way all collecting societies are managed by establishing common governance, transparency and financial management standards; (2) set minimum standards for the multi-territorial licensing by authors' collecting societies of rights in musical works for the provision of online services; and (3) create conditions that can expand the legal offer of online music.[60]

10.29 The Directive in its current format reflects the above aims in two complementary objectives, which includes (1) increasing transparency and efficiency in the functioning of copyright collective management organisations and (2) facilitating the granting of cross-border licensing of authors' rights in online music.[61]

10.30 At first glance, the Directive appears to be in step with the European Commission's 2005 Study, which recognised the need to facilitate the emergence of a European single market for the exploitation of musical works in digital format[62] and European Commission's 2012 Impact Assessment, which highlighted CMOs as being out-dated in a technological era where digital

59 *See,* European Commission, n. 14, p. 2.

60 European Commission, Proposed Directive on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing –Frequently Asked Questions (11 July 2012) at http://europa.eu/rapid/press-release_MEMO-12–545_en.htm?locale=en.

61 http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/intm/141081.pdf.

62 European Commission, n. 5.

rights management tools provide for a more accurate mechanism for the distribution of royalties.[63]

10.31 As such, proponents of the CRM Directive suggest that it embraces new technologies in order to 'provide a framework for best practice in licensing, including obligations on licensees as regards data provision'.[64] This means 'the Directive creates scope for the voluntary aggregation of music repertoire and rights with the aim of reducing the number of licences needed to operate a multi-territorial, multi-repertoire service'.[65]

10.32 At the same time, the supporters of the Directive accept that such 'measures are underpinned by detailed requirements to ensure effective monitoring and compliance, overseen by a national competent authority. Those requirements include ensuring that proper arrangements are in place for handling complaints and resolving disputes'.[66]

10.33 Furthermore, the Directive appears to resolve the long-term debate of whether CMO membership should be voluntary or mandatory. As Helfer argues, there are strong arguments that mandatory membership in CMOs interferes with freedom of association, at least in industrialised countries. 'In particular, compulsory membership rules are an overly broad means of advancing society's interest in facilitating access to creative works through a single licensing mechanism.'[67] In this regard, the Directive goes as far as permitting rights holders to choose their CMOs or in fact choose to manage their rights individually. There are implications, which can arise here as discussed below, however, the CRM Directive should be applauded for providing the option of choosing CMO membership if a rights holder so wishes, in its legal framework.[68]

10.34 However, critics of the Directive submit that;

> Directive 2014/26 departs significantly from the liberalising path sketched by the Commission in the 2005 Study on collective cross-border management of rights for online music services, worsening a scenario that had already been criticised for unduly

63 *See* European Commission, Impact Assessment, 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 Use in the Internal Market (11 July 2012), s 3.2.3, p. 27. *See also,* Steyn, n. 31.

64 Ross, n. 22, p. 130.

65 Ibid.

66 Ibid.

67 L.R. Helfer, 'Collective Management of Copyrights and Human Rights: An Uneasy Alliance Revisited' in Gervais, n. 25, p. 94.

68 *See*, CRM Directive, art. 31.

protecting only the interests of some of the stakeholders (namely, those of big major publishing companies).[69]

For example and as mentioned above, the 2005 Study suggested that CMOs provide a more efficient service to rights holders and users (service providers) including better collection and redistribution of revenue and granting of multi-territorial licences for aggregated repertoire.[70] However, the introduction of the European licensing passport model and the option of individual rights management, raises a number of questions in this regard.

10.35 The next part of this chapter will highlight two very important and distinct features, which demonstrates the opportunities and challenges thrown up by the Directive. These two features have been picked for the fact that they can have wide-ranging implications for CMOs, rights holders and users (service providers) of online musical works.

10.4.1 The European Licensing Passport model

10.36 The introduction of 'European Licensing Passport' model brings together a number of new provisions mandating specific technological requirements to be met by CMOs in order to administer multi-territorial licences for online rights in musical works.[71] The European Commission, Impact Assessment of July 2012 set out five policy options for the supply of multi-territorial licences for the online use of musical works. These included (B1) the status quo option; (B2) European Licensing Passport model; (B3) Parallel Direct Licensing; (B4) Extended Collective Licensing and Country of Origin; and (B5) Centralised Portal. The Impact Assessment suggested a governance and transparency framework (Option A4)[72] drawn from the policy options on transparency and control of collecting societies, combined with the European Licensing Passport (Option B2) as the most suitable way to achieve the objectives.[73]

10.37 While it may appear to be a sensible idea, in reality, this would mean that CMOs, which have the financial means to acquire the necessary technology,

69 Arezzo, n. 31, p. 562. *See also*, Steyn, n. 31.

70 *See,* European Commission, n. 14, p. 2.

71 For example, *see,* CRM Directive, arts 24, 27, 28.

72 Four policy options on transparency and control in collecting societies were considered. Among these were (A1) the status quo option; (A2) better enforcement; (A3) codification of existing principles; and (A4) governance and transparency framework. *See also,* For more about the European Licensing Passport *see,* European Commission, Impact Assessment (11 July 2012) at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52012SC0205.

73 *See* ibid., and Explanatory Memorandum accompanying the Proposal Directive, sections 6.1–6.2 at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012SC0205&from=EN.

would be able to administer multi-territorial licences. This is a clear departure from the spirit of the 2005 Study, which 'envisaged rights holders right to withdraw and reassign their mandates to a CMO of their choice as a means to introduce competition between *existing* collecting societies'.[74] The basis for this structure as proposed by the 2005 Study was to allow for a situation where all CMOs could grant multi-territorial licences (each for their own repertoire) to commercial users, like the model enshrined in the IFPI/Simulcasting Agreement.[75] Doing so, would lead to healthy competition, thereby urging CMOs to phase in a new structure, which is commensurate with digital technologies, and the online world, which would lead them to gradually adapt their structure and organisation to the possibilities offered by the Internet.[76] Contrary, to the aim of the 2005 Study, the CRM Directive sets out a course were access to multi-territorial licences will only be available to CMOs who have the ability to invest in new technologies and thereby gather the broadest repertoires.

10.38 What about those CMOs that do not have the financial backing to introduce a European Licensing Passport system? Interestingly, the Directive provides for a 'tag-on regime'.[77] According to this system, CMOs not capable or not willing to comply with the requirements of the European Licensing Passport can seek the help of another CMO, which has sufficient technological means to meet the aims of the Directive by entering into a representation agreement with the chosen CMO. This would allow the smaller CMO to mandate to the more technologically advanced CMO the administration of the online rights pertaining to its own repertoire. In such cases, the same conditions as those, which it applies to the management of its own repertoire would apply, in particular by including the mandated works in all the commercial offers it presents to commercial users.[78]

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74 Arezzo, n 31, p. 540.

75 Commission Decision of 8 October 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of EEA Agreement, case COMP/C2/38014 – *IFPI 'Simulcasting', OJ EC,* L-107, p. 58 *et seq.*, para. 61, 30 April 2003. *See,* in particular, the case *IFPI-Simulcasting* where the Commission explained that:

> The licensing of copyright and related rights in the online environment is significantly different from the traditional offline licensing, in that no physical monitoring of licensed premises is required … .This means that *monitoring can take place from a distance.* In this context, the traditional economic justification for collecting societies not to compete in cross-border provision of services does not seem to apply (emphasis added).

76 Graber, n. 6.

77 The term 'tag-on regime' was introduced by the European Commission in the Impact Assessment (11 July 2012), s. 6.2 and s. 24.3 and is represented in CRM Directive, art. 29.

78 CRM Directive, art. 30(1) and 30(3):

> (1) Member States shall ensure that where a collective management organisation which does not grant or offer to grant multi-territorial licences for the online rights in musical works in its own repertoire requests another collective management organisation to enter into a representation agreement to represent those

10.39 This means that in reality, very few CMOs will be capable of granting multi-territorial licences. Moreover, the few Pan-European societies that will emerge (if any) will face aggressive (and unfair) competition from larger rights holders, such as major music publishing companies, which will be capable of either individually managing their rights or granting their mandate to a new digital platform performing a somewhat hybrid form of rights management.[79]

10.40 Challenges can also be envisaged from the rights holders' point of view. Where a CMO is not capable or willing to adapt to the requirements of the European Licensing Passport by the established deadline of 10 April 2017[80] or has decided not to assign the management of their rights to a Pan-European CMO, it appears that they will face a situation of 'deadlock'.[81] This is not something that was dealt with, by the 2005 Study, however, Articles 5 and 31 the CRM Directive respond to this scenario as discussed below.

10.4.2 From 'collective' management to 'individual' management of rights in the digital era

10.41 Ever since rights management was introduced, it has operated on a collective basis, in recognition of the fact that collective administration is a straightforward response to a problem of transaction costs.[82] Copyright folklore often recounts the story surrounding Ernest Bourget, a French composer of the popular musical *chansons* and *chansonettes comiques,* who visited the Paris café Ambassadeurs in 1847 where, among other pieces, his music was being played without permission. In response, Bourget refused to settle the bill for his drink of sugared water (at the time a fashionable beverage), his reasoning being – 'you consume my music, I consume your wares' – an argument he won before

rights, the requested collective management organisation is required to agree to such a request if it is already granting or offering to grant multi-territorial licences for the same category of online rights in musical works in the repertoire of one or more other collective management organisations.

(3): Without prejudice to paragraphs 5 and 6, the requested collective management organisation shall manage the represented repertoire of the requesting collective management organisation on the same conditions as those which it applies to the management of its own repertoire.

79 A hybrid form of rights management falls somewhere in-between collective and individual rights management. For more about hybrid rights management, *see*, R.M. Hilty, and S. Nérisson, 'Collective Copyright Management' in R. Towse and C. Handke (eds) *Handbook on the Digital Creative Economy* (Cheltenham: Edward Elgar Publishing; 2013), p. 222.

80 CMR Directive, art. 31.

81 *See*, J.P. Quintais, 'Proposal for a Directive on Collective Rights Management and (some) Multi-Territorial Licences' (2013) 35(2) *European Intellectual Property Review,* pp. 65–73. Quintais questions the novelty of art. 31 pointing out that withdrawal and termination of rights management including 'mono-territorial licensing 'already exist as an option for rights holders.

82 Ficsor, n. 15, Ch. 2, pp. 15–24.

the Tribunal de Commerce de la Seine which upheld a revolutionary law of 1793, recognising a private right to regulate public performance for the first time.[83]

10.42 Although Bourget won his case before the Tribunal de Commerce de la Seine and supposedly received exemplary damages, the issue was not dealt with altogether. The Court's ruling meant that copyright owners had to identify the use of their works and secure payments from thousands of cafés, theatres and other venues – an impossible task for an individual composer to carry out.[84] It was recognised that collective administration spreads the cost of administration (for example, establishment and maintenance of repertoires, exemplary litigation, employment of advocates) over all members of the society. It reduces the cost to consumers, with users paying a single fee for access to the whole of a society's repertoire, thereby eliminating high transaction costs that would be incurred through clearing rights with every individual author, publisher, composer, lyricist, artist, performer and record company.[85]

10.43 It is therefore surprising that the CRM Directive proposes a new set of provisions which depart from the founding feature of these societies: that the administration of these rights indeed be *collective (emphasis added)*. The Directive promotes individual rights management as an alternative to collective rights management by CMOs. This objective is reflected in Article 5(6) of the Directive, which states that a;

> collective management organisation shall not restrict the exercise of rights … by requiring, as a condition for the exercise of those rights, that the management of rights or categories of rights or types of works and other subject-matter which are subject to the termination or the withdrawal be entrusted to another collective management organisation.[86]

10.44 The point is stressed once again in Article 31 as follows:

> … Rights holders who have authorised that collective management organisation to represent their online rights in musical works can withdraw from that collective management organisation the online rights in musical works for the purposes of multi-territorial licensing in respect of all territories without having to withdraw the online rights in musical works for the purposes of mono-territorial licensing, *so as to*

83 Ibid. *See also*, M. Kretschmer, 'The Failure of Property Rules in Collective Administration: Re-Thinking Copyright Societies as Regulatory Instruments' (2002) 24(3) *European Intellectual Property Review,* pp. 126–37, p. 127; Kretschmer in Towse, n. 25, pp. 140–64.

84 Ficsor, n. 15, Ch. 2, pp. 15–24. *See also*, Mendis, n. 14, p. 4.

85 *See,* Ficsor, ibid.; Mendis, ibid., pp. 143–7; Kretschmer in Towse, n. 25, pp. 140–64; Gervais, n. 25, Ch. 1.

86 CRM Directive, art. 5(6).

> *grant multi-territorial licences for their online rights in musical works themselves or through any other party they authorise* or through any collective management organisation complying with the provisions of this Title *(emphasis added)*.[87]

10.45 While individual management of copyright has always been possible, from a theoretical point of view, it has not been exercised for the reasons set out above.[88] This is especially true in the music industry where authors of musical works (composers, lyricists) have traditionally relied on the collective management of their rights by collecting societies. This is partly because of the high cost of monitoring uses of musical works such as public performance in restaurants, discotheques etc.,[89] which has meant that individual licensing, has never been seen as an option. The option of individual licensing becomes even more problematic in the secondary market for copyright works concerning use of (by-) products of the primary markets such as phonograms and DVDs where individualised contracts would simply be unfeasible in practice, involving high transaction costs.[90]

10.46 The possible success of the Directive's new offering of individual management of rights through digital technologies for all rights holders, is yet to be seen. However, at the same time, it is not unthinkable. In 2002, Kretschmer pointed out that digital technologies such as technological protection measures (TPMs) and digital rights management (DRM) systems have made it easier for rights holders to manage their rights individually, rather than turn to intermediaries such as CMOs.[91] While this is possible, the question that becomes central in such a situation is the *type of rights holder* and the *distribution of works* in the context of rights clearance, which includes not only the copyright of the work but also neighbouring rights of interpreters, performers and phonogram producers, otherwise known as 'copyright fragmentation'.[92] In this context, therefore, it seems that:

> the only rights holders who could truly benefit from the 'individual management option' envisaged by the CRM Directive would be the major music publishers, which

87 Ibid., art. 31; *see also*, Recitals 2 and 12.

88 *See also,* Impact Assessment (11 July 2012), s. 2.1.

89 Ibid. The situation can however vary amongst holders of related rights. For instance, performers and phonogram producers tend to rely on collective management as far as their remuneration rights (notably for broadcasting and other forms of communication to the public) are concerned, but less so for their exclusive rights where direct licensing by the producer, including of the performers' rights transferred to the producer, is predominant.

90 M. Ricolfi, 'Individual and Collective Management of Copyright in a Digital Environment' in P. Torremans (ed.) *Copyright Law: A Handbook of Contemporary Research* (Cheltenham: Edward Elgar Publishing; 2007), pp. 283–5.

91 Kretschmer, n. 83, p. 130.

92 The concept of 'copyright fragmentation' is discussed at length by Gervais, n. 25, Ch. 1.

are the entities in the best position to collect all the necessary rights to directly 'sell' (the whole) music titles to consumers.[93]

10.47 This is an unsatisfactory position from the point of view of both rights holders and CMOs alike. Academic commentators point out that the hidden goal of the Directive lies in the promotion of a 'broadened' competitive scenario in which new Pan-European collecting societies will compete directly with big right-holders (i.e., music publishers) or with new independent intermediaries, as opposed to promoting individual management of rights per se.[94] As to its success, both rights holders and CMOs will have to wait until the crucial date of 10 April 2017, to measure the possibility and impact of an individual management system.[95] For now, the proposition does not look very promising and the fact that the UK has shied away from introducing a Pan-European Licensing model, in its implementation of the CRM Directive, is telling.[96]

10.5 CONCLUSION

10.48 The aim of this chapter was to draw a line through the development of the CRM Directive, provide an overview of it, certain selected provisions and analyse whether its aims have been successfully met. In doing so, it has to be accepted that introducing the CRM Directive as part of European Commission's Digital Agenda for Europe and the Europe 2020 Strategy for smart, sustainable and inclusive growth[97] was important. An essential part of the strategy was to introduce the proper governance of CMOs and provide a framework for administering multi-territorial licences for the emergence of the digital EU market. The fact that it was followed through from European Commission's 2005 Study to the Directive in 2014 has to be applauded.

10.49 However, it is also clear that in an attempt to achieve the twin aims of a streamlined process for multi-territorial licences for musical works and better governance for CMOs, the Directive is multifaceted in nature and hence, complex. This is reflected by the extensive coverage of regulations for CMOs, which is in stark contrast to the shorter section on the regulation of multi-territorial licensing of online rights in musical works, a complicated area,

93 Arezzo, n. 31, pp. 544–5.

94 Ibid.

95 10 April 2017 is the established deadline for CMOs to adapt to the requirements of the Pan-European Passport.

96 Government Oppose Pan-European Licensing Proposals (15 September 2015) at http://www.alcs.co.uk/About-us/News/News/2015/09-September/Government-oppose-pan-European-licence-proposals.aspx.

97 European Commission, Study on A Strategy for Smart, Sustainable and Inclusive Growth: Europe 2020 (3 March 2010) at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF.

which is covered in about ten articles.[98] In relation to the former, the Directive is comprehensive in its coverage of the regulations relating to the governance of collecting societies. The CRM Directive establishes well-defined rules with regard to information duties and transparency obligations, as recommended by the Commission in 2005 and sets out the standards that CMOs must meet to ensure that they act in the best interests of the rights holders they represent as well as providing protection for rights holders, including those who are not members of CMOs.

10.50 While the Directive has kept in step with this aim, it is also clear that it departs from the 2005 Study of the European Commission, in the context of multi-territorial licences, which apart from being scant in its coverage, raises a number of questions.

10.51 Therefore, while it can be argued that the treatment of the twin aims appear imbalanced and potentially unsatisfactory, two central features of the Directive – the European Licensing Passport and the option of individual management of rights as discussed above, raises more pressing questions for the future of CMOs and rights holders. As suggested in the discussion above, the reality of the European Licensing Passport is that very few CMOs will be capable of granting multi-territorial licences and those capable of dealing with it will most likely be larger rights holders, such as major music publishing companies. This is because it is these larger rights holders who will be capable of either individually managing their rights or granting their mandate to a new digital platform performing a somewhat hybrid form of rights management, which leaves the niche, smaller creators in a difficult position, which is disappointing.

10.52 Apart from the reasons set out above, a further impact of these approaches will be the progressive weakening of small CMOs in the long term, together with the disappearance of blanket licences caused by repertoire fragmentation, which will be detrimental to authors and will risk impairing cultural diversity.[99] The benefit of the blanket licence system was that it allowed all works – famous or not – to reach a wide audience/market.[100] The offering of such provisions, which paves the way for supporting commercial repertoires, will undoubtedly favour well-known and popular rights holders as opposed to the up-and-coming artist. In such cases, the less well-known artist will find it harder to make their way to the market should their local CMO be excluded from the remit of multi-territorial licensing.

98 CRM Directive, Title III, arts 23–32; and Title IV, art. 38.

99 Graber, n. 6; *see also,* Arezzo, n. 31, pp. 555–6.

100 Ficsor, n. 15, Ch. 2, pp. 15–24.

10.53 Yet, the true impact of this Directive remains unknown at present and at the time of writing and will remain unknown at least until after 10 April 2017, when CMOs will have to adapt to the requirements of the European Licensing Passport, which is at the heart of the multi-territorial licensing framework. Maybe a judgement on the true success of the CRM Directive should be passed, after 10 April 2017.