RESPONSE TO UK GOVERNMENT CONSULTATION

ON THE IMPLEMENTATION OF THE EU DIRECTIVE ON THE COLLECTIVE MANAGEMENT OF COPYRIGHT AND MULTI-TERRITORIAL LICENSING OF ONLINE MUSIC RIGHTS

1. INTRODUCTION

1.1 PPL welcomes the opportunity to respond to the UK Government's consultation on the implementation of the EU Directive on the collective management of copyright and multi-territory licensing of online music rights (referred to in this Response Document as the "Directive").

1.2 PPL supports the principles of transparency, accountability and performance which underpin the Directive and believes that the appropriate implementation of these provisions across Europe should be of material benefit to the many thousands of record companies and performers on whose behalf PPL collect revenues internationally from other collective management organisations ("CMOs"). With that in mind, PPL would encourage the UK Government to implement the Directive in the UK in such a way as to ensure that UK CMOs and the rightsholders they represent are not instead put at a competitive disadvantage. In that context, PPL is pleased to see specific recognition in the recently-published Corporate Plan of the Intellectual Property Office (IPO) that the introduction of *"minimum standards of conduct for all EU collecting societies"* through the Europe-wide implementation of the Directive is *"vitally important to many British music businesses"* because of the UK's status as a net exporter of music in Europe.

1.3 For PPL itself, the process of compliance with the requirements of the CRM Directive builds naturally on the investment that it and other UK CMOs have made in voluntary self-regulation over recent years, and PPL is pleased to note the recognition by Government of "ever-improving standards of governance and transparency" demonstrated by UK CMOs. Against that backdrop, whilst acknowledging that the UK has responsibilities under the Directive as a Member State to ensure that the requirements of the Directive are met, PPL would encourage the UK Government to take a sensible and proportionate approach to implementation, especially as regards any exercise of its discretion under the Directive and the overall remit and approach of the national competent authority. An unduly onerous or inflexible approach may lead to an unnecessary increase in cost and bureaucracy which would run contrary to the underlying spirit and aims of the Directive (and could put UK CMOs at a competitive disadvantage compared to other CMOs across Europe, which would be contrary to both the Government's stated implementation aims for this Directive and the general Government guidelines for transposition of EU Directives into national law).

2. RESPONSES TO CONSULTATION QUESTIONS

2.1 PPL's responses to the consultation questions are set out below. Definitions used in the consultation paper have the same meaning in PPL's responses unless expressly stated otherwise.

INITIAL ANALYSIS OF OPTIONS
1. Please say whether and why you would prefer to implement using Option 1 or 2?
PPL supports the Government's preferred approach, Option 2 (replacing the existing regulatory framework, including the 2014 Regulations, with new Regulations copying out the Directive as far as possible). PPL believes that this approach will provide greater certainty and clarity, which is in the best interests of CMOs, members and licensees alike. From PPL's perspective, that is not just important as regards its interactions with such other parties in the UK, but also in relation to its international collection services on behalf of record companies and performers. That is because being able to demonstrate clearly that the UK has implemented the requirements of the Directive (and that UK CMOs are complying with those requirements) should help to apply appropriate pressure to the CMOs, national competent authorities and Governments in other Member States as regards the same happening in those other jurisdictions.

However, even where a "copy-out" approach is generally favoured, Government will need to apply a sensible and flexible approach, whether that is (i) as regards how exactly to implement provisions where the Directive sets out objectives to be achieved, but leaves the mechanism for achieving these objectives to the discretion of Member States or (ii) where it will subsequently fall to the UK's national competent authority to interpret what compliance with certain provisions of the Directive requires in practice. Further, both in relation to initial implementation and subsequent interpretation, the Government must also have due regard to the important clarification contained in Recital 56 that the provisions of the Directive are without prejudice to *"any other relevant law in other areas, including confidentiality, trade secrets, privacy, access to documents, [and] the law of contract".*

Related to this, PPL notes the role of the "expert group" established under Article 41, to be composed of representatives of the various national competent authorities. Article 41 envisages the expert group examining the impact of transposition, highlighting any difficulties, organising consultations on questions arising from application of the Directive, and facilitating the exchange of information on relevant developments in, *inter alia*, legislation and case-law. The operation of the expert group should be open and transparent and the UK national competent authority should ensure appropriate reporting to, and opportunities for input by, CMOs in relation to any matters being put to or considered by the expert group.

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

From the consultation paper, PPL understands this question to be referring specifically to the *licensee-related* aspects of the 2014 Regulations, and has responded below on that basis. To the extent that any other aspects of the 2014 Regulations are considered by Government to "go beyond the scope" of the Directive, but cover similar ground to the Directive, then those should not be retained as to do so would undermine the benefits of certainty and clarity afforded by the Option 2 approach.

Based on the limited information provided in the consultation paper, PPL would provisionally support the retention of licensee-related provisions from the 2014 Regulations (and as noted in PPL's response to Question 4 below, PPL certainly intends to retain its Code of Conduct for Licensees, including the customer service commitments set out within it).

However, that provisional support for retaining licensee-related provisions from the 2014 Regulations is subject to having the opportunity to consider more specific proposals from the Government as regards what would be retained and how that would interface with the aspects of the new Regulations that copy out the Directive. Even with the licensee-related aspects of the 2014 Regulations, there is potentially a risk of causing a confusing and unclear overlap with those aspects of the Directive which affect licensees (and unlicensed users), which would be counter-productive.

As part of the Government's proposed technical consultation on the proposed new Regulations in due course, PPL would therefore urge the Government to allow submissions regarding whether the specific licensee-related provisions that Government proposes to retain can actually co-exist alongside the requirements of the Directive without adversely impacting clarity and certainty. That said, PPL would not consider it appropriate for any retained licensee-related provisions to go *beyond* what is currently in either the 2014 Regulations or the Directive, as to do so would unnecessarily extend an existing checklist of requirements that have been derived from recent legislative processes at, respectively, UK and EU level.

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

The potential costs will vary substantially depending on how the Government approaches implementation and interpretation of the Directive and it is difficult to provide a meaningful estimate at this stage. Overall, PPL considers that such costs will be lower on the basis of the Government adopting the Option 2 approach to implementation (as compared to the potential costs of seeking to comply with a less clear and certain set of requirements if Option 1 is followed).

Government's approach to those areas of the Directive in respect of which Member States have discretion could also materially affect CMOs' implementation and compliance costs. Exercising such discretion so as to give CMOs and their members the greatest flexibility will help CMOs to manage the resulting costs in the most effective way.

It is also hard to predict the costs involved for a CMO in managing its relationship with the UK national competent authority before its nature and role is fully defined and again these could vary substantially. See further PPL's answers to Questions 39-41. One aspect of that unpredictability relates to how the national competent authority will interpret the provisions of the Directive over time. If a very literal and inflexible approach is adopted, this could increase costs unnecessarily.

By way of example, Article 8 sets out certain matters for which the "general policy" must be decided by the CMO's general assembly. In practice, the view taken by the UK national competent authority regarding how much detail is required in such a policy to be compliant with Article 8 will affect the likelihood that a CMO will need to call regular extraordinary meetings of its general assembly in order to re-approve such policies, as whilst the high-level policy is unlikely to change frequently, a certain level of detail within it may need be reviewed and revised on a more regular basis (to adapt to changing markets, usage patterns and business models). For a large CMO, the costs of holding a meeting of the general assembly can be significant.

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. PPL believes that, since their voluntary introduction in 2012, its Codes of Conduct have been a valuable and effective means of providing members and licensees with key information, setting out key customer service commitments, and signposting its complaints processes. PPL fully intends to retain both of its Codes and will simply look to update them accordingly following implementation of the Directive.

TITLE I – GENERAL PROVISIONS

SCOPE AND DEFINITIONS

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.

PPL is covered by the Directive's definition of "collective management organisation".

Based on the stated definition of a "micro business" as having fewer than ten employees and a turnover or balance sheet of less than two million euros per annum, PPL is not a micro business.

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

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.

PPL does not have any subsidiaries.

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

PPL agrees with the Government's interpretation as set out in the consultation paper.

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

In PPL's case, its members (using the Directive definition) are the owners or exclusive licensees of the UK copyright in sound recordings. However, the performers on those recordings are also rightholders for the purposes of the Directive as they have a statutory entitlement to share in PPL's UK revenue under s.182D of the Copyright, Designs and Patents Act 1988 ("CDPA") and, if they elect to use PPL for international revenue collection, also thereby have a contractual relationship with PPL (and therefore "*under an agreement… or by law"* are *"entitled to a share of the rights revenue"* as per Article 3(c)). The relevant provisions of the Directive (i.e. as regards non-member rightholders) are therefore also applicable to PPL's relationship with performers.

TITLE II – COLLECTIVE MANAGEMENT ORGANISATIONS

CHAPTER 1: REPRESENTATION OF RIGHTHOLDERS AND MEMBERSHIP/ORGANISATION OF CMOs

REPRESENTATION OF RIGHTHOLDERS

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

The Directive covers a wide range of industries and it is unlikely that a single definition of "non-commercial" will be appropriate in all situations. This reality is reflected in the wording of Recital 19 of the Directive, which states that a decision should be taken by each CMO on the conditions attached to the exercise of the right to license non-commercial uses. It should be for each CMO, acting in accordance with its management and accountability structures, to set the appropriate boundaries of what constitutes non-commercial use within its sector.

However, in general, this provision is seemingly intended to enable rightholders to permit certain uses of their works at a lower cost or on alternative terms where the *use* is for non-revenue-generating charitable or community purposes. The term "non-commercial" should therefore be construed narrowly in most cases. The risk of using a broader definition is that companies or organisations that are technically e.g. not-for-profit (or might otherwise be described at least by some as non-commercial entities) may still be making a commercial *use* of copyright works that is actually part of the core licensing activity of the CMO. For example, it cannot be intended by the Directive that the BBC's inclusion of music in its radio and television broadcasts is "non-commercial use" that is covered by Article 5(3).

Regard should also be given to the wording of Article 5(3) which makes it clear that the right to license non-commercial uses relates to *"rights, categories of rights or types of works and other subject matter"*. This is an important qualification and must be read in conjunction with the wording of Recital 19 stating that *"The rights, categories of rights or types of works and other subject-matter managed by the [CMO] should be determined by the general assembly of members of that organisation…"* The recital also notes that an important factor in this exercise is the ability of the CMO to manage the rights effectively.

Article 5(3) does not therefore constitute a right for each rightholder to choose whether to license non-commercial uses of their work directly on a case-by-case basis, but only according to broader categories set by the CMO (such as, for example, non-commercial public performance uses). This is an essential safeguard, as given the very large numbers of licensees and members that a CMO will often have, there would be disproportionate cost and administration involved in having to track, on a per-licensee basis, whether each of the CMO's members was participating in (and therefore due some of the revenue in respect of) the CMO's licensing of that licensee for any non-commercial uses. In addition, allowing case-by-case (as opposed to per-category) decisions about licensing non-commercial uses would introduce substantial uncertainty into a CMO's core licensing operations, as licensees could claim that they hold direct licences, and each such claim, in respect of each relevant work used, would have to be checked by the CMO and verified by the rightholder. The cost of developing and operating such a system would be very substantial and may well exceed the revenue derived from such non-commercial users in some cases.

Finally, as regards the conditions that a CMO may attach to the use of this right, and without limiting the discretion of each CMO to set appropriate conditions, a CMO should be able to require a reasonable period of notice for a rightholder to take back the right to license non-commercial uses directly. This is required to provide certainty to licensees who may have already relied upon a licence from the CMO to begin to use that rightholder's works, and may therefore be committed to certain further uses of those works. It will be appropriate in many cases for the period of notice to be equal to the period of notice required to terminate mandates under Article 5(4). It may, in some cases, be appropriate for a CMO to pass on costs associated with administering the notification to licensees that would be necessitated by the partial withdrawal of rights.

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?

PPL does not currently operate any processes specifically related to non-commercial licensing.

However, outside of (i) UK public performance and broadcasting licensing, and (ii) PPL's international collections service (where in both cases the nature of the relevant market means that the certainty of an exclusive mandate is required to enable efficient and effective administration of the rights) all of PPL's mandates are optional and non-exclusive in nature.

Those optional, non-exclusive mandates (which, for example, cover all of PPL's online licensing except for internet simulcast licensing) are broad in overall scope but specific categories of rights covered by them are then "activated" by means of a notice and opt-out system. This means that members can choose to license certain categories of rights directly, rather than collectively via PPL, if they so wish.

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

In this respect, due regard should be given to the wording of Article 5(2) and Article 5(4) which makes clear that the right of a rightholder to grant and terminate appointments in respect of their rights, applies in respect of *"rights, categories of rights or types of works and other subject matter*".

As noted above, Recital 19, further states that *"The rights, categories of rights or types of works and other subject-matter managed by the* [CMO] *should be determined by the general assembly of members of that organisation…"* and that an important factor in setting these is the ability of the CMO to manage the rights effectively.

Rightholders do not therefore have a right to simply withdraw individual works, and nor can they remove rights, categories of rights, or types of rights according to their own description of those things. In this regard, the Directive rightly anticipates the extensive uncertainty for licensees, and administration for CMOs, that would otherwise be caused.

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"?

It should be borne in mind that each CMO manages distinct rights and operates in a distinct market with often very different rightholders and licensees from other CMOs. Even within the remit of each CMO, there are often a wide range of different types of organisations and individuals who may be members or prospective members. It would therefore be unhelpful for Government to seek to have a comprehensive one-size-fits-all approach as the appropriate criteria will depend on the circumstances. A degree of flexibility is therefore required and PPL is not in a position to provide a definitive answer to this question.

To allow for that flexibility, PPL notes that there are various safeguards within the Directive e.g. the requirements for CMOs to publish their membership requirements and to give a refused membership applicant a clear explanation of the reasons behind the refusal, and the opportunity for that rightholder to use the CMO's complaints process.

There is however some important guidance to be drawn from Recitals 18, 19 and 20 of the Directive:

- Recital 18 states that a CMO should not *"discriminate directly or indirectly between rightholders on the basis of their nationality, place of residence or place of establishment".* This helps to illustrate what the Directive means by "non-discriminatory".
- Recital 19 makes it clear that a rightholder's freedom to choose a CMO to manage that rightholder's rights is subject to the proviso that they can only choose a CMO which *"already manages such rights"*. Recital 20 then goes on to say that CMOs are not obliged *"to accept members the management of whose rights, categories of rights or types of works or other subject matter falls outside their scope of activity"*. It follows that it would be objective, transparent and non-discriminatory for a CMO to refuse membership to a rightholder which e.g. does not own or control rights of the type managed by the CMO.

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

Again, PPL is not in a position to provide a definitive answer to this question and again it would arguably be unhelpful for Government to seek to have a comprehensive one-size-fits-all approach as it will depend on the circumstances and therefore a degree of flexibility is required. Account should also be taken of the fact that, as regards statutory directors of a CMO that is subject to the Companies Act 2006, all of those directors will owe the company certain fiduciary duties including the duty to act so as to promote the success of the company for the benefit of its members as a whole.

As regards whether to adopt any specific provisions or guidance relating to what constitutes fair and balanced representation, PPL would encourage the Government to consider the following:

- "Fair and balanced" representation should involve a more holistic assessment than simply looking at any one factor (such as applying a strict ratio of directors based solely on e.g. the size of, or the percentage of revenue distributed by, different elements of the membership).

- Similarly, it would be wrong to assess any one aspect of the governance structure of the CMO in isolation (e.g. the composition of the board should properly be considered in the context of any wider structure of delegated powers to sub-committees with different balances of representation).
- This provision of the Directive should be considered in the light of other provisions of the Directive, such as those regarding the powers of the general assembly and the transparency provisions, which are likely to have an influence towards creating fair and balanced representation in any event.

As a further aspect of how Article 6(3) potentially interacts with other provisions, it should be taken into consideration when assessing compliance with other, more detailed and specific, provisions of the Directive, such as those regarding procedures of the general assembly of members and supervisory function.

15. What do you consider to be an appropriate "regular" timeframe for updating members' records?

It is important to note that the size and nature of a CMO's membership varies very widely between different CMOs. The appropriate procedures for keeping members' records up to date will therefore vary. Whilst the wording of Article 6(5) is that CMOs *"shall regularly update"* its member records, this can only reasonably be interpreted as recognising that the completeness, accuracy and timeliness of such updates necessarily depends on the co-operation of the members themselves in responding to CMO's attempts to obtain updates from them. Timeframes for actions must therefore be proportionate as regards cost, as must the methodologies to be employed in seeking and receiving updated information.

In many cases, ongoing activities to update records will be the most appropriate action, rather than working to particular timeframes. By way of a case study from PPL's own experience, PPL provides record companies and performers with continuous access to a secure, online portal (myPPL) where they can each view (and if necessary update) all records regarding their own PPL membership or registration, including contact and bank details,. PPL sends frequent reminders to keep these records up to date, including by way of regular messages in e-newsletters and specific reminders to update details around the time of upcoming payments or where required for particular initiatives. Calls to action to update records are also regularly included in the footers of emails from PPL staff members.

RIGHTS OF NON-MEMBER RIGHTHOLDERS

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?

PPL considers that it may not be appropriate for the Government to make a one-off assessment at the time of implementing the Directive as to whether or to what extent to exercise its Article 7(2) discretion. It might be more appropriate for the Government to instead reserve a power under the implementing regulations which would allow it to extend additional provisions of those regulations to non-member rightholders in the future. Such an approach would afford greater flexibility, as it would enable the Government to assess over time, in light of how the Directive as originally implemented is operating in practice, whether there is a compelling evidence base for extending any additional provisions and what the impact would be.

GENERAL ASSEMBLY OF MEMBERS

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

As a general principle, PPL would advocate that the Government takes an approach to these discretionary provisions which, in the interests of maximising CMO efficiency, allows CMOs and their members the greatest flexibility possible:

- In some cases, that would involve exercising the discretion – so for example PPL would urge the Government to exercise the Article 8(9) discretion to allow CMOs to operate general assembly voting rules which take account of duration of membership and/or amounts received or due to a member. Indeed, PPL's existing voting rules are based on amounts received or due, and for a CMO with the size and diversity of membership that PPL has, losing the ability to operate such voting rules would run the risk of disincentivising certain elements of PPL's membership from participating in collective rights management.

- In other cases, that would involve not exercising the discretion. For example, PPL would not support the exercise by Government of the Article 8(7) discretion to make it *compulsory* for the general assembly to determine more detailed conditions for the use of rights revenue and investment income than are already required by Article 8 – it should be for CMOs and their members to decide whether to go further in this area. Similarly, PPL does not see a need for Government to override the current Companies Act 2006 position by restricting the appointment of proxies under the Article 8(10) discretion.

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?

As contemplated by Recital 24, PPL currently anticipates that the supervisory function required by Article 9 will be carried out by its non-executive statutory directors. As such, PPL does not currently anticipate any material additional cost in this respect.

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

PPL considers that it is more appropriate for the Government to undertake its own analysis in this regard.

CHAPTER 2 – MANAGEMENT OF RIGHTS REVENUE

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?

PPL believes that its distribution system is already substantially compliant with Article 13:

- PPL has published and acts in accordance with a detailed distribution policy. This policy has been approved by PPL's Board (and following implementation of the Directive, PPL will put the general policy on distribution before its AGM);
- PPL distributes revenue within six months of the end of the year in which the rights revenue was collected and therefore well within the timescales set out in Article 13(1). There is typically a small proportion of such revenue which is not paid out at this time, but this is due to objective reasons falling within the reasons prescribed by Article 13(1). As-yet undistributed amounts are kept separate in PPL's accounts;
- PPL takes a wide range of measures to identify and locate rightholders, including proactively researching and reaching out to individuals by email and telephone. PPL also currently makes information on all recordings freely available to all members and rightholders in a searchable database, and viewers of that database may submit claims to be the rightholder on such recordings electronically via the same system;
- PPL will comply with the specific procedures required under Article 13(3) once these are implemented. This is the subject of ongoing preparatory work which may in due course have some cost implications but those are not expected to be material.

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

PPL's management and board recognise the importance of striking a balance between speed of distribution and accuracy of distribution. In theory, it would be possible to have a system where all, or nearly all, monies were distributed very quickly, but based on imprecise usage and recording data, and without holding appropriate monies to deal with later corrections or additions to that data, or where the correct recipient cannot be located and paid. However, such an extreme system would clearly be unfair and open to abuse.

As regards speed of distribution, PPL distributes UK revenue within six months of the end of the year in which the rights revenue was collected as set out in response to Question 20. PPL works hard to achieve the highest possible "pay through" rates in this first distribution. For example, the first time "pay through" rate for licence fee income from 2013 in PPL's distribution in June 2014, was 93.5%.

As regards accuracy of distribution, PPL has over recent years invested in new distribution systems and, as part of this process, has worked with its members on obtaining more complete and more accurate data from them, including unique identifiers like ISRCs that enable more accurate and efficient rights management. This system has enabled PPL to distribute revenue more accurately, and to identify where usage or recording data is insufficient to enable allocation with a reasonable degree of confidence.

That investment has been particularly important against the backdrop of historic data quality issues in the music industry, with a great deal of enduringly popular and widely-used recorded music having been recorded in previous decades, at which times record companies and performers were not generally capturing the data about those recordings and the performances on them which are needed for distribution accuracy. Whilst PPL has worked closely (and successfully) with its members over recent years to help bring about a positive step-change in data quality for the recordings being made and released now, challenges still remain in respect of the historic data for older recordings.

It is also relevant that PPL operates on a large scale. There are details of over 7 million recordings in the PPL Repertoire Database. PPL processes in the region of 4 billion seconds of music airplay as part of its distributions each year. In 2014, PPL paid 55,852 performers and 5,458 record companies.

Against the backdrop of factors such as these, striving for distribution accuracy does therefore inevitably mean that some monies may be held in the short and medium term, where usage or repertoire data is initially not sufficiently complete or accurate. These monies may have to be held until PPL can be confident that they will be allocated and distributed accurately and fairly in accordance with the use of the relevant recordings. This is consistent with the Directive, which requires CMOs to distribute *"diligently and accurately"* and recognises that, for example, *"objective reasons relating in particular to reporting by users, identification of rights* [or] *rightholders, or matching of information on works…with rightholders"* may hinder the distribution process and timetable (Article 13).

PPL currently holds £32.5 million of "undistributed" licensing revenue (defined by approximation to Article 13, as monies not yet distributed nine months after the end of the financial year in which they were collected), which relates to 2008-2013 collections. That sum is 5% of the total of £600 million in distributable revenue for 2008-2013. Of the undistributed licensing revenue, £18.1 million is "non-distributable" licensing revenue (defined by approximation to Article 13, as monies not yet distributed three years after the end of the financial year in which they were collected).

These amounts are, by their nature, fluctuating amounts over time, as PPL is engaged in a continuous cycle of work which enables it to pay out residual amounts of previously undistributed monies (with for example undistributed monies being reduced by 32% in 2014). For any given year of licensing revenue, PPL continues that work for six years. After that six year period has expired, any remaining held monies are allocated pro-rata across sound recording copyright owners and performers in proportion to the allocations made in respect of the relevant financial year (with the held monies for performers and sound recording copyright owners being treated separately and allocated across the respective category of rightholders).

By this "distribution closure" point, there is typically only a small percentage of revenue that has not already been distributed. For example, in January 2015, PPL allocated remaining held monies from 2007 in this way, which following six years of work to maximise the amount distributed, represented just 2% of the original total allocations for 2007 (with the remaining 98% having already been distributed by that stage).

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?

PPL is not well placed to comment upon the practices of CMOs other than those managing rights in sound recordings and/or performances incorporated in sound recordings. In respect of these two categories of CMOs, some information on the size and scale of revenue to fund social, cultural and educational activities is published by the supra-national bodies IFPI and SCAPR.

It should be noted that these figures include all amounts used for social, cultural and educational activities, and are not limited to "non-distributable" amounts used for these purposes. Many CMOs will deduct monies for these activities from all revenues received and figures are not recorded separately for the categories defined in the Directive. It should also be noted that not all CMOs will currently report monies used for these purposes. As noted in PPL's response to Question 26 below, there are numerous ways in which such deductions are made indirectly, without being identified as such.

In the UK, PPL makes small donations to certain charities as part of a Corporate Social Responsibility policy, broadly comparable to many private companies, but does not deduct monies specifically for social, cultural or educational activities. The total amount of such donations in 2013 (the last year for which audited accounts are available) was £49,500 (which equated to 0.03% of PPL's total licence fee income for 2013).

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

As noted in PPL's answer to Question 9, performers have a statutory entitlement under s.182D CDPA (and in many cases a contractual relationship with PPL in respect of using its international collections service) which renders them non-member rightholders for the purposes of the Directive. Revenues allocated to known but not located performers, or to nominal unknown performers, could therefore be undistributed or non-distributable revenue due to non-members in the sense described in the consultation paper. PPL's answer to Question 21 includes such revenues.

Performers have a say in the distribution of such non-distributable amounts through the operation of PPL's governance structure. PPL has five performer directors on its main board (alongside eight record company directors, two directors from PPL management and one non-music-industry director (currently Lord Smith of Finsbury)). PPL anticipates that the number of performer directors will further increase over time. The PPL board has also delegated powers over the performer aspects of PPL operations to a dedicated Performer Board where those performer directors already have majority control. Performers are also represented on PPL's Finance Committee, Distribution Committee, Audit Committee and Remuneration Committee.

PPL understands that the reference in Question 23 to the Government's potential exercise of discretion is referring to Member States' discretion under Article 13(6) to *"limit or determine the permitted uses of non-distributable amounts"*. PPL further understands that the Government is only considering exercising such discretion in respect of non-distributable amounts generated by CMOs' operation of extended collective licensing (ECL) schemes. PPL considers that it would not be necessary or justified for Government to intervene in the distribution process other than, at most, in the context of ECL schemes.

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

PPL notes that this is not an aspect of the Directive where Member States have discretion, and that the wording of the Directive provides fairly clear guidance. Article 12(2) makes it clear that deductions must be reasonable in relation to the services provided by the CMO and based on objective criteria. Article 12(3) specifies that management fees must not exceed the justified and documented costs incurred by the CMO.

As regards applying those tests, the reality is that CMOs vary greatly as regards the type and number of licensees and the type and number of rightholders, as well as the value that can be attributed to the rights that the CMO manages. What a CMO's costs will be, and what constitutes a reasonable deduction, will therefore vary from CMO to CMO, and from case to case.

It is rightholders, engaged through proper governance structures, who will be best placed to judge these matters and indeed the Directive provides for this. Article 8 requires that the general policy on deductions must be approved by the general assembly of members of each CMO. As noted above, Article 12(3) also requires that costs be "documented", which is a further safeguard to ensure that rightholders are able to exercise proper oversight over CMOs. This will also help to establish if deductions described as management fees are properly categorised, or whether they are in fact other deductions not associated with the actual management of rights.

The Government's approach to this issue should be flexible and take the above points into account.

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

See PPL's comments on this issue as part of its answer to Question 23.

CHAPTER 3 – MANAGEMENT OF RIGHTS ON BEHALF OF OTHER CMOs

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?

PPL is only able to provide information regarding those CMOs managing rights in sound recordings and/or rights in performances incorporated in sound recordings.

In respect of PPL's operations, the nature of receiving repertoire and rights data in bulk from other CMOs means that there are some necessary operational differences in the way such data is received and processed (and other CMOs often have narrower mandates, meaning that PPL is unable to include their members' repertoire in certain of its new media licensing activities, although those members can join PPL directly). Nevertheless, PPL allocates payments to tracks in the same way regardless of whether those tracks are managed on behalf of a direct member or under a representation agreement. All of PPL's distribution policies are designed to allocate revenues according to the extent of the usage of the recording with no weighting for matters such as "cultural relevance". In addition, payments to other CMOs are made at the same time as payments to direct members.

This equal treatment is not always reflected in the operations of CMOs in some other territories. There are a variety of ways that members claiming revenue via PPL or another CMO are treated differently from direct members of the distributing CMO. For example:

- In some cases there is direct discrimination such as payments being made later or the application of a higher costs rate to distributions made via representation agreements.
- In other cases discrimination may be indirect, such as the uplifting of distributions to genres of music based on their "cultural relevance", which is likely to favour local repertoire. Some CMOs also make "indirect distributions" to local organisations providing social, cultural or educational services that overseas performers cannot, or are unlikely to, access or benefit from. In some cases payments such as these may be incorrectly described as management fees.
- In some cases discrimination may be outside of the control of the CMO, and instead be the result of local legislation (for example German legislation requires distributions to take account of cultural relevance) or actions of government agencies. For example, PPL is encouraged by the position of HMRC on deducting tax from payments made to overseas CMOs, but tax authorities in other countries may not always take such an even-handed or pragmatic position, and may treat foreign nationals registering directly with a local CMO, or via a commercial agent, more favourably than when registered via another CMO.

The measures that can be taken to tackle these forms of discrimination will depend upon the particular ways that the Directive is implemented in each relevant country. However, PPL notes that Article 37 envisages a role for the national competent authorities in the various Member States to exchange information about compliance issues and, where considered necessary, request action to be taken by a national competent authority in relation to alleged non-compliance by a CMO in its jurisdiction. PPL hopes that the UK national competent authority will have appropriate regard to any concerns of UK CMOs in this regard.

CHAPTER 4 – RELATIONS WITH USERS

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

There are different types of licensing negotiations between CMOs and users. In some cases CMOs will negotiate new licensing schemes with trade associations or groups of users. In other situations there is no licensing scheme and individual licences are negotiated between CMOs and individual users.

PPL's comments below reflect these different situations. They are general comments only, as the requirements of Article 16 in any given case may vary depending on the precise circumstances of a specific negotiation.

The CMO should generally make available reasonable information regarding its repertoire, as provided for in Article 20 of the Directive. Where a licensing scheme is in place, the CMO should also provide details of that scheme, including the basis on which fees are calculated and any other terms and conditions. In contrast, in some cases users or trade associations may request information that is not relevant to the negotiations, or which the CMO cannot or should not be required to disclose due to commercial sensitivity. Information that is not relevant includes detailed distribution information, or other information regarding the CMO's relationships with members; information that may be commercially sensitive includes the fees paid by other licensees or the overall tariff yield. Such information should not be considered "necessary" for the purposes of Article 16(1). In this context, PPL also refers back to the acknowledgement in Recital 56 that the provisions of the Directive are without prejudice to *"any other relevant law in other areas, including confidentiality, trade secrets, privacy, access to documents, [and] the law of contract"*.

In respect of negotiations with trade associations regarding a new or updated licensing scheme, all trade associations should be required to provide reasonable information regarding the basis and extent of their authority to negotiate on behalf of their members, and the scope and nature of their membership (so as to indicate the trade association's representativeness). This is necessary to enable CMOs to ensure that the overall consultation process is fair, reasonable and proportionate.

In respect of negotiations with individual licensees, such negotiations in general concern users making extensive use of the works, and it is generally necessary to require detail of the volume of such usage, the duration of that usage and, where available, any audience numbers in respect of the works being licensed.

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?

It is important to emphasise that Article 17 of the Directive states that information should be provided *"as is necessary for the collection of rights revenue"* and not just as is necessary *"for the distribution and payment of amounts due to rightholders"*.

It is also relevant to note the definition of "user" under the Directive, which is *"any person or entity that is carrying out acts subject to the authorisation of rightholders…"* – i.e. it is not limited to where such authorisation has already been granted. PPL's view is that the obligation therefore applies to all users, and not just licensed users. Accordingly, it is important that the Article 17 obligation is not enacted in such a way that it applies only where a contractual relationship exists. In many cases no contractual relationship will exist until the CMO is able to calculate the required fees, relying upon the information necessary for the collection of rights revenue that should be provided by the user under Article 17. Recital 33 recognises that the obligation to provide information may be statutory and need not be purely contractual.

PPL notes that Recital 33 also limits the Article 17 information to that which is *"reasonable, necessary and at the users' disposal… taking into account the specific situation of small and medium-sized enterprises"*. PPL appreciates that Article 17 should not impose a disproportionate or unreasonable burden. However, in many cases, the information necessary for the collection of rights revenue will simply require the user to confirm whether or not it is using works managed by the CMO (in order for the CMO to determine whether or not the user legally requires a licence from the CMO). To do so should not be disproportionate or unreasonable.

Where it therefore becomes apparent that the user legally requires a licence, it follows that the information necessary for the collection of rights revenue will also include basic information about the user, such as their legal identity and contact details, and any other information that is needed to calculate the fee under the relevant tariff. Again, the information needed to calculate the fee should be relatively simple for the user to apply. Taking the example of PPL's public performance tariffs, many simply require the user to provide one simple variable, such as the size (in square metres) of the area where recorded music is audible.

Information necessary for the distribution and payment of amounts due to rightholders will vary and should be proportionate in respect a number of factors, including the size of the relevant fee, the nature and extent of the use and the availability of automatic usage tracking and reporting technologies in the relevant sector.

For example, from the perspective of PPL licensing the broadcast of recorded music, radio broadcasters generally operate a database of recordings which automatically tracks which recordings are broadcast, which facilitates reporting. Listener figures are also generally available for many radio broadcasters via RAJAR. On the other hand, it would generally not be reasonable to require a small business (e.g. a local shop) that plays recorded music in public (such as background music from the radio, or from CDs) to undertake a laborious and manual task of providing full, detailed track-level reporting.

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

There are a number of different ways that problems with data can cause additional administration cost. As noted above, data may be incomplete, such as where an artist name or standard identifier (in PPL's case, the ISRC) is missing. As also noted above, data may also be submitted in a format that needs to be converted into a format that PPL can use. In other cases, a licensee may provide no data at all.

Furthermore, it should be noted that data issues can arise with both usage data from licensees and repertoire data from members. These issues interact with each other, so that it is not always easy to determine where the issue lies.

By way of illustration, PPL estimates that in respect of matching usage and repertoire data, the cost that could theoretically be saved if the data (from both licensees and members) was fully complete, is approximately £130,000 per year. This is based on an assessment of the cost of both internal and external resources and covers only the cost of dealing with issues of "bad" data at the point of utilising that data. It does not include the costs associated with liaising with members and licensees to explain data requirements and assist them in setting up data submission processes.

In addition, while it is difficult to quantify the cost incurred specifically as a result of incomplete data, PPL does expend significant cost overall in seeking information from businesses and organisations to ascertain whether they require a PPL licence and, if so, gather the information necessary to determine the appropriate licensing fee.

CHAPTER 5 – TRANSPARENCY AND REPORTING

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

PPL is already compliant with the majority of the transparency and reporting obligations set out in the Directive. PPL notes the following:

- The Directive requires publication of certain general policies that are to be agreed by the general assembly of members (or the supervisory function where this power can be and has been delegated). While much of the information that would correspond to such policies is already published by PPL, these general policies have not yet been finalised in the form set out in the Directive and following the procedures required by the Directive.
- In addition, certain detailed requirements of the annual transparency report are available, but not currently published and a small number of the items of financial information required by the annual transparency report are not currently collated. PPL is currently in the process of determining the particular meaning of some of the requirements of the transparency report in the context of PPL's particular licensing and distribution operations.

PPL anticipates that some further analysis of PPL's accounts will be required and that a number of items of detailed information will now need to be audited where this has not previously been required. Based on the current costs of preparing PPL's accounts and having these audited, PPL estimates additional costs of at least £10,000 - £20,000 per year.

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

Article 20 deals with the making available (electronically) of information about the works a CMO represents, the rights it manages and the territories covered, in response to a "duly justified" request from any rightholder, any user, or a CMO on whose behalf it manages rights under a representation agreement. PPL considers that the requirement for requests for such information to be "duly justified" means that, for example, the Directive's reference to "any" rightholder or user should be interpreted as meaning a rightholder or user who has a genuine connection or relevance to the CMO and that the request itself should be made in good faith (e.g. where a rightholder is considering joining the CMO, or a user wishes to establish whether use of a particular copyright work will be covered by a licence from the CMO).

Notwithstanding the requirement for there to be a duly justified request for the information, CMOs may consider that it is actually more transparent and efficient to make such information more generally available (such as the repertoire search facilities available via PPL's website on an ongoing basis).

TITLE III: MULTI-TERRITORIAL LICENSING OF ONLINE RIGHTS IN MUSICAL WORKS

As PPL does not manage rights in musical works, and Title III is therefore not applicable to PPL's operations, PPL has not responded to Questions 32 – 36 of the consultation paper.

TITLE IV: ENFORCEMENT MEASURES

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?

PPL licenses over 325,000 premises that play recorded music in public, covering a very broad range of businesses, in addition to thousands of broadcasting and dubbing[1] licensees. PPL is not easily able to estimate how many are likely to have a larger turnover than PPL.

[1] Businesses that copy recorded music in order to provide other businesses with music services, such as jukeboxes.

However, PPL understands that the Government is asking this question, at least in part, in relation to the consultation paper's references to the role of the Copyright Tribunal and the potential option of allowing CMOs (in addition to users, licensees and their representative bodies) to refer matters to the Copyright Tribunal (in respect of which, please see PPL's answer to Question 38 below). The consultation paper refers to the current rules in that regard being designed to redress a perceived imbalance of power. Against that backdrop, PPL respectfully suggests that it is not just relevant to look at the size of individual licensees compared to the size of a CMO, but that Government should also take account of the size and power of trade associations which effectively aggregate the interests of many licensees within an industry (and conversely Government should bear in mind that CMOs' members are often small businesses or sole traders themselves, including the vast majority of record companies and performers represented by PPL).

In this regard, PPL understands that the total Gross Value Added (GVA) of the hotel industry (one of the most recent sectors with which PPL has negotiated a new tariff, and for which estimates are available) is estimated at £7.6 billion[2], as compared with the GVA of the music recording industry of £618 million (and the GVA of the wider music industry of £3.8 billion) [3]. According to its website, the British Hospitality Association (with which PPL negotiated) has over 40,000 members.

In addition to tariff reviews carried out in conjunction with trade associations, PPL also negotiates some licences directly with individual licensees, primarily in the broadcast television sphere. Looking by way of general illustration at some of PPL's largest broadcasting licensees: in the year to 30 June 2014, British Sky Broadcasting had a total turnover of £7.6 billion and a profit before tax of £1.082 billion[4]; and in the year to 31 December 2014, ITV had total revenues (after deducting internal supply) of £2.59 billion and an adjusted profit before tax of £712 million[5]. These figures can be compared to PPL's total licensing revenue of £177 million in 2013 (the most recent year for which audited accounts are published). As another indicator of how large some licensees can be, the BBC had a total expenditure in 2013/2014 of £3.778 billion[6].

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.

PPL generally considers that the existing set of procedures available within the UK is broadly fit for purpose.

As regards the references in the consultation paper to Ombudsman Services, PPL considers that the current arrangements are appropriate in terms of the scope of Ombudsman Services' role in dealing with, fundamentally, customer service disputes (which is Ombudsman Services' recognised area of expertise). In that regard, PPL notes with caution the consultation paper's reference to *"build on the service provided by the existing independent Ombudsman scheme".* If Government is suggesting expanding the scope of Ombudsman Services' role, PPL would be concerned that there is no evidence to explain or justify why such an expansion would be necessary and that Ombudsman Services is not equipped to perform a wider role. In this context PPL would also note the overall low level of complaints about UK CMOs, as stated in Parliament by Government when the 2014 Regulations were being passed and as also cited by last year's Independent Code Review report.

PPL notes the existing availability of the IPO mediation service, which may well be a suitable option in some cases, but this should remain an option that parties are free to consider rather than obliged to use.

As regards the references in the consultation paper to the role of the Copyright Tribunal:

- As a general matter, PPL considers that the Copyright Tribunal should continue to operate with the same scope as it does currently in relation to licensing terms.
- As regards the specific question of whether Government should change the rules to allow CMOs to make references to the Copyright Tribunal (rather than the current position whereby only users, licensees or their representative bodies can do so), PPL would support the Government making this change. The IPO's own review of the Copyright Tribunal recommended making this change in 2007 (noting that the current position was asymmetrical and inequitable), albeit that it was never implemented. Also, the consultation paper suggests that the current position was designed to redress a perceived "imbalance of power" between CMOs and licensees. As noted in PPL's response to Question 37 above, the reality is that many licensees of CMOs are large and well-resourced businesses and that there are also large and well-resourced trade associations representing groups of licensees.

[2] Estimate of GVA in 2011, provided from statista.com based on statistics from the Office of National Statistics http://www.statista.com/statistics/299982/gross-value-added-gva-by-hotels-in-the-united-kingdom/

[3] Estimate of GVA in 2013, "Measuring Music" report published by UK Music, http://www.ukmusic.org/research/measuring-music/

[4] Sky Annual report 2014, https://corporate.sky.com/documents/annual-report-2014/consolidated-financial-statements.pdf

[5] ITV plc results published online, http://www.itvplc.com/media/news/itv-plc-2014-results

[6] BBC Annual Report 2013, 2014, http://downloads.bbc.co.uk/annualreport/pdf/2013-14/bbc_annualreport_201314_bbcexecutive_managingourfinances.pdf

PPL understands that the reference in this question to multi-territorial disputes is primarily referring to Title III matters. However, given the national nature of copyright, it is important that any dispute over ownership of copyright should be determined under the applicable local law.

OPTIONS FOR NATIONAL COMPETENT AUTHORITY

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

PPL supports the Government's favoured option of the national competent authority (NCA) function to be carried out within the Intellectual Property Office. PPL agrees that this is more likely to allow for an efficient and effective NCA which can draw upon the IPO's existing knowledge base in respect of copyright and collective rights management and its working relationships with the UK's CMOs.

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 and upper and lower estimate.

It is not possible to respond in detail to this question without a greater understanding of the IPO's current thinking regarding how to carry out the NCA function in practice. PPL understands that the IPO is still developing that thinking. Once there is a more developed proposal, PPL would urge the Government to consult further (whether formally or informally) in due course.

Based on the information provided by the Government so far, PPL would challenge the estimated cost and resourcing set out in the Impact Assessment accompanying the consultation paper. PPL appreciates that there are potentially various dimensions to the NCA role as indicated in the Impact Assessment, but the preliminary estimate of the NCA costing £150,000 to £200,000 per annum and requiring a staff of 3 to 4 full time employees nevertheless seems disproportionate when set against the backdrop of Government itself and last year's Independent Code Review process both concluding that self-regulation by CMOs was working well and that complaints were at a low level that was not of concern.

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

PPL does not support the proposal that the costs of the NCA should be passed onto CMOs, as in reality that would unavoidably mean passing the costs onto rightholders.

The Impact Assessment accompanying the consultation paper is fundamentally mistaken in asserting that implementing the Directive does not impose costs on rightholders. A CMO such as PPL operates on a not-for-profit basis. PPL only deducts its actual operating costs (and deductions such as industry anti-piracy funding, subject to authorisation at its AGM) from the licensing revenue it generates. Having to pay towards the costs of the NCA can therefore by definition only be funded by a further deduction from the revenue that would otherwise be available for distribution by PPL to record companies and performers. PPL understands that the position is much the same for other UK CMOs.

Passing the cost of the NCA onto CMOs/rightholders would also remove an important check and balance on how the role, remit and cost-effectiveness of the NCA would be managed. Government should seek to impose the minimum amount of regulation and bureaucracy that is strictly necessary to meet the requirements which the Directive places on Member States. Bearing its own costs of doing so would help to keep that in sharp focus.

It does not seem appropriate for PPL at this stage to comment on what an appropriate mechanism or formula for passing on NCA costs might be, in the absence of any specific proposals from Government and given PPL's fundamental objection to the principle such costs being passed on (as set out above). PPL therefore reserves its positon in that regard. PPL would however make the preliminary comment that it would not automatically follow that such costs should be passed on in proportion to the relative size of CMOs (regardless of how size is assessed) as opposed to e.g. by reference to the level of compliance. It would not seem appropriate for compliant CMOs to subsidise the cost of dealing with non-compliant CMOs.

PPL anticipates that Government may seek to "park" this issue by reserving a power in the implementing regulations that would enable the Government to pass on the NCA costs at a future date, but without specifying how that power would be exercised or what safeguards would be applied. PPL notes that, under the 2014 Regulations, other reserved powers were expressly subject to a statutory requirement that the relevant Secretary of State undertake a consultation before seeking to exercise those powers. At the very least, any reserved power in relation to passing on NCA costs should be subject to such a consultation requirement.

PPL (30 March 2015)