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COMMISSION STAFF WORKING DOCUMENT

EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT

Accompanying the document

**Proposal for a Directive of the European Parliament and of the Council
on the collective management of copyright and related rights and multi-territorial
licensing of rights in musical works for online uses in the internal market**

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1. INTRODUCTION

Creative industries contribute significantly to GDP, employment and growth in the EU. The distribution of copyright protected goods and services (e.g. books, films, recorded music) requires the licensing of rights by different rightholders (e.g. authors, performers, producers). Collecting societies are often essential in facilitating the licensing of such rights, notably when direct licensing by rightholders is not feasible or practical. From the viewpoint of many commercial users, whether active in traditional (e.g. broadcasting, cable retransmission) or new forms of exploitation (e.g. download, streaming services), the role of collecting societies is also essential. Moreover, they play a key role in the protection and promotion of the diversity of cultural expressions by enabling the smallest and less popular repertoires to access the market.

Collective rights management has a Single Market dimension. Even when collecting societies grant licences limited to their own territory their licences normally cover the rights of both domestic rightholders and rightholders from other Member States. For online uses, collecting societies are increasingly requested to grant licences that cover several or all Member States.

The degree to which different rightholders and sectors rely on collective management varies, depending largely on the preference of rightholders and on the needs and practices of different industries. Authors, in particular of musical works (composers and lyricist), rely the most on collective management.

2. PROBLEM DEFINITION

The impact assessment identifies two problems: problems as regards the functioning of collecting societies in general (irrespective of the category of rightholders they represent or the category of rights they manage) and problems specific to the supply of multi-territory licences for the online exploitation of musical works. These problems are interlinked as the licensing problems derive, to a large extent, from the inability of rightholders to access information and exercise real control over certain societies. In this sense, the second problem (licensing) cannot be solved without addressing the first one.

2.1. The functioning of collecting societies in general

A substantial copyright *acquis* has been adopted over the years to facilitate the functioning of the Single Market. This *acquis* deals almost exclusively with the definition of rights, limitations and exceptions and related provisions. Very few provisions in the copyright directives deal with the management of rights; none establishes a framework for the functioning of collecting societies. Important principles concerning their governance and transparency have been developed by the CJEU and by Commission decisions on grounds of competition law but these principles are not uniformly and properly applied in the EU.

The approach to the regulation of collective rights management varies between Member States and over recent years evidence has accumulated pointing to insufficient checks and balances on the functioning of a number of collecting societies. Rightholders, including non-domestic rightholders, are not fully informed of the activities of their societies and cannot exercise meaningful control over them, especially with regard to the collection, handling and distribution of royalties. There is also evidence of poor financial management of some societies; royalties due to rightholders accumulate with little oversight and/or are poorly handled. Many consulted authors' associations, publishers, commercial users and consumers argue that there is a need for specific measures focusing on their governance and transparency whereas collecting societies consider that self-regulation would suffice.

For rightholders, underperforming collecting societies mean lost (licensing) opportunities and excessive cost deductions from their royalty income. For users, insufficient transparency and accountability lead to poorer quality services and, in some cases, to more expensive licensing.

2.2. The supply of multi-territory licences for the online exploitation of musical works

Online service providers often need to secure multi-territory licences of the aggregate or entire music repertoire in order to launch their services. Currently they must combine a number of multi-territory licences (from some collecting societies and music publisher agents) with territorial licences (from some collecting societies) which is cumbersome and often restricts the territorial scope of online services. Several stakeholders consulted including commercial users, publishers and record producers complain of this situation and call for improvements in the multi-territory licensing for the online exploitation of musical works.

Whilst a number of factors contribute to the territorial fragmentation of online music provision, including the commercial decisions of service providers, copyright licensing practices play an important part in it. The licensing of authors' rights for the online use of musical works, notably obtaining coverage for the entire repertoire ('aggregation'), is proving difficult, time consuming and costly¹ for commercial users (in particular small ones and new entrants). It is not adapted to a very fast moving market. This is important for commercial users who expect repertoire aggregation and simplified rights clearance and licensing. Many societies are not equipped to manage multi-territory online licensing which is demanding and costly (managing repertoire across multiple jurisdictions, interacting with large and multi-territorial service providers and processing the usage data generated in different jurisdictions). Entering the market without the required capacity and technical resources leads to further problems (inaccurate or 'double' invoicing, significant delays in invoicing to users and in

¹ These difficulties are specific to this area partly because other sectors and rightholders rely far less on collective management for the licensing of online rights and partly because of the manner in which the management of rights in musical works has evolved in Europe.

payments to rightholders). Additionally, multi-territory licensing is subject to legal uncertainty as regards the application of the *acquis* and the possibility for collecting societies to provide licences covering several EU countries and/or to licensees established in other Member States.

As a result some services may opt to launch only in one or a few Member States, thus depriving themselves of the larger consumer base that the Digital Single Market has to offer. Alternatively, some services may choose to launch on the basis of a major repertoire only, which can be secured with a smaller number of licences. This would be detrimental to niche and local repertoire and cultural diversity. For consumers, this means that access to the wide range and types of music services on offer is unevenly spread across the EU. For rightholders, the increased income that could be generated by consumers accessing their works via new services and throughout the Single Market is lost.

3. SUBSIDIARITY

The rationale for European action arises from the trans-national nature of the problem. For all collecting societies, a significant share of collections derives from non-domestic repertoire as they represent rights of foreign rightholders. Protection of the interests of EU rightholders requires that all royalty flows, including cross-border flows, be transparent and accounted for. It is also in the interests of commercial users across the EU that societies function efficiently. This can only be achieved if basic common rules address the collection and distribution of royalties in a manner which is consistent across the EU.

Facilitating the granting of multi-territory licences for the use of musical works in online services and the aggregation of repertoire is a cross-border issue by nature and it can clearly be better solved at EU level. A European framework should ensure that users, rightholders and consumers can benefit from the opportunities of the Digital Single Market.

4. OBJECTIVES

The objective of the initiative is to ensure the contribution of collective management of rights to the development of the Single Market, through a coherent and efficient governance and transparency framework for the collective management of rights and through an improved supply of multi-territory licences in musical works. This should help to improve consumers' access to a wider variety of cultural goods and services. Commercial users will benefit from better functioning and more transparent collecting societies and, in the online environment, from a framework facilitating access to licences for the provision of music services throughout the EU. Rightholders will maximise their earnings by widely promoting their works. Cultural diversity will be fostered by the availability of a large and diverse repertoire. In consequence, more content and more services will become accessible to European citizens, including across borders.

5. POLICY OPTIONS ON TRANSPARENCY AND CONTROL IN COLLECTING SOCIETIES

5.1. Options

Four options were analysed, including the 'status quo' option. Option A2 (better enforcement) would not involve any legislative intervention and would rely solely on the enforcement of

existing national and EU rules. Option A3 (codification of existing principles) would involve the codification of existing EU rules and non-binding recommendations issued with regard to collective rights management. Option A4 (governance & transparency framework) would complement Option A3 with principle-based rules which would 'fill in the gaps' and be specifically adapted to the nature of collective rights management (transparency of financial operations and the participation of rightholders in the decision-making process). Sub-option A4a would combine the regulatory intervention with industry self-regulation. Sub-option A4b would involve more extensive legislation creating an exhaustive legal framework for all collecting societies in Europe.

5.2. Impacts

Better enforcement would improve the regulatory oversight of collecting societies but governance inefficiencies would be addressed only to a limited extent and in consequence rightholders' control over collecting societies would not be significantly improved. Option A3 would be more effective as it would introduce a minimum governance and transparency framework but it would not improve the quality of key issues such as financial management. Option A4 would provide rightholders with access to relevant, detailed and accurate information benchmarks on the performance of societies, including financial information, and would ensure effective rightholder participation in the decision-making process. Sub-option 4a and Sub-option A4b could deliver similar results but past experience raises doubts about the effectiveness of Sub-option A4a, while Sub-option A4b would leave no flexibility for Member States in the regulation of collecting societies.

5.3. Costs

Option A2 would not create compliance cost for collecting societies as it would not entail any legislative intervention. The burden would be on the Commission and on national authorities responsible for enforcement. Option A3 would require the setting up of dispute resolution mechanisms for rightholders and users (the actual costs would vary according to the nature of the chosen mechanism). The cost of the preferred Option A4 would be relatively higher, as this option combines Option A3 and additional elements. Most additional costs of Option A4 would be related to the application of new rules for the handling of funds (no data is available for the estimation of these costs) and financial reporting and audit (the annual cost is estimated at approximately €4.1 million on average for all EU collecting societies). However, the cost of Option A4 must be seen in relation to the efficiency gains to be achieved by this option. Costs of Sub-option A4a would depend on the extent of rules agreed in the stakeholder dialogue. Sub-option A4b would result in the highest compliance costs.

6. OPTIONS ON THE SUPPLY OF MULTI-TERRITORY LICENSES FOR THE ON-LINE USE OF MUSICAL WORKS

6.1. Options

Five options were analysed, including the 'status quo' option. Option B2 (European Licensing Passport) would encourage the aggregation of repertoire for online uses of musical works at EU level as well as the licensing of rights through effective and responsive multi-territory licensing infrastructures. It would do so by requiring that collecting societies wishing to license the online rights of musical works on a multi-territorial basis comply with a pre-defined set of conditions designed to ensure sufficient data handling and invoicing capabilities, compliance with certain transparency standards in respect of rightholders and

users and scope to use a dispute resolution mechanism. A right to tag on repertoire to a 'passport entity' would ensure that all rightholders could have their rights licensed on a multi-territory basis.

Option B3 (parallel direct licensing) would give rightholders the ability to conclude direct licences with users, in parallel with their membership of a collecting society. In order to achieve this, societies' mandates would have to become non-exclusive: a rightholder would no longer have to withdraw his rights from a society to grant licences himself.

Option B4 (extended collective licensing and country of origin principle) would establish the presumption that each authors' collecting society had the authority to grant 'blanket' licences for online uses covering the entire repertoire, subject to the possibility for rightholders (and other societies) to opt out of such licences. This would be combined with the establishment of a country of origin principle so that the licence/s would be obtained under the law of one Member State only.

Option B5 (Centralised Portal) would allow collecting societies to pool their repertoire in a central portal for multi-territorial licensing. This option would allow the creation of a pan-European organisation with *de facto* monopoly power and would raise *prima facie* competition concerns. Impacts of this option were accordingly not analysed.

6.2. Impacts

Option B2 would lead to the aggregation of repertoires in licensing entities and allow all societies to license their repertoire on a multi-territory basis through such entities. Option B3 would allow rightholders to grant flexible and responsive parallel direct licences to online services, and to benefit from improved management services. But it would also risk creating a two-tier licensing system, with smaller local or niche repertoire in the lower tier, having a negative impact on cultural diversity. Option B4 would put all local societies in a position *prima facie* to administer rights to the entire repertoire on a multi-territory basis, without ensuring that such societies were able to provide adequate licences to users or that rightholders' rights were properly managed. It is also likely to result in those societies and rightholders who already grant multi-territory licences opting-out of local societies (creating further disaggregation).

6.3. Costs

Option B2 would entail costs for 'passport entities' but these would improve the effectiveness of the rights management services provided. Only those entities best placed to meet such costs would be expected to incur them, while other societies could use the services of such entities. Option B3 would be the least costly option, requiring only that collecting societies' mandates be made non-exclusive. Option B4 would require Member States to increase the supervision of societies granting extended licences, and would entail costs for societies (notifying Member States and changing their statutes to safeguard the rights of 'non-represented' rightholders) and for rightholders and societies which would need to opt out to carry out their own multi-territory licensing activities.

7. POLICY CHOICE

A governance and transparency framework (Option A4) combined with the European Licensing Passport (Option B2) is the most suitable way to achieve the objectives.

8. CHOICE OF INSTRUMENT

A Directive best ensures coherent and effective governance and transparency standards across the EU, while allowing individual Member States to adapt their existing legal regime. A Directive also allows for different degrees of harmonisation depending on the specific aspects touched upon, which is particularly important given the different, although related areas that will be regulated.

9. MONITORING AND EVALUATION

Immediately after the adoption of the proposal, the Commission will organise transposition workshops with Member States representatives to assist them in the transposition process and to facilitate the mutual exchange of information.

In the mid-term to long-term, the Commission will focus on monitoring, on the basis of a well-defined set of indicators, direct effects such as improvements to the transparency and governance of collecting societies and the ease of obtaining multi-territory licences.

A first comprehensive evaluation could take place 5 years after the transposition date.