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COMMISSION STAFF WORKING DOCUMENT

Report on the use of collective licensing mechanisms with an extended effect under Article 12(6) of Directive 2019/790/EU on copyright and related rights in the Digital Single Market

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REPORT ON THE USE OF COLLECTIVE LICENSING MECHANISMS WITH AN EXTENDED EFFECT IN THE EU

Introduction

Article 12(6) of the Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market¹ ('DSM Directive') requires the Commission to report on collective licensing mechanisms with an extended effect ('CLEE') in the EU including the impact CLEE may have on licensing and rightholders, their effectiveness in facilitating the dissemination of cultural content and their impact on the internal market.

As acknowledged in recital 44 of the DSM Directive, CLEE mechanisms in national law allow a collective management organisation ('CMO') to offer licences on behalf of rightholders, irrespective of whether they have authorised the organisation to do so². Article 12 is an optional or discretionary provision, which allows Member States to apply CLEE mechanisms only for use in their territory and, as indicated in recital 46, subject to the safeguards mentioned in Article 12 and in compliance with Union law and the international obligations of the Union. Article 12 states that there can be resort to CLEE mechanisms when obtaining authorisations from rightholders on an individual basis is typically onerous and impractical, to the extent that it makes the required licensing transaction unlikely due to the nature of the use or the types of works or other subject matter concerned.

Article 12 was not part of the Commission Proposal for a Directive³ and CLEE mechanisms were not analysed in the accompanying impact assessment, with the exception of the specific area of out of commerce works. As of the date of this report, most Member States have not yet transposed the DSM Directive and this includes Member States that applied CLEE mechanisms in their national law prior to the adoption of the DSM Directive⁴. As a result, in most cases, the information provided in this report concerns the use of CLEE in Member States as provided in national laws before the transposition of the DSM Directive. Therefore, this report presents a general and preliminary overview of CLEE mechanisms, based on available information.

As provided for under Article 12(5) of the DSM Directive, Member States informed the Commission of the existing use of CLEE mechanisms⁵. Discussions took place with the Member States in the Copyright Contact Committee⁶. The Commission also ordered a study on the emerging issues on collective licensing practices⁷ ('the study'), which provides an overview of CLEE in EEA countries, an assessment of the different mechanisms and their impact on the market and on social welfare.

¹ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, p. 92–125.

² Recital 44 of Directive (EU) 2019/790

³ Proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM/2016/0593 final - 2016/0280 (COD)

⁴ On 26 July 2021 the Commission launched infringement procedures against the Member States that had not notified a complete transposition of the DSM Directive: https://ec.europa.eu/commission/presscorner/detail/en/mex_21_3902

⁵ The Member States' replies to the questionnaire on CLEE are published alongside this report.

⁶ Copyright Contact Committee meeting of 26 March 2021

⁷ Ecorys and Ivir, Emerging issues on collective licensing practices – Final Report

The report does not seek to assess compliance of CLEE mechanisms with Article 12 of the DSM Directive. However, existing CLEE systems in national law should be in conformity with the CRM Directive. Once Member States notify complete transposition of the DSM Directive, the Commission will assess whether the transposition measures comply with the DSM Directive. Nothing in this report should be read as the Commission considering that those Member States that apply CLEE systems are in conformity with Union law.

The report will be submitted to the European Parliament and the Council alongside the report on the application of Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

Before the adoption of the DSM Directive, the only specific rules in Union copyright law on CLEE were introduced in the Satellite and Cable Directive⁸ in 1993⁹.

Otherwise, there were limited references to CLEE in recitals of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society¹⁰ (the ‘InfoSoc Directive’) and Directive 2012/28/EU on orphan works¹¹. Such recitals were introduced with the aim of ensuring that the provisions of these particular directives did not affect licensing arrangements in Member States providing for CLEE mechanisms.¹² There is no corresponding rule on CLEE in the main provisions of these directives.

There is a similar recital in Directive 2014/26/EU on collective management of copyright and related rights¹³ (the ‘CRM Directive’). Recital 12 of the CRM Directive purports to state that the CRM Directive, despite applying to all CMOs, does not interfere with CLEE mechanisms. Nevertheless, a number of provisions in the CRM Directive do indeed affect in a material way the mechanisms mentioned in that recital. This recital and the CRM Directive have not been interpreted by the Court of Justice¹⁴.

In 2016, the Court of Justice examined the compatibility of CLEE mechanisms with Article 3 of the InfoSoc Directive¹⁵ in relation to legislation adopted in France in 2012 introducing a

⁸ Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10.1993, p. 15–21.

⁹ For the acquisition of broadcasting rights, Article 3(2) of the Directive 93/83/EEC allows the Member States to extend a collective agreement concluded between a collecting society and a broadcasting organisation covering a given category of works to rightholders of the same category who are not represented by the collecting society, under certain conditions. The conditions listed in Article 3(2) include that the communication to the public by satellite must simulcast a terrestrial broadcast by the same broadcaster, and that the unrepresented rightholders must be able to opt out and exercise their rights, either individually or collectively.

¹⁰ Recital 18 of Directive 2001/29/EC

¹¹ Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan work, OJ L 299, 27.10.2012, p. 5–12, recital 24.

¹² Insofar as neither directive specifically concerned rights management, these recitals have not had an impact on the interpretation of either directive.

¹³ Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20.3.2014, p. 72–98, recital 12.

¹⁴ It is settled case law that the preamble to an EU act has no binding legal force and cannot be relied on as a ground either for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner that is clearly contrary to their wording. Judgments of 19 November 1998, Nilsson and Others, C 162/97, EU:C:1998:554, paragraph 54, and of 19 December 2019, Puppinck and Others v Commission, C 418/18 P, EU:C:2019:1113, paragraph 76)

¹⁵ Judgment of 16 November 2016, C-301/15, *Soulier and Doke*, ECLI:EU:C:2016:878.

legal mandate for out-of-print books. In particular, the legislation provided that the right to authorise the digital exploitation of out-of-print books is transferred to the authorised CMO when authors do not oppose it within 6 months of registration of their books in a database established to that effect. The Court held that the rights guaranteed to authors by Article 2(a) and Article 3(1) of the Infosoc Directive are preventive in nature, in the sense that any reproduction or communication to the public of a work by a third party requires the prior consent of its author, whether express or implicit. It ruled that French law did not ensure that the authors were actually informed, and that a mere lack of opposition on their part could not be regarded as the expression of their implicit consent to the use of their works. The Court held that the authors must be able to stop the future exploitation of their books included in the database without having to first submit any additional formalities.

With this judgement, the Court interpreted the *acquis* to the effect that prior consent of rightholders is required for rights that are preventive in nature i.e. the exclusive rights. This judgement has had consequences for CLEE mechanisms in national laws and created some legal uncertainty. Following the judgment, and before the entry into force of the DSM Directive, Member States had to ensure that their CLEE mechanisms include a safeguard allowing rightholders to give their prior consent.

The DSM Directive sought to remove this legal uncertainty and regularise the application of CLEE mechanisms in the EU by delimiting its use and putting in place safeguards. There is a general optional (discretionary) provision on CLEE (Article 12) and a special provision on the use of CLEE to facilitate the licensing of out-of-commerce works, i.e. works that are not commercially available in the typical channels of commerce (Article 8). Article 12 harmonises the conditions under which Member States may use CLEE in certain areas of use and in line with set safeguards. It covers agreements concluded by a CMO for the exploitation of works or other subject matter that apply to rightholders who have not authorised that CMO to represent them or for which the organisation has a legal mandate or is presumed to represent rightholders who have not authorised the organisation accordingly¹⁶.

It is important to distinguish CLEE from mandatory collective rights management, although the same legal mechanisms (extending the licence, legal mandate or legal presumption) may be used in certain Member States for mandatory collective management. Under mandatory collective management of rights, a CMO must manage certain rights of rightholders. Unlike in the CLEE mechanisms, rightholders are not able to opt out or manage their rights individually. Therefore, mandatory collective management of rights is explicitly excluded from the scope of Article 12(4) of the DSM Directive and is not covered in this report¹⁷.

1. Overview of CLEE mechanisms in the EU

According to the information provided by Member States, it appears that CLEE mechanisms exist to date in 14 Member States¹⁸. This section maps out the different legal mechanisms used in the Member States and the areas where CLEE mechanisms are applied¹⁹.

¹⁶ Article 12(1) of Directive (EU) 2019/790.

¹⁷ The study ‘Emerging issues on collective licensing practices’ covers mandatory collective management schemes in the Member States.

¹⁸ Czechia, Denmark, Germany, Estonia, France, Croatia, Hungary, Poland, Romania, Slovakia, Finland and Sweden already had CLEE mechanisms before transposition of the DSM Directive. In addition, following transposition of the DSM Directive, the Netherlands and Malta also incorporated CLEE mechanisms into their national legislation.

1.1. Types of legal mechanisms used

This section describes the three types of CLEE mechanisms identified in the Member States: ECL, legal mandate and legal presumption of representation. As an effect of the DSM Directive, Member States need to make sure that the legal mechanisms used for CLEE are in line with Article 12.

Under Article 12 of the DSM Directive, Member States have certain flexibility to provide for specific types of CLEE mechanisms in accordance with their national traditions and practices, subject to the safeguards provided for in this Directive and in compliance with Union law and the international obligations of the Union²⁰. In particular, such mechanisms should also ensure that Article 7 of CRM Directive applies to rightholders that are not members of the organisation that concludes the agreement²¹. Such mechanisms should only have effect in the territory of the Member State concerned, unless otherwise provided for in Union law.

a) Extended collective licence (ECL)

ECL is based on a licence initially concluded between a CMO and a user, which is extended by national law to also cover rightholders who are not members of the CMO.

Under the CRM Directive, rightholders authorise a CMO of their choice to manage their rights, categories of rights or types of works and other subject matter of their choice (direct authorisation). When giving a direct authorisation, rightholders can also decide that the chosen CMO will represent their rights in other territories based on reciprocal representation agreements with the local CMO.

A CMO can conclude voluntary agreements to license the repertoire of its members with different types of users, based on the mandate given by rightholders.

Under ECL, a legal provision in national law extends the effects of a licensing agreement concluded between a CMO and user to the rights of other non-member rightholders. As a result, the licence concluded allows the user to use the works of rightholders who are not members of the CMO.

Based on available evidence, it appears that ECL is the most commonly used collective management mechanism with an extended effect under the laws of the EU/EEA Member States. Denmark, Finland, Sweden, Czechia, Hungary, Romania and Slovakia have all introduced some form of ECL prior to the DSM Directive.

CMOs are usually authorised to conclude ECLs within a certain period, for a limited duration. For example, in Slovakia, an ECL can be concluded for a maximum period of 1 year, which can be extended for consecutive periods of 1 year under certain conditions²². In Sweden and Finland, a CMO is authorised for 5 years, during which it can conclude ECL agreements.

¹⁹ Information on the types and areas of use is based on the study and information from the Member States.

²⁰ See recital 46 of the DSM Directive

²¹ Under Article 7 of the CRM Directive, Member States shall ensure that CMOs comply with certain rules of the directive in respect of rightholders who have a direct legal relationship by law or by way of assignment, licence or any other contractual arrangement with them but are not their members.

²² Article 79(4) of the Slovakian Copyright Act

b) Legal mandate

Where a national law mandates a representative CMO to conclude licensing agreements on behalf and for the benefit of non-member rightholders, this has been described as a “legal mandate” or statutory mandate. The key feature of this mechanism, which distinguishes it from ECL, is that the mandate is extended, not the licence itself. For example, in France, this mechanism appears to be used to conclude licensing agreements for the digital exploitation of out-of-commerce books from the 20th century²³ and was the basis of the Court’s judgement in *Soulier and Doke*.

c) Legal presumption of representation

Under this mechanism, a representative CMO is presumed to represent the interests and rights of both member and non-member rightholders. Contrary to the previous mechanism, there is no direct legal mandate to represent non-member rightholders.

According to the information received, it appears that this mechanism is used only in a few Member States. Croatian legislation²⁴ stipulates that the CMOs authorised²⁵ to collectively manage a given category of rights and a given category of rightholders have the legal mandate to represent all domestic and foreign non-member rightholders, except rightholders who have opted out. In Germany and Poland, the CMOs managing the rights²⁶ in out-of-commerce works are presumed to represent non-member rightholders. However, according to the information available, the mechanism does not seem to be applied in practice in Poland.

1.2. Areas of use

The information gathered from the study and from Member States shows that the areas of use, and the legal techniques used to define them, vary across the Member States. In practice, it appears that a few Member States such as Croatia and Hungary have a general provision in their national legislation allowing for CLEE. Typically, these general provisions allow CLEE to apply under certain conditions, either by leaving it to the parties to define the area of use or by indicating that the specific area will be defined in the authorisation granted by a national authority to a CMO.

In some other Member States, such as Denmark, Finland, Sweden, Czechia and Slovakia, general provisions allowing for CLEE under certain conditions are complemented by specific provisions in national laws governing the areas of use. Certain Member States (e.g. Denmark and Sweden²⁷) also allow the use of CLEE in areas other than those specifically identified in national law, subject to certain conditions. Such provisions allow to accommodate new uses

²³ Article L-134-1 to 9 of the French IP Code (*Code de la propriété intellectuelle*), as amended by Decree n°2016-1823 of 22 December 2016.

²⁴ Article 157(4) and (5) of the Croatian Copyright Act.

²⁵ Currently seven CMOs are authorised to manage the following rights respectively: authors’ rights in musical works, performers’ rights, phonogram producers’ rights, copyright and related rights of authors and film producers in audiovisual works, publishers’ rights for private copying, authors’ rights in public lending and private copying, and journalists’ rights.

²⁶ In Germany, the rights managed this way are the right of reproduction and communication to the public. In Poland, legal presumption covers the making available of out-of-commerce works by archives, educational and cultural institutions.

²⁷ Article 50(2) of the Danish Copyright Act and Article 42(h) of the Swedish Act on Copyright in Literary and Artistic Works.

(as long as they are covered by the mandate given to CMOs by rightholders), without having to issue specific legislation for each area.

In certain Member States (e.g. Poland, Germany, France), national laws provide for CLEE only in relation to specific areas of use, for example out-of-commerce works.

Regardless of the legislative technique employed to introduce CLEE, it appears that CLEE mechanisms are often used both in areas where rightholders have exclusive rights (Article 3 of Infosoc Directive in relation to broadcasting and communication to the public) and where EU copyright law provides for compensation under an exception or a remuneration right (e.g. reprography, public lending). The Commission will check the compliance of national provisions on CLEE, including the areas of use, with Article 12 of the DSM Directive when following up on implementation of this Directive by the Member States.

a) Broadcasting and related activities

The most common use of CLEE under national law is to facilitate the clearance of rights for broadcasting-related activities. ECL was first used in the field of broadcasting to address the challenges faced by broadcasters linked to the need to clear the rights for the radio and television programmes they transmit, which use various copyright-protected content. The scope, the works and other subject matter covered by the CLEE mechanisms vary across the Member States. Some Member States²⁸ use the scope provided in the Satellite and Cable Directive to apply ECL to the acquisition of broadcasting rights for communication to the public by satellite, when it simulcasts a terrestrial broadcast by the same broadcaster²⁹.

Denmark, Finland, Sweden and Hungary use ECL for repeated broadcasting³⁰ and/or making available works stored in broadcasters' archives³¹. In this case, ECL applies to programmes broadcast before a specific date³². In Finland, ECL may be used by broadcasters for reproductions of works used in their own broadcasts. There is a distinction in national law between licences granted for ephemeral recordings and for extensive technical reproductions³³. Dramatic and cinematographic works do not appear to fall within the scope. In Sweden, ECL may be used for the re-use of works in radio or television programmes. This applies only to works included in broadcasters' own productions or in productions that have been commissioned by broadcasters and which were broadcast before July 2005.

In Finland, ECL can also be used by providers of online recording services to reproduce works included in a TV programme and made available to customers via a recording service.

²⁸ For example, this is the only area where ECL is used in Estonia.

²⁹ As provided for in Article 3(2) of Directive 93/83/EEC: '*A Member State may provide that a collective agreement between a collecting society and a broadcasting organization concerning a given category of works may be extended to rightholders of the same category who are not represented by the collecting society, provided that the communication to the public by satellite simulcasts a terrestrial broadcast by the same broadcaster, and the unrepresented rightholder shall, at any time, have the possibility of excluding the extension of the collective agreement to his works and of exercising his rights either individually or collectively.*'

³⁰ The study refers to 'repeated broadcasting' as the re-use by broadcasters of works that they previously broadcast and that are kept in their archives.

³¹ Finland, Hungary and Sweden apply ECL for the communication to the public of broadcasters' archives. ECL is used in Denmark for the making available of broadcasters' archives. In Poland, CLEE may be used for broadcasting and making available broadcasters' archives.

³² For example, in Finland, it applies to works included in a television programmes produced by the broadcasting organisation and transmitted before 1 January 2002 (Section 25g of the Finnish Copyright Act).

³³ Section 25f of the Finnish Copyright Act.

Another area where ECL has been used in Member States is for the retransmission of broadcasts by means other than cable (the rights in cable retransmissions have been subject to mandatory collective management since the entry into force of the Satellite and Cable Directive³⁴). Before the entry into force of Directive (EU) 2019/789 on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes³⁵, which extends mandatory collective management to retransmissions by means other than cable (satellite, IPTV, digital terrestrial, mobile, internet), several Member States used ECL to clear the rights for such retransmissions (e.g. Denmark and Slovakia).

In Poland, CLEE may be used for broadcasting and making available online minor musical and lyrical works, as well as for the public playback of radio and TV programmes.

b) Out-of-commerce works and uses for education, research and cultural heritage

The DSM Directive brings in a legal framework to help cultural heritage institutions digitise and make available out-of-commerce works across borders (Articles 8 to 11)³⁶.

Prior to the DSM Directive, CLEE mechanisms were applied in at least five Member States (Czechia, France, Germany, Poland, Slovakia) for the licensing of out-of-commerce works, in order to avoid the high transaction costs associated with clearing rights for digitisation and making available works that are no longer available in customary channels of commerce. High transaction costs were mostly due to the specific characteristics of such works (for instance large size of the out-of-commerce works collections held by cultural heritage institutions or their age and difficulty to find rightholders). The type of legal mechanism used for this purpose varies, with Germany and Poland providing for a presumption of representation, France using a legal mandate and Czechia and Slovakia applying ECL. In these five Member States, CLEE covers the reproduction right and communication to the public or making available rights of out-of-commerce works. In France, the legal mandate covers the possibility to issue licences for digital reproduction and for making available certain out-of-commerce books, including for commercial uses. Poland limits the scope of application of their national scheme to the reproduction and making available of works by archives, educational and cultural institutions. In Slovakia, CLEE covers the reproduction, making available and distribution of out-of-commerce works.

The national laws in France, Germany and Poland make the application of CLEE conditional on the publication date of the out-of-commerce works. In France, CLEE applies only to books published in France before 2001 and added to the registry of out-of-commerce books before 2016³⁷. In Germany, CLEE applies to out-of-commerce works (texts and images), books, professional or scientific journals, newspapers, magazines and other writings first published before 1 January 1966 if they feature in publicly accessible collections of libraries, educational institutions, museums, archives and institutions active in film or audio heritage. The Polish CLEE mechanism applies to works published before 24 May 1994.

³⁴ Article 9 of Directive 93/83/EEC.

³⁵ Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC, OJ L 130, 17.5.2019, p. 82–91

³⁶ Out-of-commerce works are works held by cultural heritage institutions, such as books, films or visual works that are still protected by copyright but are no longer or have never been commercially available.

³⁷ According to the study, following the judgment in C-301/15, Soulier and Doke ECLI:EU:C:2016:878, no new works were added to the registry.

Three Member States provide CLEE for use by cultural heritage institutions (CHIs) for works and subject matter other than out-of-commerce works or orphan works. Finland and Sweden use ECL for the reproduction and communication to the public of works by archives, libraries and museums. Czechia applies CLEE mechanism to the reproduction and communication to the public of certain works by libraries for research or private study purposes and to make available works that are not in a library's collection but available via dedicated terminals.

Finnish law provides for CLEE for the reproduction and communication to the public of works stored in publishers' archives published before 1999.

In Croatia, Czechia, Finland and Sweden, CLEE is used to facilitate the use of protected content for educational and/or scientific purposes (such as research, teaching and other activities). Under a licensing agreement with an extended effect, rightholders may authorise certain uses of protected content that go beyond what is allowed under the exception under Article 5(3)a of the Infosoc Directive or under Article 5 of the DSM Directive (new exception for digital uses in teaching activities). Member States may use ECL in implementing Article 5 of the DSM Directive³⁸.

c) Other uses

In addition to the traditional use of CLEE for broadcasting-related activities and for facilitating access to cultural heritage, many other uses of CLEE have been identified in Member States.

According to the information provided by the Member States, CLEE is used in Hungary for the performers' right to make their performance available to the public and in Romania for the communication to the public of musical works³⁹. In Croatia, CLEE may be used for licensing the rights of authors, performers and phonogram producers to public performance and communication to the public, including making available (stage musical and literary works are excluded)⁴⁰. In other Member States, these areas are typically left to individual licensing or to voluntary collective management.

Denmark, Finland and Sweden provide for ECL for the reproduction and/or communication to the public of works for internal uses⁴¹ in public and private organisations. Slovakia also provides for the use of ECL for the performance or communication to the public of works, through a technical device, in business organisations or other premises. However, this does not include broadcasting, retransmission or making the work available to the public⁴².

The other CLEE uses identified are in areas where the EU provides for the possibility for Member States to introduce compensation under the exceptions or remuneration rights. For example, laws in Czechia and Slovakia lay down ECL mechanisms for public lending of works and subject matter by cultural institutions⁴³. In Czechia, the scope is limited to lending

³⁸ Under Article 5(2) of the DSM Directive, Member States may decide to subject the application of the exception or limitation, fully or partially, to the availability of suitable licences, covering at least the same uses as those allowed under the exception or limitation.

³⁹ Romanian law is under examination in the context of an infringement procedure launched by the Commission in December 2017: https://ec.europa.eu/commission/presscorner/detail/EN/MEMO_17_4767

⁴⁰ Study, Annex 4.

⁴¹ 'Internal use by organisations' groups national provisions permitting reproduction and/or communication by public and private organisations for the purpose of their internal use.

⁴² Article 80 of the Slovakian Copyright Act

⁴³ Related to lending and rental rights. Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), OJ L 376, 27.12.2006, p. 28–35.

works, phonograms and videograms, with the explicit exclusion of audiovisual works and computer programmes. Slovakia also applies ECL to the rental of copies of works.

Denmark and Finland provide ECL for reproductions linked to the reprography exception provided for in Article 5(2) of the Infosoc Directive. In Slovakia, ECL may be used to make copies of literary works.

Three Member States appear to apply ECL to different uses of works of visual arts. In Denmark, the scope includes the reproduction of published works of art and the use of works of art in informative presentations (e.g. encyclopaedias, art books, educational material) and critical and scientific representations for business purposes. In Finland, visual arts works can be used in catalogues, information and in visual representations of a building. If a work is included in a collection, displayed or offered for sale, it may be reproduced by printing, photocopying or by other means, for material informing readers about the exhibition or sale. In Hungary, a remuneration right⁴⁴ for the public exhibition of works of visual artists, applied artists, photographers and applied designers is managed under ECL⁴⁵. France has recently brought in a new provision⁴⁶ to authorise extended collective licences for the use of visual arts works to illustrate teaching or research publications made available online for non-commercial purposes.

In the context of the transposition of the DSM Directive, Denmark has extended the use of CLEE to Article 15 (online use of press publication) and to certain types of video-on-demand (VOD) services⁴⁷.

2. Existing safeguards provided for in national legislation

CLEE mechanisms typically bring in certain constraints on rightholders in terms of the management and exercise of their rights, by extending the effects of collective management of rights to rightholders who are not members of a CMO. When a CMO and a user conclude a traditional licensing agreement, it applies only to those two parties (and to the rightholders who have mandated the CMO to manage their rights). However, an agreement under a CLEE mechanism extends the effect of the licence to rightholders who are not part of the original agreement and have not participated in the negotiations, thus having had no opportunity to influence the terms of the agreement. Even before Article 12 of the DSM Directive came into force, Member States applied several safeguards to protect the legitimate interests of all rightholders. Specific safeguards are now harmonised under Article 12(3) of the DSM Directive. These safeguards are particularly important where CLEE schemes are used to manage exclusive rights⁴⁸, as these schemes directly affect the rightholders' ability to authorise or prohibit the exploitation of their works.

In addition to specific safeguards in national laws, certain Member States highlighted that the well functioning of the collective management system is a prerequisite for CLEE mechanisms

⁴⁴ §69 of the Hungarian Copyright Act.

⁴⁵ Study, Annex 18.

⁴⁶ Article 28 of the Law No 2020-1674 of 24 December 2020 on the programming of research for the years 2021 to 2030 and laying down various provisions relating to research and higher education (*Loi n° 2020-1674 du 24 décembre 2020 de programmation de la recherche pour les années 2021 à 2030 et portant diverses dispositions relatives à la recherche et à l'enseignement supérieur*).

⁴⁷ Section 69a and Section 35 of the Danish Copyright Act.

⁴⁸ As mentioned above, CLEE schemes are also used to manage remuneration rights or the compensation due under certain copyright exceptions.

to work. Certain Member States reported that they have set up a supervisory system to make sure that CMOs meet the obligations imposed to them under CLEE.

The CRM Directive already contains certain obligations for CMOs with respect to non-member rightholders. Under Article 7 of the CRM Directive, CMOs have to comply with certain rules in the Directive in respect of rightholders who have a direct legal relationship by law or by way of assignment, licence or any other contractual arrangement with them but are not members. This concerns the obligation for a CMO to allow its members to communicate with it by electronic means⁴⁹, to provide information to rightholders⁵⁰, to inform rightholders of the main terms of the agreement⁵¹, to make available effective and timely complaint procedures⁵².

According to the study and the information received from Member States, four types of safeguards protecting the legitimate interests of non-member rightholders have been identified in national laws as they currently stand⁵³. The safeguards are designed to ensure that the CMO benefiting from the extended effect is sufficiently representative and that non-member rightholders are adequately informed about CLEE mechanisms, remunerated and given the option to opt out. They broadly correspond to the types of safeguards under Article 12(3) of the DSM Directive: (i) ensuring representativeness of the CMO; (ii) equal treatment of rightholder members and non-members; (iii) the option for rightholders to opt out; and (iv) publicity measures for CLEE mechanisms. Under Article 12, these safeguards are mandatory for Member States to implement if they provide for CLEE in their national legislation.

The following sections depict how these different types of safeguards are currently used in the Member States.

2.1. CMO representativeness

CMO representativeness is an important safeguard, which has been identified in all national laws providing for CLEE. It is now a harmonised requirement under Article 12(3)(a) of the DSM Directive.

To ensure that the extended effect on which CLEE mechanisms are based does not harm the interests of non-member rightholders, the CMO concluding the agreement must be sufficiently representative of the types of works and rights, which are covered by the licence. CMO representativeness is important to guarantee the system's effectiveness, and in particular to limit the number of possible opt-outs by rightholders.

The definition of when a CMO is considered representative varies between Member States. They often apply both quantitative and qualitative criteria to assess representativeness. Quantitative criteria include the number of rightholder members of a CMO and the number of reciprocal agreements with CMOs in other countries⁵⁴.

⁴⁹ Article 6(4) of the CRM Directive.

⁵⁰ Article 20 of the CRM Directive.

⁵¹ Article 29(2) of the CRM Directive.

⁵² Article 33 of the CRM Directive.

⁵³ This information may not yet fully take into account measures transposing Article 12 of the DSM Directive and does not affect the conformity assessment.

⁵⁴ For example, in Hungary, national law provides that the number of rightholders, the licensing ratio of their works or subject matter of related rights, and their share in rights revenues need to be taken into account to establish whether a CMO is significantly representative (Article 34(3) of the CMO Act).

Quantitatively, being representative does not necessarily mean representing the majority of rightholders. As regards the number of members, the study⁵⁵ mentions that a CMO must represent a ‘substantive’ number of rightholders in Denmark and Sweden, a ‘numerous’ amount in Finland, ‘the highest number’ in Slovakia and a ‘significant’ number in Hungary.

Qualitative criteria used in certain Member States include the capacity of CMOs to manage rights, the representation of certain types of rights and rightholders, governance rules and measures for safeguarding the interests of non-member rightholders⁵⁶. Certain Member States assess additional circumstances or characteristics, which may indicate that a particular CMO is well suited to collectively managing the rights of rightholders, e.g. the professional qualifications of employees. This is notably the case in France. Some Member States, for example Croatia, formulate this criterion leaving considerable flexibility, e.g. ‘other circumstances indicating that this collective management organisation would be the most efficient one’.

Some Member States have national authorities responsible for assessing whether a given CMO meets the requirements to be considered representative. This is the case in Croatia, Germany, Czechia, Denmark, Finland, France, and Poland, for example.

When discussing the representativeness of a CMO, it is also worth examining whether more than one CMO can be considered representative for the purpose of CLEE. Only one Member State, Hungary, appears to have this possibility explicitly provided for in national legislation. In theory, more CMOs per domain could be considered representative. However, only one CMO per domain may be authorised to grant a collective licence with an extended effect in order to avoid parallel licensing of non-members, and in practice, only one CMO operates per domain⁵⁷. If there are several representative CMOs in the same categories of rights and applying for an authorisation to grant CLEE in Hungary, the CMOs would have to agree which one should conclude CLEE with users. In the absence of an agreement, the Hungarian national authority can appoint one CMO. In other Member States, either only one CMO can be considered representative for CLEE or the legislation does not specifically regulate this matter⁵⁸.

According to the information collected during the study, in certain Member States a single CMO could be designated by a legal provision or by a competent authority⁵⁹. This may create a monopolistic situation, at least in relation to the specific CLEE schemes in question. However, this does not necessarily mean that there is only one CMO operating in the Member States or even within a specific domain. For example, there may be several CMOs but only one is deemed representative for the purpose of granting licences under CLEE mechanisms.

The adequacy of Member States’ measures to ensure representativeness will be checked when the Commission assess the conformity of Member States’ transposition with Article 12(3)(a).

⁵⁵ Study, section on ‘National approaches to representativeness’.

⁵⁶ Study, section on ‘Legal meaning of ‘representativeness’ of CMOs’.

⁵⁷ Study, section on ‘National approaches to representativeness’.

⁵⁸ Different national approaches are presented in the study, in the section ‘National approaches to representativeness’. For example, in Finland, the Ministry of Education and Culture approves the CMOs that can grant ECL. The legislation does not preclude the possibility for different CMOs to apply for approval to issue licences under an ECL scheme, provided that they fulfil the requirements set in the Copyright Act.

⁵⁹ Study, section ‘Legal monopoly’.

2.2. Equal treatment

Another important safeguard in the legislation of several Member States is the equal treatment obligation, i.e. the obligation for CMOs to treat member and non-member rightholders (but covered by the extended effect) equally. Article 12(3)(b) of the DSM Directive provides for this safeguard. The CRM Directive also includes specific obligations for CMOs in this regard. Under Article 7, Member States are required to ensure that CMOs meet certain obligations⁶⁰ also *‘in respect of rightholders who have a direct legal relationship by law or by way of assignment, licence or any other contractual arrangement with them but are not their members’*. Providing equal treatment is essential because non-member rightholders are covered by a licence concluded by a CMO that they have not mandated to manage their rights. As the CMO also collects and distributes monies for non-members under the CLEE mechanism, both categories of rightholders must be treated equally.

Most Member States that provide for CLEE appear to have provisions on equal treatment in their legislation⁶¹. The provisions may be specific to CLEE mechanisms or may derive from implementing the CRM Directive, or the Treaty rules on non-discrimination. They ensure equal treatment between members and non-members whose works are exploited under the licence, including on access to information on the licensing and distribution of remuneration. In many Member States, non-members have the right to claim individual remuneration, i.e. to receive remuneration collected by the CMO on their behalf, even if they are not members.

According to the information collected during the study, both members and non-members (including foreign rightholders) appear in general to have equal treatment. CMOs take an active role in locating and contacting non-member rightholders to distribute the collected remuneration to them. According to the information provided by certain CMOs during the study, this is the main way remuneration is distributed to non-member rightholders⁶². CMOs do so, for example, by using specialised databases, publishing information on their website, or through contacts with other CMOs and rightholders and online searches. The second most common way remuneration is distributed to non-member rightholders is by the rightholders themselves contacting the CMO and asking for remuneration to be distributed.

The adequacy of Member States’ measures to guarantee equal treatment will be checked when the Commission assess the conformity of Member States’ transposition with Article 12(3)(b).

2.3. Opt-out

The right of a non-member to exclude the works or other subject matter from the CLEE mechanism (‘opt-out right’) is provided for in national laws in all Member States currently using CLEE mechanisms. This right is now harmonised under Article 12(3)(c) of the DSM Directive. Rightholders who have not mandated a CMO to manage their rights may oppose the use of their works under the licensing agreement concluded by the CMO under a CLEE mechanism. Once rightholders have decided to opt out of a licensing agreement, it may be possible for them to conclude individual licences with a user, depending on national legislation and on the area of use.

⁶⁰ Article 7 of the CRM Directive states that ‘Member States shall ensure that collective management organisations comply with the rules laid down in Article 6(4), Article 20, Article 29(2) and Article 33 in respect of rightholders who have a direct legal relationship by law or by way of assignment, licence or any other contractual arrangement with them but are not their members’.

⁶¹ Study, page 168.

⁶² Study, section on ‘Distribution of rights revenues to rightholders non-members’.

According to the feedback received from the Member States and from CMOs, it appears that rightholders rarely use the opt-out option in practice⁶³.

Member States have taken different approaches to the practicalities involved in asserting the right to opt out. For example, in some Member States, it is possible to opt out only for entire categories of works, whereas in other Member States it is possible to opt out for single works.

If non-member rightholders wish to opt out, they typically need to contact the CMO responsible for the licence. This is for example the case in Hungary, where the opt-out must be given to the CMO. In other Member States (Denmark, Sweden, Finland), non-members can exercise their opt-out by contacting either the CMO or the user. In any event, the CMOs are usually obliged to inform their users/licensees when a non-member opts out of a CLEE. Though the practical arrangements vary from one Member State to another, the underlying principle appears to be that the information should reach the user in a timely and appropriate manner, taking effect within a reasonable time.

The documentation that CMOs require to process an opt-out request varies slightly across Member States. Except for one Member State (Hungary⁶⁴), the national legislations generally do not lay down, at this stage, specific rules on the form of the opt-out process and the need for documentation.

When non-member rightholders opt out, their works are no longer a part of the licensing agreement concluded between the CMO and a user. Therefore, those works cannot be used, unless the user concludes a direct licensing agreement with the rightholder. The timing of the opt-out is therefore important, to ensure legal certainty for users. Most Member States provide that the opt-out can happen *ex post*, but a few Member States also provide for an *ex ante* opt-out⁶⁵. This option is mentioned in the national legislation of Germany, France, Poland and Slovakia, for example. The effect of the opt-out in most Member States happens at the end of the calendar year. According to CMOs, this is due to practicalities as it is easier (for users) to be able to use a licence for a full year⁶⁶.

The adequacy of Member States' opt out measures will be checked when the Commission assess the conformity of Member States' transposition with Article 12(3)(c).

2.4. Publicity measures

The aim of publicity measures is to ensure that non-members are sufficiently informed about any licensing agreements concluded with an extended effect that may be relevant to them. If non-members are sufficiently informed about the licensing agreements and the use of their works, they can choose whether to opt out of the CLEE or request further information about the CLEE from the CMO. Article 12(3)(d) of the DSM Directive now harmonises the publicity measures to be applied under CLEE schemes. Member States must take sufficient publicity measures to inform rightholders of the CMO's ability to licence their works, the licensing agreements in place and the opt-out possibilities.

⁶³ Study, section 'Practical application of safeguards – right to opt-out'.

⁶⁴ Article 18 of the Hungarian CMO Act provides that rightholders may opt out "by way of a statement made in a private deed with full probative value and addressed to the representative collective management organisation performing extended collective management".

⁶⁵ An '*ex post*' opt-out is the situation when a rightholder exercises their right to opt out after a licensing agreement has been concluded, whereas an '*ex ante*' opt-out is before a licensing agreement has been concluded.

⁶⁶ Study, Section 'Practical application of safeguards – right to opt-out'.

Of the Member States that provide for CLEE in their national legislation, only France⁶⁷ currently appears to have specific rules on publicity measures in relation to the specific scheme used for out-of-commerce books. However, according to the information collected during the study⁶⁸, all CMOs providing for CLEE in all Member States do provide for some form of information on licensing agreements. In all Member States, CMOs provide this information on their webpage.

Publicity measures are particularly important to inform non-member rightholders in other Member States. To this end, CMOs generally provide information on their webpage in both their national language and in English. According to the study⁶⁹, CMOs often provide information on the CMO's general policy for deductions and fees as well as information on the legal ability to provide CLEE in a given domain, tariffs for licensing and dispute resolution procedures.

In some Member States, in addition to CMO webpages, the information is also published by the competent ministry (Slovakia) and by the State Office for Intellectual Property (Croatia).

The adequacy of Member States' publicity measures will be checked when the Commission assess the conformity of Member States' transposition with Article 12 (3)(d).

3. Overview of impacts of CLEE mechanisms

As required by Article 12(6), this section gives a general overview of the impact of CLEE on licensing and rightholders, including non-member rightholders, their effectiveness in facilitating the dissemination of cultural impact, and their impact on the internal market, including on the cross-border provision of services.

The analysis provides an overview of the impact before the transposition of the DSM Directive and is based on the information received from the Member States and the study. It does not aim to make an exhaustive economic assessment of the impacts of CLEE, nor does it aim to assess the conformity of existing CLEE mechanisms with Article 12 of the DSM Directive.

3.1. Impacts on licensing and rightholders

The evidence collected to prepare this report suggests that, even before Article 12 of the DSM Directive, CLEE mechanisms were brought in in Member States to cover cases where individual licensing was considered unlikely to happen, due to the high volume of works that need to be licensed and the transaction costs involved. With these mechanisms, CMOs have been able to offer a licence that fully covers all uses of works on a particular market. This contributes in principle to reducing the transaction costs for all parties involved. However, stronger CMO bargaining power might increase the risk of overcharging licence fees. Some Member States noted that both a well-functioning CLEE mechanisms and transparency could mitigate these risks⁷⁰. Nevertheless, however efficient it may be, the use of CLEE mechanisms removes choice for rightholders in relation to their exclusive rights and the

⁶⁷ Article L134-7 and R134-11 of the Code of Intellectual Property (France). Article R134-11 provides for an information campaign organised by the Ministry of Culture, in cooperation with CMOs and professional organisations in the publishing sector, on the specific scheme applicable to out-of-commerce books.

⁶⁸ Study, Section 'Practical application of safeguards – publicity measures'.

⁶⁹ Study, section 'Practical application of safeguards – publicity measures'.

⁷⁰ According to certain replies provided by Member States on the use of CLEE and the discussion held in the Copyright Contact Committee of 26 March 2021.

ability to give prior consent to use of their works. The Union legislature has now put in place safeguards which take into account the impact of these mechanisms on the exclusive rights and which should be implemented in national law.

Some Member States and stakeholders also highlighted the flexible nature of CLEE mechanisms. In particular where Member States have a provision in their legislation allowing for the use of CLEE beyond set areas, they can use CLEE to facilitate licensing for new uses, which may be linked to new technologies or user demand. For example, in the context of the COVID-19 pandemic, some Member States brought in specific CLEE schemes to enable access to content held by libraries, museums and other cultural heritage institutions⁷¹. The Union legislature has now delimited CLEE to defined areas of use which should be implemented in national law.

a) Rightholders

The impacts of CLEE on rightholders largely depend on the areas of use and on safeguards provided for under national law. As indicated in Article 12 of the DSM Directive, CLEE should be used in cases where individual licensing is typically onerous and impractical. Article 12 limits the impact on individual licensing by delimiting the areas of use of CLEE and introducing specific safeguards for rightholders.

When there is a transparent and well-functioning mechanism to ensure that rightholders non-members are remunerated for the use of their works under the collective licences, CLEE mechanisms can be beneficial to rightholders who would otherwise not receive such remuneration, unless they had concluded individual licences. Failure to ensure that these non-members are paid would constitute an infringement of copyright.

Different methods are used in the Member States for the distribution of remuneration to non-member rightholders. Most commonly, a CMO will identify and contact non-member rightholders or their representatives to distribute remuneration. For foreign rightholders that are not members of any CMO, some CMOs appear to transfer collected monies to foreign CMOs on the basis of reciprocal agreements for distributing to foreign rightholders⁷². Sometimes, non-member rightholders claim remuneration directly from a CMO. However, it appears that these individual claims are made to a rather limited extent. Raising awareness by taking targeted publicity measures could lead to an increase in individual claims for remuneration.

From the collective perspective, certain rightholders can benefit from a stronger bargaining power when represented by a CMO that covers a wide repertoire of works. Therefore, some rightholders may obtain higher remuneration through a CLEE than through individual licences, as the CMO may be able to negotiate higher licence fees. From an individual's perspective, rightholders with stronger bargaining power, for example, because they represent a broad catalogue of works, may not be interested in being represented by CMOs as they can conclude profitable individual licences directly⁷³.

b) Users

⁷¹ For example, COVID-19 emergency ECL schemes were implemented by the National Library of Sweden and relevant CMOs to grant remote access to the library's collections to researchers and students, when consultation on-site in the premises of the libraries was impossible due to COVID-19 measures. Such schemes were developed to facilitate access to books, newspapers, manuscripts and audiovisual works.

⁷² Study, section 'Practical application of safeguards – equal treatment of rightholders members and non-members'.

⁷³ For example, some large audiovisual producing companies when licensing their rights for certain online uses.

CLEEs typically bring about several advantages for both commercial and institutional users. Typical commercial users are broadcasters and retransmission operators, whereas libraries, other cultural heritage institutions (CHIs) and education establishments are institutional users.

Through CLEE, users only need to conclude one licence covering all rightholders in a given area. Therefore, they can access and use a large repertoire of works and other subject matter with legal certainty.

However, the right to opt out may limit legal certainty for users. Member States reported that rightholders have only used the opt-out in a limited number of cases. In principle, once the opt-out procedure is completed, a user can no longer exploit the excluded works lawfully, unless it concludes individual licensing agreements. In this context, any unauthorised use constitutes a copyright infringement. It is therefore crucial for users to have clear rules on opt-out administration, including a date from which an opt-out will take effect.

Managing the opt-out directly and identifying the specific works that are no longer covered by a licence may create administrative burden for users. There is no information on the extent of this possible negative impact on users.

Some Member States have established certain practices to minimise the negative impact that the opt-out may have on licensees. For instance, according to the study, some CMOs indemnify users from claims by individual non-member rightholders who have exercised their right to opt out⁷⁴. These situations are nevertheless very rare.

3.2. Impacts on the dissemination of cultural content

CHIs usually hold large amount of works in their collections and have the dissemination of cultural heritage as one of their core missions. In addition, many institutions have engaged in large-scale digitisation projects in order to make their collections available online, either for registered users or for the general public. In this context, using CLEE mechanisms can address the challenges linked to the clearance of rights for high volumes of works. Using CLEE mechanisms makes it easier for CHIs to obtain the necessary authorisations and to grant broader access to works in their collections. This has been recognised by the DSM Directive, which brought in specific rules on the dissemination of out-of-commerce works (Articles 8 to 11).

CLEE mechanisms are currently used in several Member States⁷⁵ to disseminate cultural content, particularly to facilitate access to works and other subject matter in the collections of CHIs such as libraries, archives, museums. The licensing agreements' scope varies in terms of the CHIs covered, type of works (literary works, visual arts works, audiovisual recordings), and the type of use allowed (making digital copies, inter-library loans, making works available online, etc.).

In other Member States (e.g. Germany, Poland) CHIs can use CLEE only for out-of-commerce works⁷⁶. CLEE mechanisms are particularly well suited for out-of-commerce works, for which it may be difficult to obtain individual licences. Using CLEE for out-of-

⁷⁴ Study, section 'Practical application of safeguards – right to opt-out'.

⁷⁵ According to the study, the legislation of four Member States provides for CLEE for uses by cultural heritage institutions: Czechia, Denmark, Finland and Sweden.

⁷⁶ According to the study, Czechia, France, Germany, Poland and Slovakia provide for CLEE for out-of-commerce works in their national legislation. In most cases, the licensing schemes cover only non-commercial uses (at the moment only France provides for the use of CLEE for out-of-commerce works for both commercial and non-commercial purposes). See Section 2.2.b above.

commerce works provides access to works that may otherwise not be available to the public. It is also beneficial to rightholders, as it could generate revenue for works that are not distributed commercially and therefore do not produce any income.

The use of CLEE for non-commercial uses of out-of-commerce works is now provided for under Article 8 of the DSM Directive. Articles 8 and 10 provide for the same types of safeguards as those in Article 12: representativeness of the CMO, equal treatment between member and non-member rightholders, the right to opt out and the obligation to provide for publicity measures⁷⁷. Under Article 8, Member States must allow the use of CLEE for agreements between CMOs and CHIs for the reproduction, distribution, communication to the public or making available to the public of out-of-commerce works that are permanently in the collection of the institutions.

Beyond uses by CHIs, CLEE may have a positive impact on the dissemination of cultural content by facilitating the clearance of rights in broadcasters' archives, which contain a variety of programmes and involve a high number of rightholders. The agreements concluded in this context (for example in Denmark, Sweden and Finland) allow for the online use of television programme archives.

CLEE may also facilitate the use of cultural content for educational purposes⁷⁸. Licences may be concluded with different CMOs, covering different types of works that may be used in the context of education (literary works, audiovisual works, visual arts, etc.). The extended effect associated with the licences provides legal certainty for teachers and students. For example, under the ECL agreement for educational use in Sweden and Finland, educational institutions can use different types of works in teaching activities, including digital activities. In Denmark, the 'TVIS' agreement concluded by Copydan AVU-medier⁷⁹ authorises the use of TV broadcasts and online content in educational activities.

Article 12 would apply to uses by CHIs covering works that are not out-of-commerce and to other uses not covered by Article 8. As mentioned above, Article 12 allows Member States to apply CLEE mechanisms only for use in their territory, while Article 9 grants a cross-border effect to the licences concluded under Article 8 for out-of-commerce works.

In its guidance on Article 17 of the DSM Directive⁸⁰, the Commission acknowledged that CLEE could be considered in the context of Article 17 in specific cases and for specific sectors, provided they meet all the conditions set out in EU law, notably in Article 12 of the Directive. Representatives from rightholders in the visual arts sector, for example, consider that CLEE could facilitate the use of visual arts works on online content sharing platforms⁸¹.

⁷⁷ Article 10 provides for publicity measures in relation to Article 8. Under Article 10, Member States must ensure that information from CHIs, CMOs or relevant public authorities on the use of out-of-commerce works is made accessible on a single public online portal.

⁷⁸ The use of CLEE is provided for educational purposes in Croatia, Czechia, Denmark, Finland and Sweden (source: Study, page 123). This covers a variety of uses in Member States such as making available audiovisual works for teaching purposes, reproduction and public performance.

⁷⁹ Copydan AVU-medier is a Danish CMO that grants licences for the use of audiovisual works. Further information on the TVIS licence can be found on the webpage of CopydanAVU-medier via this link: [Masser af muligheder med TVIS | Copydan AVU-medier \(copydan-avumedier.dk\)](#).

⁸⁰ Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market, <https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A52021DC0288&qid=1625142238402>.

⁸¹ This has been explained by representatives from the visual arts sector in the context of the stakeholder dialogue on Article 17 of the DSM Directive: <https://digital-strategy.ec.europa.eu/en/policies/stakeholder-dialogue-copyright>.

3.3. Impact on the internal market

When discussing the possible impact of CLEE on the internal market, it is necessary to look at the scope of the licences, in particular the scope of the extended effect. The CLEE mechanisms currently used in Member States only cover national uses. This means that, for example, a library concluding a licence with an extended effect with a CMO would only be able to make the works covered by the licence available in the Member State where it operates. The same would apply to licences concluded under Article 12 of the DSM Directive, as this provision only allows for the use of CLEE at national level. This is linked to the difficulty in applying the safeguards in a cross-border context. For example, it would be difficult to assess the representativeness of a CMO at EU level, or to ensure that rightholders in other Member States can always be found and receive payment especially if they are not members.

A few pilot projects have been launched on a small scale to allow cross-border use of works licensed under CLEE, in particular under licences granted to CHIs. For instance, the Swedish National Library has recently set up a system allowing researchers from a Finnish university to have remote access to audiovisual works (broadcasters' archives). These pilot projects operate on the basis of an agreement concluded between the user (here the Swedish National Library) and the CMOs in different Member States representing multiple rightholder organisations. The CMOs agree mutual representation for the works and types of uses allowed under the licence, and can use ECL provisions extending the effect of the collective licence to non-represented rightholders in the respective Member States⁸².

Discussions with Member States in the context of the Copyright Contact Committee have not been conclusive on whether to introduce a cross-border mechanism for CLEE. This question is still premature since the DSM Directive has just entered into force.

Article 9 of the DSM Directive brings in a cross-border effect to licences granted for the use of out-of-commerce works under Article 8. Therefore, Member States must ensure that the licences allow the use of out-of-commerce works by CHIs in any Member State. However, Article 12 limits CLEE to use in the territory of a Member State. The Commission will monitor the implementation and practical application of this provision.

CONCLUSION

CLEE is used in several Member States for a variety of different purposes. The information collected when preparing this report indicates that CLEE schemes facilitate licensing in specific situations, therefore providing legal certainty for users and where it functions well, the possibility of remuneration for rightholders, including non-members. It is, however, important that the safeguards are properly implemented to ensure the protection of both members and non-members.

With the DSM Directive, CLEE is now a part of EU law. Member States have an obligation to provide for a CLEE mechanism for out-of-commerce works and may use CLEE for other purposes under Article 12. Both Articles 8 and 12 provide for safeguards, which are essential for the correct functioning of CLEE mechanisms. As Member States complete their transposition of the DSM Directive, the Commission will assess the compliance of national provisions on CLEE with Article 12.

⁸² This report does not take a position as to the compatibility of this approach with Article 12 of DSM Directive.