Consultation on "Collective Rights Management in the Digital Single Market"

1. BPI (British Recorded Music Industry) ltd. is the representative voice for the recorded music industry. Our membership comprises around 300 independent record labels and the three major record labels – Universal Music, Sony Music and Warner Music. Together, these account for more than 85 per cent of the sound recordings sold in the UK every year.

2. BPI supports the Directive as a positive step to improve the governance and transparency of all Collective Management Organisations in Europe. We would also hope that this is a step that will further facilitate the cross-border licensing of music online.

3. BPI members' collective rights are managed by PPL, the body for record labels and performers. BPI sits as a (non-voting) member of the PPL board. Additionally BPI sits as a board member of the Educational Recording Agency (ERA) and is a beneficiary of that scheme.

4. PPL is, rightly, highly regarded across Europe for the excellence of its operation, low cost administration of rights and open governance. PPL is run by its members, and the UK Government should avoid unnecessary interference with this right of members of PPL to manage the governance and administration of the fund on their behalf. BPI is also fully satisfied that ERA is a highly efficient and effective organisation that operates on behalf of its members and in full consultation with them to the highest possible standard.

5. The Government should, wherever possible, also avoid additional regulatory burdens on collective management organisations. Any costs of regulation are borne by those that benefit from the income PPL and ERA provides them.

6. As such, the UK Government should implement a light-touch regulatory regime under the CRM directive and any set up and ongoing compliance costs should be kept to a minimum and proportionate to any problem that the UK Government might identify with the running of UK collective management organisations. Any costs for the Government should be provided for under central Government funds rather than out of the monies paid out to performers and producers by PPL and ERA.

7. BPI would encourage the Government to take a flexible approach in its implementation, particularly as regards how the national competent authority operates and the strictness of the interpretation it takes in practice to the issue of compliance.

8. Where the Directive affords latitude, for the Government to take an overly strict approach may simply increase cost and reduce efficiency. So, for example, where the Government has discretion in relation to various aspects of the role of the general assembly of a Collective Management Organisation, we would encourage Government to exercise that discretion such that Collective Management Organisations and their members have the greatest flexibility.

9. This would reflect the reality that the experience in the UK is of highly effective Collective Management Organisations and that, where possible under the Directive, Government should allow the members of those Organisations to govern their own organisations as they see fit.

10. BPI is in full support of the PPL submission, and this response will restrict comments to the questions that have specific relevance to BPI and its members in support of the PPL submission.

Initial Analysis of Options

11. BPI would prefer to implement using Option 2. The Government should not attempt to bend the 2014 Regulations to fit the CRM Directive, and it would be much simpler and clearer for new Regulations to be adopted in their entirety.

12. Given the Government's commitment not to "Gold Plate" European Regulations it would seem that it must remove all 2014 Regulations that are wider in scope than the Directive in order not to breach its own policy towards European Regulation[1].

13. The Government's implementation guidelines published in April 2013 state that it is *"Government policy is that you should not to go beyond the minimum requirements of European Directives, unless there are exceptional circumstances".*

14. BPI is not aware of a problem in the UK that would warrant regulations for "exceptional circumstances" and would, indeed, say that PPL is a model collective rights management body. If the Government does decide to go for Option 1, BPI would welcome a through narrative on the exceptional circumstances in the UK that require more burdensome regulation than our competitors in the EU.

15. The guidelines are also clear that any Regulations that go wider than the EU directive should be explicit about any gold plating in the impact assessment alongside the legislation. If the Government does decide to keep its additional burden of Regulation, BPI would expect that the IPO will be explicit about this Gold Plating in its impact assessment alongside any amendments to the 2014 Regulation to support the conclusion that the UK has "exceptional circumstances".

Representation of Rights holders

16. In line with Article 5, Government needs to provide for rights holders' ability to decide to which Collective Management Organisation, what particular rights, and in which territory to authorise the collective management of their rights.

17. Likewise, rights holders must be able to withdraw particular rights from collective rights management, and to terminate the authorisation given to a particular Collective Management Organisation.

[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229763/bis-13-775-transposition-guidance-how-to-implement-european-directives-effectively-revised.pdf

18. BPI believes that it is not advisable to define the exact scope of activities that fall under "non-commercial use". The general principle is that any mandates given by the right holders to the Collective Management Organisation should be non-exclusive.

19. The principles of fairness, transparency and non-discrimination need to be ensured as the basis for the membership requirements, for the application of provisions to non-member right holders, and for the participation of rights holders in the Collective Management Organisations' governance.

Rights of rights holders who are not members of CMOs

20. In principle, BPI believes that non-member rights holders should enjoy the same benefits as the members of the Collective Management Organisation. In particular, provisions related to transparency, equal treatment, non-discrimination, access and availability of additional services financed by non-distributable amounts should apply to non-member right holders.

Management of Rights Revenue

21. BPI strongly objects to any Government intervention over the re-use of non-distributed monies. The revenues raised by Collective Management Organisations are due to rights owners. The UK Government should not use the discretion under the Directive to direct where such funds should go, particularly as it may set a precedent that funds do not, by right, get distributed directly to owners of rights.

22. The revenues raised by Collective Management Organisations belong to the music publishers, performers and record companies that create that work. The funds raised by Collective Management Organisations are due to its members and should be distributed as agreed by the members of those organisations. This is an important principle to maintain.

23. However, if Government does *"exercise the discretion in Article 13(6), but only where the monies belong to rights holders who are not members of a CMO"* it would not be acceptable if preferential treatment were given to non-members of Collective Management Organisations. Members contribute to the operation of the Organisations that raise money on their behalf, and the benefits that flow to rights owners, members and non-members alike, is built on that operation.

24. Hence, if Government does exercise this discretion, it should recognise that non-members should contribute an equivalent sum to the operations of the Collective Management Organisation that members have to in order for the Collective Management Organisation to function.

Transparency and Reporting

25. The information required under Article 16(1) should include, where appropriate, information on the revenues, accounting/auditing and usage. For users that are new services or start-ups, it should include the business plan, revenue projections, etc. More generally, it should include any information necessary for accurate calculation of licensing rates under the applicable or relevant tariffs

26. Tariffs for exclusive rights and rights to remuneration have to be set on the basis of the economic value of the use of the rights in trade, according to Article 16(2)(2). This means that the rules on tariff setting need to incorporate the standard of "willing seller-willing buyer".

27. BPI would like to stress the importance of the user obligations in regard to data provision. Transparency and appropriate information is an essential part of the smooth running of a Collective Management Organisation and for the fair and equitable distribution of monies to rights owners. This has become particularly important in an age of many small value transactions in digital supply chains.

28. Collective Management Organisations rely on users to provide accurate data and this is an area where improvement is always welcome. The better the data provided by users, the more accurate the distribution of monies.

29. All parts of the value chain have an interest in ensuring that data is accurate and provided in detail that maximise the efficient management of collective revenues. This implementation should consider how best to ensure users provide such data in a timely and appropriate way in formats that are suitable to ensure good governance of funds.

Enforcement Measures

30. Collective Management Organisations need to establish procedures for handling complaints by their members, according to Article 33. BPI believes that the alternative dispute resolution mechanisms provided in Article 34 are not well suited for disputes between users and Collective Management Organisations, but different types of alternative dispute resolution may be applied in disputes between Collective Management Organisations and their members.

31. For disputes between Collective Management Organisations and users, it is important to ensure that parties have recourse to swift and effective dispute resolution provided under Article 35, by expert bodies possessing expertise both regarding IP rights and economics. Such procedures need to be swift, and the decisions of those bodies must be legally binding, like the existing practice of the Copyright Tribunal.

Options for a National Competent Authority

32. BPI is supportive of the placing of the National Competent Authority within the IPO in order to ensure the lightest possible burden.

33. However, BPI objects to the suggestion that the cost of the National Competent Authority should be borne by right holders through their relevant Collective Management Organisation. Costs placed on Collective Management Organisations would be unfairly borne by rights owners themselves.

34. Also, given the placing of the National Competent Authority in the IPO it would be extremely difficult to have clear transparency of operation, particularly over cost allocations, and the governance obligations that are placed on Collective Rights Organisations would not be replicated by the National Competent Authority itself.

35. So rights holders would not have the direct influence in governance as they have with their Collective Management Organisations. They would have no direct redress to ensure that money taken from them by the Government was used wisely, effectively and efficiently in the National Competent Authority. This is redress that they do have as a member of a Collective Management Organisation and is one of the fundamental principles behind the Directive.