

EXPLANATORY MEMORANDUM TO
THE COLLECTIVE MANAGEMENT OF COPYRIGHT (EU DIRECTIVE)
REGULATIONS

2016 No. 221

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Intellectual Property Office, an executive agency of The Department for Business, Innovation and Skills and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 The instrument is designed to transpose the Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (2014/26/EU) (“The CRM Directive”) into UK Law.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The Regulations implement the CRM Directive using powers under section 2(2) of the European Communities Act 1972 (ECA). The Regulations revoke the Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014 (S.I. 2014/898) (“Licensing Bodies Regulations”) because they are superseded by these Regulations: the Licensing Bodies Regulations cover the same area as the provisions of the CRM Directive which are implemented. These Regulations also make certain amendments to the Copyright (Extended Collective Licensing) Regulations 2014 (S.I. 2014/2588) (“ECL Regulations”) which are needed to reflect the revocation of the Licensing Bodies Regulations and the provisions of these Regulations. Both of the 2014 Regulations could have been amended or revoked under the affirmative procedure powers under which they were made in the Copyright, Designs and Patents Act 1988. The amendment and revocation is done by the implementing Regulations under the negative procedure under section 2(2) ECA as the scope for controversy is low. The protection provided by the Licensing Bodies Regulations is not reduced as a result of these Regulations superseding them. The amendments to the ECL Regulations only reflect the changes needed as a result of the implementing Regulations superseding the Licensing Bodies Regulations. In addition it is desirable to have all the provisions which relate to implementation of the CRM Directive in one instrument rather than in multiple instruments as this avoids confusion for users.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 The Instrument is necessary to meet the UK's obligations to implement the CRM Directive by 10 April 2016. The instrument largely copies out the Directive. Provision has been made in 3 particular cases additional to those specified in the Directive – as mentioned in the Transposition Note submitted with this document. they concern the retention of certain provisions currently provided for by the Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014, which have no specific equivalents in the CRM Directive.
- 4.2 The Directive was considered by the European Union Committee of the House of Lords and received clearance on 4 December 2013. The House of Commons European Scrutiny Committee cleared the document on 27 November 2013.

5. Extent and Territorial Application

- 5.1 The instrument extends to England, Scotland, Wales and Northern Ireland.
- 5.2 The instrument applies to England, Scotland, Wales and Northern Ireland.

6. European Convention on Human Rights

- 6.1 Baroness Neville-Rolfe has made the following statement regarding Human Rights:
In my view the provisions of the Collective Management of Copyright (EU Directive) Regulations 2016 are compatible with the Convention rights.

7. Policy background

What is being done and why

- 7.1 The CRM Directive is designed:
- To improve standards of governance, financial management, and transparency among EU collective management organisations (CMOs – organisations which manage large volumes copyright works by offering licences to users and distributing the income from these licences to rightholders)
 - To promote a level playing field for multi-territorial licensing of online music;
 - To help create innovative and dynamic licensing structures that encourage the development of legitimate online music services.
- 7.2 It was introduced following an Impact Assessment conducted by the European Commission which concluded that rightholders did not have efficient means to control the management of their CMOs. This was felt to be leading to problems including discrimination against some rightholders, and inefficient distribution of royalties, with EU CMOs accumulating €3.6 billion of liabilities to rightholders in 2010. In addition, the Commission concluded that weaknesses in the framework for multi-territory licensing of online music was leading to a loss of potential revenue for rightholders, and delaying the development of new services for EU consumers.
- 7.3 The Directive fulfils its objectives by introducing minimum standards for CMOs located in EU Member States, covering areas such as governance, distribution policy, transparency, data collection, licensing, and complaints procedures. The Directive also requires CMOs to cooperate to facilitate the availability of repertoire in multi-territory licences for online music. Compliance by CMOs with the Directive's requirements is the responsibility of the relevant member state – each member state is

required to nominate a National Competent Authority to monitor and enforce compliance.

- 7.4 The policy objectives of the Directive align strongly with UK policy. Following a recommendation in the 2011 Hargreaves Review of Intellectual Property and Growth, the Government legislated to improve standards of governance, transparency and service among UK CMOs by requiring them to adopt codes of practice which met specified criteria set by Government. These criteria were designed to address similar issues to those identified by the Commission, as well as concerns from CMO licensees about customer service and licensing practices. CMOs in the UK are a major part of the copyright system: they have a combined turnover of over £1 billion p.a., and around 500,000 members. As they have historically tended to operate as monopolies in relation to the type of rights they manage, it is important to ensure that they adhere to high standards.
- 7.5 The instrument will support these objectives by implementing the Directive's requirements for UK CMOs, while also maintaining some additional protections equivalent to those which existed in the Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014, but for which there is no equivalent provision in the Directive. These include:
- A requirement for CMOs to provide appropriate staff training on compliance with the Directive
 - A requirement for CMOs to act in good faith towards their licensees
 - An extension of the Directive's provision on complaints procedures to cover complaints from licensees as well as members
 - Taking advantage of a discretionary provision in the Directive to require CMOs to offer Alternative Dispute Resolution.
- 7.6 Retention of these additional provisions is based on extensive consultation both during the Hargreaves Review process, and the consultation in February 2015 on transposition of the Directive.
- 7.7 The UK is required to transpose the Directive into UK law by 10 April 2016. Most of the Directive's requirements are specific and provide little scope for derivation. The UK considered the option of a co-regulatory approach, which would have entailed amending the Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014 to incorporate the Directive's requirements into the specified criteria that CMOs are required to use for their codes of conduct. However, this option was felt to carry a significant risk of infraction, and was not supported by consultees (who felt it would be confusing).
- 7.8 It has not been possible to directly quantify the benefits of the instrument based on evidence received from the consultation. Rightholders will benefit from increased transparency, flexibility, and participation in decision making in CMOs. This should help them to maximise the value of their rights, particularly in other EU member states. UK CMOs may benefit from attracting repertoire from competitors, improved data receipts from and negotiations with licensees, higher collections from representation agreements, and there may be opportunities related to multi-territorial licensing. Licensees should benefit from improved negotiations with CMOs, and from the opportunities related to multi-territorial licensing. The UK Government will also benefit in having well run, compliant CMOs.

Consolidation

- 7.9 The instrument will have the following impacts on other legislation:
- The Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014 will be revoked, to avoid duplication as it covers the same area as this instrument. Most UK CMOs confirmed at consultation that they intend to retain their codes of practice on a voluntary basis.
 - The Copyright (Extended Collective Licensing) Regulations 2014 will be amended to align with the new instrument (for example, by requiring that a licensing body seeking to operate an extended collective licensing scheme must demonstrate material compliance with the instrument).
 - Section 116 of the Copyright, Design and Patents Act 1988 will be amended to ensure that all CMOs as defined in the new instrument are within the purview of the Copyright Tribunal.

8. Consultation outcome

- 8.1 Transposition of the Directive has been subject to two periods of consultation. The main consultation on the Government's approach ran between 4 February 2015 and 30 March 2015. Thirty responses were received. The key outcome of the consultation was support for the Government's preferred approach to transposition: to copy out the Directive into a new instrument, revoking the existing domestic Regulations. Only one response opposed this approach, which obtained support from CMOs, representatives of rightholders, and representatives of licensees on the grounds that it would provide a clear regulatory framework. There was also strong agreement that the Intellectual Property Office should fulfil the role of the national competent authority in the UK.
- 8.2 The major objection to the UK's proposed approach came from CMOs, who argued that the Directive required that they should be able to refer disputes about licensing to the Copyright Tribunal (this ability is restricted to licensees and their representatives in the UK). The Government rejected this position on the grounds that it was not necessary to implement the Directive, and that the policy rationale for limiting access (as a means of balancing the significant market power of CMOs in negotiations) remained valid.
- 8.3 The response to the consultation is available at <https://www.gov.uk/government/consultations/implementation-of-the-collective-rights-management-directive>
- 8.4 More recently, the Government published draft Regulations for a technical review, which ran from 14 October 2015 to 10 November 2015. Seventeen responses were received, primarily from CMOs and representatives of rightholders. Responses from CMOs were critical of the Government's proposed approach to the retention of protections from the 2014 Regulations, arguing that the drafting in some cases was disproportionate to the objective and could create additional costs. The Government has responded by making amendments as follows:
- **Staff training:** clarifying that the requirement covers 'appropriate' training in relation to the role of the member of staff
 - **Alternative Dispute Resolution:** Amending the requirement to exclude a type of dispute which could be taken to the Copyright Tribunal

- **Sanctions and Enforcement:** The Government has changed the provision relating to compliance notices so as to ensure that the notice specifies what is considered to be the breach. The Government will use guidance to further clarify its approach to sanctions and enforcement.

8.5 The response to the technical review is available at <https://www.gov.uk/government/consultations/collective-rights-management-directive-technical-review>

9. Guidance

9.1 The Intellectual Property Office has developed guidance to support implementation of the instrument; this is available at [INSERT LINK]. The IPO intends to publish further information in due course on how it will carry out its responsibilities as the National Competent Authority.

10. Impact

10.1 The impact on business, charities or voluntary bodies is estimated at £2.3 million of transition costs, followed by running costs of £200,000 p.a. However, the effected businesses are also expected to benefit from higher collections from their counterparts in other EU member states, and from improved data collection from licensees.

10.2 The impact on the public sector is estimated at 2 FTE staff, at a current cost of £84,000 p.a. Initially this cost will be met from within the IPO's existing resources; it will be kept under review as more detail emerges of the workload created by implementation of the Directive.

10.3 An Impact Assessment is submitted with this memorandum and is published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

11.1 The legislation applies to activities that are undertaken by small businesses.

11.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is to:

- a) Retain exemptions for micro-businesses where these applied to non-Directive provisions imported from the 2014 Regulations.
- b) Encourage the resolution of disputes between small businesses and CMO's through non-regulatory means, such as CMO's internal complaints procedures and voluntary agreements on data collection.

11.3 The views of small businesses were sought through the consultation process, including via workshops attended by representatives of sectors including hospitality and entertainment retail. Many rightholders are also small businesses, and rightholder representatives provided a range of responses to the consultation and technical review.

12. Monitoring & review

12.1 A review clause has been included requiring review of the instrument within 5 years, and at subsequent intervals not exceeding 5 years. The IPO will carry out ongoing monitoring of the impact of the instrument, using publicly available data (e.g. company accounts and annual reports) alongside regular contact with affected stakeholders.

13. Contact

- 13.1 Laurence Pawley at the Intellectual Property Office Telephone: 0207 034 2833 or email: Laurence.pawley@ipo.gov.uk can answer any queries regarding the instrument.