Title: Collective Management of Copyright (EU Directive) Regulations 2016	Post Implementation Review
PIR No: BEIS011(PIR)-21-IPO	**Date: 13/04/2021**
Original IA/RPC No: BISIPO007	**Type of regulation: EU**
Lead department or agency: Intellectual Property Office	**Type of review: Statutory**
Other departments or agencies: Click here to enter text.	**Date measure came into force: 10/04/2016**
	Recommendation: Keep
Contact for enquiries: Collectiverights@ipo.gov.uk	**RPC Opinion:** Not required – *de minimis*

1. What were the policy objectives of the measure? (Maximum 5 lines)

To ensure that collective management organisations (CMOs) act in the best interests of the right holders they represent by setting minimum standards of governance, financial management and transparency for all UK CMOs. The Regulations also set certain transparency and licensing obligations for independent management entities (IMEs).

Another of the key objectives of this legislation was to improve market conditions for the take up of online music services across the EU. This was achieved by introducing a level playing field for CMOs that wished to engage in the supply of multi-territorial licences in musical works for online use.

2. What evidence has informed the PIR? (Maximum 5 lines)

The IPO has held roundtable meetings with CMOs, IMEs, right holder representatives and licensees. These meetings were attended by 30 people. The IPO also received 20 written submissions from stakeholders.

3. To what extent have the policy objectives been achieved? (Maximum 5 lines)

Consultees were overwhelmingly in favour of the policy aims of the Regulations and considered that they remained relevant. However, there was limited evidence that the Regulations had made a significant difference. According to consultees, the EU Directive that these Regulations implemented was intended to raise the standards of CMOs and IMEs in the EU. However, CMOs and IMEs in the UK were already operating to the standards required by the Directive, and so the Regulations have not had a significant impact. Also, the provisions on pan-European licensing for the online use of musical works have become less relevant in light of the UK's departure from the EU. In any case, these provisions only affected one UK CMO.

Sign-off for Post Implementation Review: Chief economist/Head of Analysis and Minister

I have read the PIR and I am satisfied that it represents a fair and proportionate assessment of the impact of the measure.

Signed: ***Pippa Hall*** Date: 24/03/2021

Further information sheet

Please provide additional evidence in subsequent sheets, as required.

4. What were the original assumptions?(Maximum 5 lines)

We assumed that the setup and running costs provided by CMOs and IMEs are accurate. We also assumed that there was a low risk of extensive non-compliance with the Regulations on the basis that there had been good compliance with the 2014 Regulations (which these replaced), and the incentive for affected parties to avoid sanctions.

5. Were there any unintended consequences? (Maximum 5 lines)

Some CMOs, particularly smaller ones, suggested that certain regulations were impractical or costly to administer and that their cost may outweigh any benefit to their members. In particular the audit requirement for annual transparency reports (ATRs) had resulted in disproportionate costs and is inconsistent with the rules on audits in the Companies Act 2006 which exempts small businesses from audit requirements.

Similarly, CMOs reported that the requirement for them to have in place a supervisory function for monitoring the performance and activities of the company placed an unnecessary administrative burden on many CMOs. In some cases, this has resulted in duplication of functions, with members sitting on both the management board and the supervisory committee.

6. Has the evidence identified any opportunities for reducing the burden on business? (Maximum 5 lines)

As noted above, CMOs identified a couple of areas where the Regulations could be brought in line with wider domestic company law, namely the audit requirements for annual transparency reports and the requirement that CMOs have in place a supervisory function. According to many CMOs, these requirements place a burden on business that is disproportionate to any benefit they achieve.

In light of the UK's departure from the EU, it is questionable whether the provisions on pan-European licensing remain relevant. However, the only CMO affected by these provisions, PRS, indicated that they did not consider them to be burdensome.

Introduction

This report sets out the results of the IPO's Post Implementation Review (PIR) of the Collective Management of Copyright (EU Directive) Regulations 2016. These set certain standards for the conduct, governance and transparency of collective management organisations (CMOs) and independent management entities (IMEs) in the UK.

In conducting the review, the IPO has considered:

(i) the extent to which the Regulations' objectives have been achieved; and

(ii) whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.

Context and purpose of the Regulations

The Collective Management of Copyright (EU Directive) Regulations 2016 came into force on 10 April 2016 and implemented Directive 2014/26/EU on the collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

One of the core objectives of this legislation was to ensure that CMOs act in the best interests of the right holders they represent. Placing minimum standards of governance, financial management and transparency on all UK CMOs, are some of the ways in which the legislation aimed to do this.

Another of the key objectives of this legislation, as well as the Directive it implemented, was to improve market conditions for the take up of online music services across the EU. This was achieved this by introducing a level playing field for CMOs that wished to engage in the supply of multi-territorial licences in musical works for online use.

The Directive's provisions for improved transparency and governance broadly complemented existing UK legislation for the regulation of UK CMOs. The Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014 (the "2014 Regulations") required UK CMOs to adhere to codes of practice that complied with minimum standards of governance and transparency set by the Government. UK CMOs self-regulated in the first instance, but Government had a reserve power to remedy any failure to self-regulate and impose sanctions where appropriate. The 2014 Regulations were repealed when the 2016 Regulations came into force.

The majority of the obligations under the Regulations apply to CMOs, although some of the transparency requirements also apply to IMEs. There are also obligations on users, members and right holders.

The Secretary of State for BEIS is the national competent authority (NCA) responsible for monitoring and enforcing compliance with the Regulations. In practice, the NCA functions are undertaken through a unit in the IPO.

At the time of implementation, the impact assessment predicted that the Regulations would result in a number of benefits for right holders. These included:

- Allowing right holders to quickly and easily move their rights to a CMO of their choice;
- Ensuring that CMOs have in place strong governance measures and that right holders can participate in the CMO's decision making processes;

- Improving transparency by ensuring access to a wider range of information.

The Government's impact assessment also predicted that the requirements for CMOs and licensees to negotiate in "good faith" and provide one another with all "necessary information" when negotiating licences should enable a smoother, more cost-effective process and result in better provision of licensing data by users.

Table 1: Estimated impact of the changes in the impact assessment

Total Net Present Value	**Business Net Present Value**	**Net cost to business per year**
£-4.02m	£-3.30m	£0.38m

Methodology / Review Process

The IPO conducted a series of roundtable meetings with CMOs, IMEs, users and bodies representing right holders, before which it circulated questions for consideration. The IPO also welcomed written evidence and received 20 responses. The consultation period ran from 28 August to 23 October 2020.

Stakeholder responses

Overall

Most CMOs and all IMEs stated they had already been operating in a manner that was largely compliant with the Regulations prior to their implementation. As a result, the Regulations had had little discernible impact on the collective licensing sector.

However, it was noted by one CMO that the Regulations had resulted in greater transparency and better communication between CMOs and right holders. Some CMOs also noted that the Regulations had provided clarity on processes and the expected minimum standards. This had been useful in providing greater certainty than the self-regulatory collective licensing environment that had existed prior to the Regulations. Also, the complaints regime provided for in the Regulations had been an improvement.

One CMO noted that the greatest impact had been the effect of the Directive itself and its transposition into the laws of EU Member States. This had provided a helpful levelling of the regulatory playing field for EU CMOs.

The responses from rights holders were more mixed, although they all agreed that the aims of the legislation were important.

Some right holder representatives expressed the view that the Regulations had had a positive impact, noting that their Members had experienced greater choice, more equitability and transparency, and better communication with CMOs. They also noted that improved competition meant that CMOs delivered their obligations more effectively.

Some right holder representatives noted that the EU Directive appeared to harmonise the EU towards the UK's existing standards, resulting in little change for UK rights holders. However, it was noted that it was useful to have a framework of standards to hold CMOs to.

Other respondents thought that the Regulations had not delivered the intended benefits as they considered that CMOs had not implemented them fully. Some argued that the legislation should go further with more regulatory oversight and enforcement.

Rights granted to rights holders

With regards to the rights granted to right holders under Regulations 3 and 4, CMOs reported little change. Most observed that their members always had the ability to withdraw or terminate rights, and there was little evidence that the volume of such requests had increased as a result of the Regulations. All CMOs reported that these new rights resulted in no, or negligible, costs for their businesses.

Although there was recognition that the ability to withdraw rights from CMOs was of benefit to right holders, user representatives noted that the withdrawal of individual works at such short notice may create significant risks for those seeking to exploit those works. In particular, the withdrawal of rights in works (e.g. music) incorporated into audio-visual works could cause large delays or costs, or even lead to the entire audio-visual work being withdrawn from release.

Right holder representatives were generally of the view that the new rights had not resulted in much change. Some respondents said that it was not easy to withdraw mandates and that information on the possibility of withdrawing rights was not easily visible on the CMOs' websites.

Governance

Some right holder representatives reported that the Regulations had not resulted in improvements to CMO governance arrangements. Others reported that there had been some improvements, but that these had been limited and it was not clear whether they had been the result of the Regulations.

Licensing

CMOs and IMEs reported that there had been no discernible impact on licensing negotiations with users, nor had there been any noticeable improvements in the usage data they received from them.

Responses from users in relation to licensing were mixed. One user stated that the Regulations had resulted in no improvements to licensing negotiations. However, a representative of users noted that their members welcomed the requirement that tariffs be reasonable in relation to "the economic value of the use of the rights in trade taking into account the nature and scope of the use of the work and other subject matter." These provisions frequently formed an important touchstone when negotiating licences and discussing tariffs with CMOs.

Transparency

CMOs and IMEs were generally of the view that the transparency provisions had had little impact as the obligations under the Regulations were largely consistent with the level of transparency CMOs and IMEs had provided prior to the Regulations. CMOs, however, supported the commitment to greater transparency.

However, one area where the Regulations had made a difference was the requirement that CMOs publish an annual transparency report (ATR). CMOs were largely supportive of this requirement, with one CMO mentioning that ATR reports had generated positive engagement and feedback.

However, some CMOs did note that some of the breakdowns required in ATRs were burdensome and impractical.

Also, one CMO suggested that the ATR requirement resulted in the publication of commercially sensitive information that may undermine competition in the sector.

Right holder representatives expressed the view that improvements in transparency had been limited. The biggest impact has been the requirement that CMOs publish ATRs. However, some respondents were of the view that these reports did not go far enough. In particular, concerns were raised around the level of detail provided in relation to overseas revenues and reciprocal agreements with other CMOs.

Complaints

CMOs stated that there was no evidence that complaints made via their internal procedures or through their designated alternative dispute resolutions (ADR) procedures had increased since the Regulations came into force.

Before December 2019, ADR for most CMOs had been provided through the Ombudsman Service. In the original impact assessment, it was predicted that each case referred to the ombudsman would cost around £400. The IPO reached out to the Ombudsman Service as part of the review process to establish whether the Regulations had had an impact on the volume of complaints they had received. Unfortunately, the ombudsman advised that they no longer had complaint data from before the Regulations came into force, nor from the year afterwards (2017). As such, they could not comment on any change in the number or nature of the complaints. However, they did note that they had received only a handful of cases in 2018 and 2019 and had only accepted 16 cases for investigation during that time.

Multi-territorial licensing

In the UK, PRS is the only CMO offering multi-territorial licences for the online use of musical works. PRS considered that there was little evidence that the Regulations had had an impact on their multi-territorial licensing. Prior to 2016, PRS already offered multi-territorial licensing though ICE Services, SOLAR and ARESA. PRS noted that ICE Services was already subject to EU competition undertakings prior to 2016 and that these undertakings placed obligations on ICE which were broadly equivalent to those under the Regulations. As a result, the Regulations did not create substantial new obligations.

PRS noted that the multi-territorial provisions would be of limited relevance going forward in light of the UK's departure from the EU. In PRS's view, ICE would be subject to these obligations anyway as it operated in the EU market and was part-owned by two EU CMOs (GEMA and STIM).

PRS noted that one potential issue in the future is that some EU CMOs may seek to license streaming services in the UK individually rather than through licensing hubs. This could lead to market fragmentation with a proliferation of licences for streaming services. However, this could be the case both if the Part 3 provisions were revoked and if the Regulations were retained in their current form. This is because, as currently drafted, the Part 3 Regulations only applied to UK CMOs, not EU CMOs.

Enforcement

CMOs and IMEs were of the view that the IPO has the relevant expertise and is the most efficient body to act as the National Competent Authority (NCA) which regulates compliance with the

Regulations. In particular, they were satisfied with the level of communication they receive from the IPO and found the regular working groups useful for raising issues and providing feedback.

Some right holder representatives argued that the IPO should take a stricter approach to enforcement of the Regulations and that there should be greater transparency around the handling of cases. Some also raised concerns regarding how effective the IPO would be at addressing activities undertaken by CMOs based in European member states in light of the UK's exit from the European Union.

At the time of implementation, the Government took the view that there was unlikely to be sufficient demand to justify setting up a new body to oversee compliance with these Regulations, so it was decided that the role should be carried out by a small team within the IPO. This assessment has been borne out by the complaint level which has averaged between 3 and 4 cases per year.

Besides the IPO's role as the NCA, two of the user respondents noted that there were issues in relation to disputes over multi-territorial licences. Usually, disputes over licensing terms and tariffs could be referred to the Copyright Tribunal which was a well-established and effective process. However, recent case law from the High Court has meant that the ability of the Tribunal to resolve disputes over multi-territorial licences is limited.

Ultimately, the Tribunal's remit is set out in the Copyright Designs and Patents Act 1988 and not these Regulations. As such, this issue falls outside of the scope of this review.

Costs and Benefits

CMOs

An impact assessment was conducted when these regulations were implemented. It estimated that the 12 CMOs affected by the legislative change would face total implementation costs of around £2.3m, and total ongoing compliance costs of around £100,000 per annum. This was not assumed to be evenly distributed across CMOs given differences in size.

The costs predicted for implementation were legal costs, operating costs and governance costs, for example for making changes to distribution systems and changing articles of association. For ongoing compliance, the predicted costs related to reporting requirements.

The IPO received responses from 11 CMOs during the consultation, and not all CMOs were able to provide estimated and actual implementation costs for the regulations. A direct comparison is therefore not possible.

However, the consultation responses noted the costs they had incurred, which included compliance costs such as audit and legal costs to amend articles of association. Where comparison was possible, the predicted cost was close to the actual cost.

However, one CMO incurred £30,000 more compliance costs than predicted as they incurred legal costs for dispute resolution outside the Ombudsman services.

Given the evidence from the consultation, it appears that the costs to CMOs were broadly in line with those predicted and on a similar scale.

The impact assessment also estimated benefits to CMOs from representation agreements with EU CMOs as the regulations require timelier payment. Responses from CMOs did not highlight a

noticeable difference in this, noting that revenue from European CMOs fluctuates in any case and may not be attributable to the regulations.

Independent Management Entities (IMEs)

The impact assessment predicted that IMEs would not face implementation costs given that IMEs were already complying with the regulations prior to their introduction. It noted that they may face limited ongoing costs to cover legal expenses. The consultation responses showed the impact on IMEs to be negligible with no implementation costs mentioned.

Staff costs to IPO

The staff costs predicted in the original IA have been realised with 1.25 FTE responsible for CRM.

Issues and recommendations from stakeholders

Some CMOs, particularly the smaller ones, suggested that certain regulations were impractical or costly to administer and the cost of these may outweigh the benefit to members.

One such issue is the requirement in Regulation 21(2) that ATRs must be subject to an audit. Many CMOs reported that the costs associated with the audit were disproportionate to any benefits achieved. The issue was particularly pronounced for smaller CMOs. Under the Companies Act 2006, many small businesses are exempt from audit requirements, whereas under the Regulations it is necessary for ATRs to be audited irrespective of the size of the business. As a result, smaller CMOs have incurred audit costs that they would not otherwise have incurred. The exact amount varied depending on the size of the CMO but some noted it was up to 20% more than previously. Respondents noted that this issue is compounded by the limited number of auditors with the necessary expertise in the collective licensing sector and ATRs. As such, CMOs have limited choice and report that the prices charged are not competitive. As well as audit fees, there were also further hidden costs such as staff time and resources to monitor compliance.

Some CMOs also noted that the supervisory function placed an unnecessary administrative burden on them. As with the audit requirement, this requirement has had the biggest impact on smaller CMOs. In some cases, this has resulted in a duplication of functions, with members sitting on both the board and the supervisory committee. They suggested that this has resulted in an additional layer of complexity in CMO governance arrangements with no tangible benefits. Some CMOs noted that the type of supervisory function imposed by the Regulations wasn't a familiar concept under existing UK company law, and that many boards already had adequate processes in place for assessing and managing the performance of the executives.

With regards to both the audit requirements and the supervisory function, it was suggested that the Regulations should be amended to bring the audit requirements and supervisory function them more in line with UK company law.

Conclusion and Next Steps

The information gathered through this review pointed to a broad consensus that the aims of these Regulations still remained relevant and that stakeholders supported their retention. However, the benefits delivered by the Regulations appears to have been limited. This is in part due to the fact that the EU Directive was intended to bring EU CMOs up to the standards to which UK CMOs already operated. Various consultees noted, though, that it was beneficial to have a clear set of standards for CMOs to adhere to. As such, the Government intends to retain these Regulations.

A couple of areas were identified where the Regulations placed burdens on businesses that may be considered disproportionate, particularly for smaller CMOs. These were the audit costs associated with annual transparency reports and the requirement that CMOs put in place a supervisory body. The IPO will keep these specific issues under review.