

Consultation on the implementation of the EU Directive on the collective management of copyright and multi-territorial licensing of online music rights in the internal market

27 March 2015

Response from British Equity Collecting Society

British Equity Collecting Society (BECS) is the only United Kingdom based collective management organisation for audio-visual performers. It represents the interests of its members – over 31,000 actors, singers, dancers, stunt artists and other performers - in the negotiation and administration of performers' remuneration.

Rights administered via agreements with other European collecting societies include rental, private copying, cable retransmission and communication to the public rights.

Since its incorporation in 1998 BECS has collected in excess of £70 million for performers in British film and television productions. BECS is a member of AEPO-ARTIS, an association representing audio and audio-visual collective management organisations in Europe and of SCAPR (The Societies' Council for the Collective Management of Performers' Rights).

BECS works to secure and distribute revenues to performers that recognise the value of performances within the increasingly diverse services now being developed through advances in technology in the digital age.

More information about BECS and the Code of Conduct currently adopted can be found at <http://www.equitycollecting.org.uk/code-of-conduct>

1. Please say whether and why you would prefer to implement using Option 1 or 2?

BECS would support Option 2.

Recital 8 of the Directive provides "The aim of the Directive is to provide for co-ordination of national rules concerning access to the activity of managing copyright and related rights by collective management organisations, the modalities for their governance, and their supervisory framework."

Therefore BECS sees real advantage in all Member States effectively copying out the provisions of the Directive when implementing the Directive into national laws. By doing this, the framework for co-ordination of national rules will be set in a more transparent way than would be the case if provisions in national laws are "worked back" to compliance with the Directive.

2. How important is it to retain those aspects of the 2014 Regulations that go beyond the scope of the Directive?

BECS is a collective management organisation (CMO) operating within the United Kingdom and as such has been bound by S.I. 2014 No 898 (The Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014) since they came into force on 6 April 2014.

Taking into account comments in response to question 1, BECS would suggest that any aspects of the 2014 Regulations that are regarded as “going beyond” the scope of the Directive should be clearly identified as such within an identifiable section(s) of any new Regulations.

Any such “additional obligations” should be addressed in the context of Recital 9 of the Directive.

This Recital provides “The aim of the Directive is to lay down requirements applicable to collective management organisations, in order to ensure a high standard of governance, financial management, transparency and reporting. This should not, however, prevent Member States from maintaining or imposing, in relation to collective management organisations established in their territories, more stringent standards than those laid down in Title II of this Directive, provided that such more stringent standards are compatible with Union law”.

Whilst BECS does not operate licensing schemes itself, it does believe that requirements for licensees to respect creators’ rights and ensure that copyright material is used in accordance with licence terms and conditions are important. Such requirements are particularly relevant in the context of wider government initiatives to educate and inform all in society about the importance of respect for intellectual property and its value to creators and to the economy as a whole.

The provisions of paragraph 4 of the Schedule to the 2014 Regulations (Conduct of employee, agents and representatives) have been relevant to UK CMO’s adoption of their current Codes of Practice and will for practical reasons, continue to be relevant after implementation of the Directive.

However, beyond this, care is needed that additional obligations do not impose burdens that go beyond the provisions of, or create obligations which are incompatible with the application of company law to the operation of CMOs.

In this context it is hoped that Regulations to implement the Directive will be drawn up acknowledging that Recital 56 expressly provides “The provisions of this Directive are without prejudice to the application of rules on competition, and any other relevant law in other areas including.....”.

3. What is your best estimate for the overall cost of (a) implementation and (b) ongoing compliance with this Directive?

BECS is a micro business with fewer than 9 employees.

For the year ended 30 April 2014, BECS’ turnover was £634,754.

In terms of time taken by officers and professional advisers of the company to ensure compliance with the 2014 Regulations (including engaging Ombudsman Services to provide the complaints service linked to the Code of Practice) it is estimated to the company incurred “additional” costs of around £6,500 in costs during the last 12 months.

This equated to approximately 1% of the turnover to the year ended 30 April 2014.

Higher costs will be incurred during the forthcoming year, since the company will be updating its Articles of Association and asking members to approve Governance changes to reflect any new provisions linked to implementation of the Directive. These additional costs will include legal costs and communications costs significantly above those that the company has needed to incur in previous years.

Additional burdens in having to report to members under company law requirements and **separately** to observe the Regulations that flow from preparation and publication of an annual transparency report pursuant to Article 22 of the Directive would be a real concern to a small organisation such as BECS. The ability to streamline reporting and avoid repetition, or duplication, to meet separate company law and CMO regulatory requirements will be important in the interests of both transparency and efficiency in the future.

By way of example, if BECS has to send a mail out to its members linked to this and postal delivery was required, BECS would incur costs of around £6,000 (doubling the costs incurred in the last 12 months).

4. If Option 2 was the preferred option, as a CMO would you consider retaining a revised code of practice as a means of making the new rules accessible to members and users?

Yes.

The BECS Code of Practice is a working document and will be developed to reflect agreed changes to distribution policies and the activities of the CMO in terms of the services that it offers to members.

5. Given the definitions of “collective management organisation” and “independent management entity”, would you consider your organisation to be caught by the relevant provisions of the Directive? Which type of organisation do you think you are and why? Please also say whether you are a micro-business.

BECS is a “collective management organisation” within the definition set out in Article 3 (a) of the Directive. It is also a “micro-business” in that it operates with fewer than 9 employees.

BECS is a company limited by guarantee (and as such “an organisation”).

It is authorised by its members to manage rights related to copyright on their behalf, for the collective benefit of the members of BECS.

The management of such rights is the main purpose of BECS and the company is organised on a not-for profit basis. It is also owned and controlled by its members.

6. If you are a rightholder or a licensee, do you either have your rights managed or obtain your licences from an organisation which you think is an IME? If so, could you please identify the organisation, and explain why it is an IME.

N/A – BECS operates as a collective management organisation (and therefore is excluded from the definition of “rightholder” in Article 3 (c) of the Directive).

7. Do you have subsidiaries? Which of the Directive’s provisions do you think would apply to them, and why? Please set out your structure clearly.

BECS owns a 50% share in the dormant company – The Authors’ and Performers’ Lending Agency Limited. It is not trading as either a collective management organisation or an independent management entity at the present time.

8. Who do you understand the “rightholders” in Article 3(c) to be?

The broad definition suggests that “agents” and organisations within the production chain for audio-visual materials may be “rightholders” alongside the performers who are members of BECS, and the “rightholders” who BECS is set up to serve.

9. If you are a CMO, what are the practical effects of a relatively broad definition of “rightholder” for you?

In addition to acting in its capacity as a collective management organisation, BECS collects revenue on behalf of its members from organisations on whose behalf BECS has been appointed a distribution agent.

Many of BECS’ activities as a CMO are linked to application of the Bilateral or Representation agreements which BECS has entered into with other CMOs based outside the UK.

Since these other organisations are CMOs in their own right, they will not be “rightholders” within the definition of Article 3 (c) – but they will hold monies that have been collected for BECS’ members who are rightholders. Monies will be collected and processed in accordance with the terms of the Representation Agreement in place between BECS and the CMO collecting monies, for the subsequent relay of the monies to BECS, before these are distributed by BECS to individual performers.

BECS is set up to represent rights that are personal to audio-visual performers. As such, it will be complex and confusing for rightholders if there is no mechanism for CMOs to focus upon a particular type of status of a rightholder when addressing the procedures for applications for membership under Article 5 and 6 of the Directive.

10. What do you consider falls in the scope of “non-commercial”?

Article 5(3) appears to suggest that rightholders retain the right to grant “free” non-paying” licences, should they choose to do this outside the scope of the mandates which they grant to CMOs.

It is difficult to envisage how individual performers whose performances are fixed in recordings (films or sound recordings or broadcasts) might retain rights to grant licences for non-commercial uses when contractual terms govern the rights that the producer secures from the performer at the time a fixation occurs.

11. If you are a CMO, to what extent do you already allow members scope for non-commercial licensing? Please explain how you do so?

It is important to note the way in which “quit clauses” are often applied to terms of contracts under which performers are engaged, linked to the provisions of collective bargaining agreements.

These quit clauses qualify the extent to which contractual assignment of rights others operate under the contracts entered into by individual performers.

A typical “quit clause” might provide:-

Where in respect of performances contracted in accordance with this Agreement the Artist is entitled by law to receive from domestic or foreign collecting societies equitable remuneration or other forms of income additional to that arising under this Agreement nothing in this Agreement shall prevent the Artist from laying claim thereto. The Artist shall not be obliged to account to the Producer for any such income to which the Artist is entitled.

For the avoidance of doubt, unless specified elsewhere in this Agreement, the Artist shall not be entitled to any equitable remuneration or other forms of income which the Producer is entitled to receive whether as a producer and /or broadcaster or otherwise from domestic or foreign collecting societies, and the Producer shall not be obliged to the Artist for any such income.

Such income includes but is not limited to equitable remuneration in respect of the off air recording right, the cable retransmission right, blank tape levies or machine levies, the lending right and rental right and any other right from time to time provided for by the law of any jurisdiction.

The Artist will make no claim against the Producer that shall arise from any failure by the Artist or any organisation that may represent the Artist to enter into any agreements with collecting societies or any failure on the part of such a society to make any payment to the Artist.

The Producer is authorised to disclose all necessary information about the Artist to a relevant collecting society so as to assist such collecting society to identify those entitled to receive the money it collects.

Therefore it is important to recognise that mechanisms do exist for secondary licensing and payments to apply to certain uses of the work of a performer outside the scope (or in conjunction with application) of an assignment of rights by a performer to a producer.

Collective bargaining agreement terms may apply to any grant of licences for non-commercial licences of rights of relevant performers in line with industrial relations good practice.

12. What will be the impact of allowing rightholders to remove rights or works from the repertoire?

Across the 28 EU Member States there are varying levels of recognition for application of rights in audio-visual performances and how rights in fixation of such performances are asserted in practice.

BECS strongly supported the adoption of the Beijing Treaty on Audiovisual Performances and hopes that ratification of the Treaty by the EU and the United Kingdom of Great Britain and Northern Ireland will be confirmed soon.

Pending this, the Representation Agreements which BECS has entered into with other CMOs who represent similar rights to those mandated to BECS provide an important mechanism for performers to collect statutorily recognised rights of performers which give rise to entitlement to equitable remuneration under local national laws. This entitlement is particularly important for performers whose work is fixed in large scale audio-visual recordings, bearing in mind the practical difficulties that might be incurred if a producer was required to seek clearance from each of a large number of performers involved in feature films in every case when the mechanisms for payment of equitable remuneration effectively avoids ongoing individual clearance obligations.

Mechanisms already apply for a performer to terminate membership of one CMO and to join another. However practical timescales for transfers to be noted and recognised within the databases that support the application of Representation Agreements in line with the reasonable notice provisions envisaged by Article 5.4 of the Directive, will be important.

13. Under what circumstances would it be appropriate for a CMO to refuse membership to a rightholder i.e. what constitutes “objective, transparent and non-discriminatory behaviour”?

The terms of membership for BECS are linked to execution of a Membership Registration Form. This sets out the terms upon which “Performers” mandate BECS to act as their appointed agent to collect, distribute and administer remuneration defined as “Performers’ Remuneration”.

The scope of performers represented by BECS is defined and published in order that all applicants understand that they must be a performer who performs other than as a musician. This is to distinguish the rights that BECS represents from the rights of musicians whose audio performances are fixed in sound recordings and for whom distinct rights are recognised and administered through CMOs that are set up to administer such rights. In some Member States CMOs may administer both audio and audio-visual rights of performers.

It is therefore regarded as “objective, transparent and non-discriminatory” to require all applicants for membership of BECS to sign the Membership Registration Form as a condition of membership.

In addition, where a performer has died, but a beneficiary or “Performer Heir” is entitled to payments from exercise of the rights that BECS represents on behalf of performers, it is “objective, transparent and non-discriminatory” to require such applicants to provide evidence of their entitlement and to require execution of a Membership Registration Form to establish the terms upon which BECS is authorised to collect, distribute and administer specified payments for the benefit of such performer heirs.

14. What should “fair and balanced” representation in Article 6(3) look like in practice?

The nature of the statutory or equitable remuneration falling due to audio-visual performers, which BECS was established to collect and administer is such that performers wish to ensure that efficient and transparent systems are in place for such administration.

As such, it is to be hoped that, whilst each member of BECS should remain entitled to attend and vote on matters at General Meetings of BECS, a fair and balanced representation can continue operate if members are able to delegate tasks to elected representatives (who will operate as Directors and/or as members of any differently constituted Board of members meeting the requirements of Article 9 of the Directive).

In the case of BECS all performers eligible for membership are in the same category.

However, distribution rules developed and approved by the Board for the members allows for fair and representation of members within application of distribution policies to recognise that way in which different distribution values can properly be attached to a performance within an individual work. This means that allocation can reflect the fact that one programme may include performances by Principal Performers, Featured Performers, Secondary Performers and other cast members. In long running soap dramas the main artists may be distinguished from performances by other more secondary cast members.

Therefore, fair and balanced representation must enable such distinctions to be made to recognise the variety of ways in which a single category of “audio-visual performers” might be involved in different films or other audio-visual fixations.

15. What do you consider to be an appropriate “regular” timeframe for updating members’ records?

In practice, when BECS is sent information about a change in the contact details of individual members, the changes will be entered in the BECS database within 48 hours.

However, in terms of members seeking to withdraw from membership of one CMO in favour of joining another CMO, BECS provides:-

“A Member may at any time withdraw from the Society by giving six months’ notice to the Society provided always that the Board of Management may accept withdrawal of membership with less or no notice if in its absolute discretion it so decides”.

This reflects the arrangements envisaged by Article 5.4 of the Directive, whilst allowing for changes to be noted and applied against the background of ensuring monies collected by BECS before BECS is notified about a withdrawal, being paid out to performers in line with current distribution practice.

16. Is there a case for extending any additional provisions in the Directive to rightholders who are not members of the CMO? If so, which are these, why would you extend them and to whom (i.e. non-members in ECL schemes, mandating rightholders who are not members, or any other category of rightholder you have identified in answer to question 7)? What would be the likely costs involved? What would be the impact on existing members?

Some CMOs representing the interests of performers, based outside the EU, allocate secondary payments to audio-visual performers by reference to the country of origin of a programme or film and then allocate a lump sum to cover all the performers within that production.

E.g. a British film involving 100 British performers being allocated £100 and the overseas CMO wishing to pay £100 to the only CMO based in the UK that generally represents audio-visual performers who are mainly based within the UK.

In such circumstances, it is helpful if BECS can receive the £100 and (under a fair and non-discriminatory distribution policy approved for BECS members) pay out £1 to each of the cast members who are members of BECS and pay on £1 to other societies that actually have any of the non-BECS members in their own membership.

If the non-BECS members are not members of any CMO, then they can be invited to join BECS and have any monies held for them paid out as soon as relevant contact details are confirmed.

This ability to receive and process monies against application of bilateral representation agreements allows for the existing Representation Agreements between CMOs to work efficiently when the monies involved are generated by application of statutes that support secondary revenues/fair compensation being paid for performers, without any proactive “extended collective **licensing**” actually being relevant.

If this is not done, CMOs may seek to withhold **all** monies due against a film or programme until a CMO is able to say that they represent every performer in a cast as members of the receiving society. That would appear to work against the legitimate interests of the members of CMOs working within the EU and to whom the provisions of the Directive will apply.

17. Which of the discretionary provisions of Article 8 do you think should be adopted?

Transparency objectives would not be served if implementation of the discretionary provisions of Article 8 created ambiguities, or lack of clarity, over application of current company law to governance of the operation of companies limited by guarantee which operate as collective management organisations within the United Kingdom.

This is important when considering authority for alternative systems or modalities for the appointment and removal of the auditor.

Company law requirements are designed to ensure that independence of the auditor from the persons who manage the business of a collective management organisation.

BECS would support adoption of Regulations which allow for CMOs to adopt rules that allow for flexible application of the options set out under Article 8.

18. Do you have an existing supervisory function that complies with the requirements in Article 9? If not, can you give an estimate of the likely costs of compliance?

BECS currently operates as set out below with reference to the provisions set out in Articles 8 and 9 of the Directive:-

Article 8

General assembly of members of the collective management organisation

8.1. Member States shall ensure that the general assembly of members is organised in accordance with the rules laid down in paragraphs 2 to 10.

BECS currently applies a one member one vote in General Assembly.

8.2. A general assembly of members shall be convened at least once a year.

BECS currently holds an Annual General Meeting during each calendar year.

8.3. The general assembly of members shall decide on any amendments to the statute and to the membership terms of the collective management organisation, where those terms are not regulated by the statute.

The Articles of Association of BECS include definition of the rights that BECS may exercise when performers (or their heirs) agree to become members of BECS.

Any changes to the Articles of Association of BECS are approved by the Members in Annual General Meeting.

8.4. The general assembly of members shall decide on the appointment or dismissal of the directors, review their general performance and approve their remuneration and other benefits such as monetary and non-monetary benefits, pension awards and entitlements, rights to other awards and rights to severance pay.

At present, 3 of the 12 Board places are open to the members to appoint as “Elected Members of the Board”. 6 members of the Board are appointed by Equity Council. The remaining 3 comprise a nominee from the PMA, a nominee from the CPMA and the CEO of BECS.

The Articles provide for the situations in which a member of the Board shall vacate office.

These include a special resolution being passed by BECS Members in General Meeting to that effect.

No Directors, other than the CEO are remunerated. Expenses are reimbursed in line with approved practice.

In a collective management organisation with a dual board system, the general assembly of members shall not decide on the appointment or dismissal of members of the management board or approve their remuneration and other benefits where the power to take such decisions is delegated to the supervisory board.

BECS does not have a dual Board system.

8. 5. In accordance with the provisions laid down in Chapter 2 of Title II, the general assembly of members shall decide at least on the following issues:

(a) the general policy on the distribution of amounts due to rightholders;

This divides between policies that apply on the instructions of Principals for whom BECS acts as an appointed distribution agent; and policies that apply to monies which BECS receives under representation/bilateral agreements which BECS has entered into with other CMOs.

Policies which apply when monies are received under bilateral or representation Agreements are either the policies which are applied by the paying society, or variations agreed with BECS and approved by the BECS' Board from time to time (see Graded Productions policy published on BECS website).

Policies applied to monies received for Principals are either those that BECS is instructed to apply or policies which are developed by BECS in agreement with its Principals.

Information about the Policies is provided to members through a number of different routes.

The BECS Code of Practice refers to the Policies and information is also published on the BECS website from time to time.

(b) the general policy on the use of non-distributable amounts;

This is established by rules approved by the Members linked to the formal Articles.

Contractual Monies held by BECS for distribution do not fall to be treated as "non-distributable" but are held pending identification or receipt of relevant banking details for the Performer or Heir of the Performer entitled to the monies.

(c) the general investment policy with regard to rights revenue and to any income arising from the investment of rights revenue;

This is delegated by BECS Members for approval by the Board of Directors from time to time.

(d) the general policy on deductions from rights revenue and from any income arising from the investment of rights revenue;

The policy allows for BECS to treat interest earned from investments and income for use in offsetting BECS' costs of administration.

(e) the use of non-distributable amounts;

The Members have approved rules for the allocation of monies that are received from non-contractual sources and remain undistributed after a period of six years.

In the event of a performer coming forward to being identified after the six year period valid claims for payment are to be honoured from an Indemnity Fund held by BECS for this purpose.

(f) the risk management policy;

This is delegated by the members to the Board.

(g) the approval of any acquisition, sale or hypothecation of immovable property;

This is delegated to the Board of Management.

(h) the approval of mergers and alliances, the setting-up of subsidiaries, and the acquisition of other entities or shares or rights in other entities;

This is delegated to the Board of Management.

(i) the approval of taking out loans, granting loans or providing security for loans.

This is delegated to the Board of Management.

8.6. The general assembly of members may delegate the powers listed in points (f), (g), (h) and (i) of paragraph 5, by a resolution or by a provision in the statute, to the body exercising the supervisory function.

The Board of Management currently acts as the body exercising the supervisory function.

8.7. For the purposes of points (a) to (d) of paragraph 5, Member States may require the general assembly of members to determine more detailed conditions for the use of the rights revenue and the income arising from the investment of rights revenue.

The current approach to the development of distribution policies is made clear to the members and any concerns can be raised and referred to member of the Secretariat and to members of the Board of Management for consideration.

8.8 The general assembly of members shall control the activities of the collective management organisation by, at least, deciding on the appointment and removal of the auditor and approving the annual transparency report referred to in Article 22.

This is addressed at each Annual General Meeting of BECS.

Member States may allow alternative systems or modalities for the appointment and removal of the auditor, provided that those systems or modalities are designed to ensure the independence of the auditor from the persons who manage the business of the collective management organisation.

N/A

8.9. All members of the collective management organisation shall have the right to participate in, and the right to vote at, the general assembly of members. However, Member States may allow for restrictions on the right of the members of the collective management organisation to participate in,

and to exercise voting rights at, the general assembly of members, on the basis of one or both of the following criteria:

- (a) duration of membership;
- (b) amounts received or due to a member;

provided that such criteria are determined and applied in a manner that is fair and proportionate.

The Articles of Association of BECS include full provisions covering the basis upon which all Members are able to vote on matters in General Meetings of the BECS.

The criteria laid down in points (a) and (b) of the first subparagraph shall be included in the statute or the membership terms of the collective management organisation and shall be made publicly available in accordance with Articles 19 and 21.

No special criteria are specified that would make (a) or (b) relevant.

8.10. Every member of a collective management organisation shall have the right to appoint any other person or entity as a proxy holder to participate in, and vote at, the general assembly of members on his behalf, provided that such appointment does not result in a conflict of interest which might occur, for example, where the appointing member and the proxy holder belong to different categories of rightholders within the collective management organisation.

The BECS Articles of Association accommodate this.

However, Member States may provide for restrictions concerning the appointment of proxy holders and the exercise of the voting rights of the members they represent if such restrictions do not prejudice the appropriate and effective participation of members in the decision-making process of a collective management organisation.

Each proxy shall be valid for a single general assembly of members. The proxy holder shall enjoy the same rights in the general assembly of members as those to which the appointing member would be entitled. The proxy holder shall cast votes in accordance with the instructions issued by the appointing member.

The BECS Articles of Association provide for this.

8.11. Member States may decide that the powers of the general assembly of members may be exercised by an assembly of delegates elected at least every four years by the members of the collective management organisation, provided that:

- (a) appropriate and effective participation of members in the collective management organisation's decision-making process is ensured; and

the representation of the different categories of members in the assembly of delegates is fair and balanced.

The current delegation of powers to the Board of Management will be reviewed in the light of this provision to address the extent to which a separate assembly of delegates is to be recognised for the performance of this function.

The rules laid down in paragraphs 2 to 10 shall apply to the assembly of delegates mutatis mutandis.

8.12. Member States may decide that where a collective management organisation, by reason of its legal form, does not have a general assembly of members, the powers of that assembly are to be exercised by the body exercising the supervisory function. The rules laid down in paragraphs 2 to 5, 7 and 8 shall apply mutatis mutandis to such body exercising the supervisory function.

BECS Articles do provide for members to vote in general assembly.

8.13. Member States may decide that where a collective management organisation has members who are entities representing rightholders, all or some of the powers of the general assembly of members are to be exercised by an assembly of those rightholders. The rules laid down in paragraphs 2 to 10 shall apply mutatis mutandis to the assembly of rightholders.

The only entities that may be members of BECS are the Heirs of individual performers who were themselves members of BECS before they died or were eligible to be members of BECS as recognised “Performers”.

Article 9

Supervisory function

9.1. Member States shall ensure that each collective management organisation has in place a supervisory function for continuously monitoring the activities and the performance of the duties of the persons who manage the business of the organisation.

The Board of Management monitors the activities and performance of the BECS Secretariat.

9.2. There shall be fair and balanced representation of the different categories of members of the collective management organisation in the body exercising the supervisory function.

The BECS Board has been restructured to provide for this.

9.3. Each person exercising the supervisory function shall make an annual individual statement on conflicts of interest, containing the information referred to in the second subparagraph of Article 10(2), to the general assembly of members.

This is applied in practice in accordance with existing Companies Act provisions.

9.4. The body exercising the supervisory function shall meet regularly and shall have at least the following powers:

(a) to exercise the powers delegated to it by the general assembly of members, including under Article 8(4) and (6);

to monitor the activities and the performance of the duties of the persons referred to in Article 10, including the implementation of the decisions of the general assembly of members and, in particular, of the general policies listed in points (a) to (d) of Article 8(5).

This is reflected in the current activities of the BECS Board of Management.

9.5. The body exercising the supervisory function shall report on the exercise of its powers to the general assembly of members at least once a year.

The Board already does this at Annual General Meetings, within the Director's Report published within Financial Statements for each financial year and in the context of the Annual Report required for compliance with the UK Licensing Bodies Regulations 2014.

19. Which of the Directive's provisions are existing requirements under UK company law?

Such analysis is a matter for Government to address.

CMOs would be concerned to ensure that auditors and directors are able to note and easily identify any reporting requirements under the Directive which will have to be linked to Annual Reports and Reports of Directors and Financial Statements, in order that those who read such reports can see and identify the additional reporting areas and compliance with these.

In this context, it is hoped that the IPO will consult with, and secure advice from, the Accounting Standards Authorities to ensure that auditors are aware of and able to assess compliance in a way that supports the general intention of transparency behind Regulations to implement the Directive.

BECS believes that the application of the Directive without prejudice to the application of rules on competition, and any other relevant laws as recognised in Recital 56 of the Directive, is important.

20. If you do not already have a distribution system that complies with the provisions of Article 13, can you say what the cost of implementing the requirements will be?

Costs will be incurred (possibly at uneconomic levels for small CMOs) if the approach adopted under Article 13 does not allow for distinctions to be made between "general policy" and practical application of approved policies in fair and non-discriminatory ways.

21. What are your organisation's current levels of undistributed and non-distributable funds, as defined in Article 13?

BECS is dependent upon receiving reporting from broadcasting organisations and the CMO's with which BECS has Representation Agreements in place, to support application of distribution policies and the payment of collected revenues to individual performers.

The date of receipt of reporting is one of the objective reasons which may mean that it is not possible for BECS to make payments within nine months of the end of the year in which particular rights revenue was collected. However, in many cases, the time frame will be possible, subject to members informing BECS when their personal contact details change.

Despite all members being asked to keep BECS informed with details of current bank accounts and any changes of address, some members fail to do so. This creates a difficulty for BECS in making payments to such members as quickly as might otherwise be possible.

Rather than delaying distributions to members for whom contact details are held, distribution policies have been approved by the Board which provide for the allocation of identified sums onto accounts in the name of performers who have been identified from cast lists as being entitled to receive a payment. Monies are then held on these accounts whilst efforts are made to obtain updated contact and bank details to enable collected payments to be distributed as soon as possible.

This approach means that no monies held by BECS are treated as non-distributable for the purposes of Article 5.4 of the Directive at a point three years from the end of the financial year in which the collection of rights revenue occurred. Instead the members of BECS have approved rules which allow for monies that are earned from investment of rights revenues or funds held for more than **six** years when sums are unable to be allocated for payment to specific performers, to be treated as “undistributable”.

This period ties in with the usual contractual limitation period.

The approved rule provides:-

Undistributed Funds

Subject to the preceding provisions of these Rules, if after the end of the Relevant Period any part of the Funds remains in the hands of the Society (called “Undistributed Funds”) the Undistributed Funds may at the discretion of the Board be applied for all or any of the following purposes and in such proportions as the Board in its discretion thinks fit, namely:

- (a) to set up and administer trust funds, scholarships, training grants and other facilities for young Performers in accordance with clause 4 (12) of the Memorandum, whether of a charitable or non-charitable nature;
- (b) to establish, support, subscribe to and aid in the establishment and support of funds, trusts, societies or institutions calculated to benefit Performers collectively in accordance with clause 4 (13) of the Memorandum, whether of a charitable or non-charitable nature;
- (c) to organise or promote such activities for the purpose of publicising or advancing the activities of the Society or benefiting or otherwise advancing the activities of Performers in accordance with clause 4 (14) of the Memorandum;
- (d) to meet any other costs or expenses of the Society;
- (e) to transfer any part of the Undistributed Funds to the general surpluses or reserves of the Society.

Clauses 4 (12) to 4 (14) of the Memorandum provides that BECS objects include the power :-

(12) To set up and administer trust funds, scholarships, training grants and other facilities for young Performers as it thinks fit.

(13) To establish support subscribe to and aid in the establishment and support of funds trusts societies or institutions calculated to benefit Performers generally.

(14) Alone or in collaboration with others to organise or promote performances concerts festivals recordings and broadcasts (whether profit making or not) for the purpose of publicising or advancing the activities of the Society or of benefitting or otherwise advancing the activities of Performers and to apply any surpluses realised either as an addition to the funds of the Society or for the benefit of Performers either individually or collectively.

Pursuant to these arrangements, the only monies that the BECS Board have identified as non-distributable are monies that have been held by BECS for more than six years on the accounts of individual performers who were not members of BECS **and** for whom no contact details could be found **and** the sums held on the accounts were below the £10 threshold that applies as a minimum economically distributable sum.

In preparation for implementation of the Directive, the Board have agreed that the above sums may be treated as undistributable and allocated to company reserves to benefit performers generally, but with the proviso that a portion of the total is retained in a claims fund so that, should any performer subsequently come forward to claim the small sum that was previously being held for them, then payment can be made to them.

22. What is your estimate of the current size and scale of non-distributable amounts that are used to fund social, cultural and educational activities in the UK and elsewhere in the EU?

Not currently relevant for BECS, but see response to question 21.

23. Do you collect for rightholders who are not members of your CMO?

Only incidentally if required by Representation Agreements with CMOs based outside the EU, or in circumstances where BECS is appointed to act as distribution agent for contractual monies negotiated by Equity for allocation and payment to identified performers.

If so, how much of that rights revenue is undistributed and/or non-distributable? If you collect for mandating rightholders who are not members of your CMO, to what extent do those rightholders have a say in the distribution of non-distributable amounts, and what do you think of the Government exercising its discretion in relation to those amounts?

Please see comments in answer to question 21 above.

24. What should be the criteria for determining whether deductions are 'unreasonable'?

It is thought that this question relates to Articles 12.2 and 12.4 of the Directive.

Article 12.2 provides that “deductions **shall be reasonable** in relation to the services provided by the collective management organisation to rightholders”. If deductions are clearly shown as being in line with market rates and are reported to and approved by members as relevant and necessary to the services provided by a CMO, this will provide objective criteria to support the reasonableness of deductions.

If deductions are made by a CMO that have a specific effect in reducing monies otherwise available for payments to rightholders represented by other CMOs , rather than allowing for allocation of an approved distribution policy to all rightholders within a particular category for particular uses of works whichever CMO they are represented by , such deductions may become unreasonable for the rightholders who are effectively treated on less favourable terms as a direct result of “unreasonable” deductions being made.

Any services provided by CMOs relevant to Article 12.4 are potentially relevant to this.

That Article provides :- “Where a collective management organisation provides, social, cultural or educational services funded through deduction from rights revenue or from any income arising from rights revenue or from any income arising from the investment of rights revenue, such services shall be provided on the basis of fair criteria, in particular as regards access to, and the extent of, those services”.

In the case of BECS, no relevant services are currently provided, but please see the response to question 21 for the rules that apply to funds being properly identified as “undistributed” and thereafter used for the purposes provided by such rules.

25. Are there any pros and cons to be particularly aware of in case the Government exercises the discretion?

The Government must be aware that despite the provisions of the Directive, CMOs that will be subject to direct application of the Regulations used to implement the Directive within the United Kingdom will not be in a position to dictate the distribution rules of CMOs based in Member States outside the United Kingdom.

The monitoring of national law applications envisaged by competent authorities referred to in Article 36 of the Directive, will be important in this respect.

26. Is there currently a problem with discrimination in relation to rights managed under representation agreements? If so, what measures should be in place to guard against this?

The monitoring of national law applications envisage by competent authorities referred to in both Articles 36 and 37 of the Directive will be important in this respect.

27. What do you consider should be the “necessary information” CMOs and users respectively should provide for in licensing negotiations (Article 16(1))?

BECS does not currently operate any licensing schemes of its own.

However, it does act as appointed distribution agent of Equity for the allocation of monies negotiated by Equity linked to the cable retransmission and video-on-demand use of performances in a number of UK based broadcasting services.

BECS is only able to apply agreed distribution policies to such monies if it is able to receive reporting on use from the broadcasters in agreed formats. As such, BECS agrees terms with broadcasters, as users, for reporting on the activities that give rise to the negotiated lump sums which BECS is appointed to distribute.

Necessary information in these circumstances includes information about the audio-visual performers whose performances have been fixed in the programmes that are re-transmitted by cable or made available in specified video-on-demand services.

28. What format do you think the user obligation should take and how might it be enforced? What is “relevant information” for the purpose of user reporting?

See response to question 27 above.

29. What is the scale of costs incurred in administering data returns that are incomplete and/or not in a suitable format?

BECS incurs considerable costs in making sure that CMOs with which Representation Agreements are in place are sent full details of the cast of films and television programmes that involve performances by members of BECS.

This is due to many databases not yet including details of all cast members linked to a particular film or television programme as a matter of course. This in turn may be due to the difficulties faced by a CMO is another Member State being unable to secure such details from the broadcaster or other user of the film or programme in the local territory.

Whilst much work is taking place to improve exchange mechanisms for full cast lists of films and television programmes, legitimate management fees are being incurred to ensure that all performers involved in relevant films and television programmes are noted and allocation of payments properly made to all eligible performers.

30. Which of the Transparency and Reporting obligations differ from current practice, and what will be the cost of complying with them?

Implementation of The Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014 has already led to BECS publishing an Annual Report which specifically addressed the transparency and reporting obligations required by the Regulations.

The specific requirements relating to reporting in deductions for the purposes of social, cultural and educational services linked to implementation of Article 22 (3) will involve additional reporting.

In addition making provision for the breakdowns of financial information required under the Annex to the Directive will involve professional fees to ensure compliance with Regulations implementing the Directive within the United Kingdom.

31. What do you think qualifies as a “duly justified” request for the purposes of Article 20?

If a request is made in good faith for a legal purpose and in accordance with the terms of any contractual terms in place under Representation Agreements, these tests would seem to amount to a request being “duly justified”.

In BECS’ case, information about the related rights for Performers whom BECS represents and information about the Representation Agreements which BECS has entered into are published on the BECS website.

32. What factors help determine whether a CMO is able to identify musical works, rights and rightholders accurately (Article 24(2))?

The provisions of Title III in the Directive are not relevant to BECS’ licensing activities.

33. What standards are currently used for unique identifiers to identify rightholders and musical works? Which of these are voluntary industry standards?

See response to question 32.

34. What would you consider to be a “duly justified request for information” (Article 25(1))? What is not?

See response to question 32.

35. What would you consider to be “reasonable measures” for a CMO to take to protect data (Article 25(2))? What would be an unreasonable ground to withhold information on repertoires?

See response to question 32.

36. What period of time would you consider would constitute “without undue delay” for the purposes of correcting data in Article 26(1) and for invoicing in Article 27(4)?

See response to question 32.

37. How many licensees do you have in total? Of these, are you able to say how many are small and medium enterprises and how many have a bigger turnover than you do?

BECS does not operate any licensing schemes of its own. However, please see the response to question 27.

The broadcasters from whom BECS requires reporting information have turnover far in excess of that of BECS.

38. What do you think are the most appropriate complaints procedures for handling disputes and complaints between CMOs, users and licensees, including for multi-territorial disputes? Please say why.

Most of the Representation Agreements which BECS has in place provide for settlement of disputes in accordance with a disputes procedure developed by The Societies’ Council for the Collective Management of Performers’ Rights (SCAPR).

Standard terms provide for contracting parties to make every effort to settle dispute that may arise from application of the terms of Representation Agreements.

In cases where no settlement can be reached, disputes may be referred for an ad hoc arbitration under World Intellectual Property Organisation (WIPO) procedures.

These procedures have in practice enabled disputes to be resolved in the past.

39. What is your preferred option for the national competent authority? Please give reasons why.

BECS believes that existing structures and institutions are in place within the United Kingdom to provide most of the compliance functions to which Article 36 of the Directive refers.

The Copyright Tribunal should continue to be the body to which disputes about licensing terms and conditions can be referred.

However, the current imbalance which prevents CMOs from referring disputes to the Copyright Tribunal should be corrected.

In addition to the Copyright Tribunal as the reference point for resolution of disputes about licensing terms and conditions, the structure put in place for complaints about CMOs to be referred to Ombudsman Services (Copyright), already provides for other UK based disputes to be addressed when necessary.

The Ombudsman Services website states clearly the types of complaint which they can deal with and those which are not within the remit of Ombudsman Services.

It is submitted that this is a clear and transparent system which does not need further requirements added to it (particularly in the case of small CMOs).

To the extent that any additional overarching monitoring is required, BECS would see that identifying a dedicated team within the Intellectual Property Office is the preferred option.

This approach would avoid costs of setting up a separate body and allow the existing institutional structures to continue to operate and report on experience within the United Kingdom.

It would also allow for levels of demand linked to the exchange of information requirements under Article 37 of the Directive to be monitored and adopted in a gradual and flexible way (rather than establishing an authority at great cost that finds itself in a position of seeking out issues to deal with to justify its existence).

40. Bearing in mind the scope of its ongoing responsibilities, what would you consider to be an appropriate level of staffing and resources needed? Please give an upper and lower estimate.

For the reasons set out in response to question 39, BECS would suggest that only a small team be tasked to cover the relevant competent authority role when Regulations implementing the Directive are adopted. It is hard to see why more than one or two people would need to be relevant points of contact in the first instance.

41. How should the costs of the NCA be met?

BECS believes that the costs of establishing any dedicated team within the IPO to provide the National Competent Authority should be a matter for Government and not impose additional cost burdens on CMOs which seek to anticipate any ultimate activities of National Competent Authorities to be put in place across Member States following implementation of the Directive.

British Equity Collecting Society Limited

Registered Office - Guild House, Upper St Martin's Lane, London WC2H 9EG