

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

COM(2012) 372 final — 2012/0180 (COD)

(2013/C 44/18)

Rapporteur: **Jacques LEMERCIER**

On 10 and 11 September 2012 respectively, the Council and the European Parliament decided to consult the European Economic and Social Committee, under Articles 50 and 304 of the Treaty on the Functioning of the European Union, on the

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

COM(2012) 372 final — 2012/0180 (COD).

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 4 December 2012.

At its 485th plenary session, held on 12 and 13 December 2012 (meeting of 12 December), the European Economic and Social Committee adopted the following opinion by 116 votes with 1 abstention.

## 1. Conclusions and recommendations

1.1 The EESC endorses and supports the Commission's proposal for a directive on the governance of collecting societies for digital rights and the granting of multi-territorial licences for musical works in the Single Market.

1.2 It considers the scope of application to be well chosen, given the importance of music in the market for online cultural content, and that it could improve understanding of the cross-border management of rights, which could then serve as a model or, at least, as inspiration for the online sale of multimedia content and books.

1.3 The EESC has taken into consideration the impact assessment <sup>(1)</sup> and the reactions of professionals and consumers. It shares the view that it is necessary to establish a uniform legal framework for collecting societies and to create some form of European licensing passport for online music services.

1.4 It draws attention to the need to support collecting societies for a transitional period in order to allow them to adapt to this form of cross-border distribution, which presents technical and material problems that the EESC is aware of.

1.5 It approves the proposed legal basis (Articles 50 to 54 TFEU), which concerns the freedom of establishment and the freedom to provide services within the single market. As regards application of the Services Directive, it should be borne in mind

that collecting societies are non-profit-making entities and have particular characteristics that make them unlike businesses.

1.6 Artists often find themselves in a very precarious situation, since they are uncertain of success and their income is irregular. Collecting societies can help artists to develop their cultural work by providing support for weaker repertoires and artists who are at the beginning of their careers. Because they operate on the principle of solidarity, collecting societies provide support to authors facing difficulties and help to promote new talent. Collecting societies effectively make a significant contribution to the development of culture in Europe and growth of the cultural economy.

## 2. The Commission's proposal

2.1 According to the Commission, the *acquis communautaire* in force on copyright is confined to the definition of copyright and related rights, to the limitations and exceptions and to related provisions.

2.2 Very few provisions of the ‘copyright directive’ and related acts <sup>(2)</sup> deal with collective rights management and none of them establish a framework for the functioning of collecting societies. If binding rules regarding their governance and transparency have now been established and continue to be developed, this is due to the case-law of the Court of Justice and the Commission's decisions.

<sup>(1)</sup> SWD(2012) 204 final (only available in English) and SWD(2012) 205 final.

<sup>(2)</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society; various related acts – directives and recommendations – including Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

2.3 However, the law varies in practice from one Member State to another; rules concerning collecting societies are equally diverse, but above all it is the arrangements and practices for monitoring the use of the revenues collected and distributed on behalf of the rightholders that vary significantly in practice and often lack transparency. In some countries, practices bordering on misuse of company assets have even been noted.

2.4 The purpose of the proposal is to 'put in place an appropriate legal framework for the collective management of rights that are administered by collecting societies on behalf of rightholders by providing for:

- rules ensuring the better governance and greater transparency of all collecting societies and also
- by encouraging and facilitating the multi-territorial licensing of the rights of authors in their musical works by collecting societies representing authors.'

2.5 An appropriate legal act (in this case, a directive) at EU level is the only way to achieve these goals, in compliance with the principles of subsidiarity and proportionality.

2.6 The EESC endorses the proposal's objectives and the other legal provisions foreseen for achieving them. It also approves the legal basis chosen for the directive, i.e. Articles 50 and 51 to 54 TFEU, and the fact that the proposal has no impact on the budget.

### 3. General comments

3.1 The EESC has already given its views <sup>(3)</sup> on the essential rules which should be binding in the area of collective rights management and the functioning of collecting societies in order to ensure the fair distribution of payments collected on behalf of authors and other rightholders, and transparent management, which should be monitored by the members of the collecting societies and by an independent administrative or judicial auditing authority, which would have to publish a periodical activity report for each collecting society, as is already the case in several Member States.

3.2 The spirit of the draft directive should be in line with that of the 'copyright directive', according to which the harmonisation of copyright and related rights must be based on a high level of protection. Indeed, their protection contributes to maintaining and developing creativity in the interests of authors, performers, producers, businesses and the general public.

3.3 The choice of market, i.e. music, for a legislative proposal can be explained by the relative importance of music in the European market vis-à-vis other cultural services and on technical grounds, since music does not require linguistic adaptation.

3.4 It might have been preferable to present two draft directives, a general one on collecting societies and another on the multi-territorial licences for the online distribution of music.

3.5 Nevertheless, the EESC can accept a single directive due to the fundamental importance of collecting societies in the distribution of music. They are in the best position to manage licences and collect and distribute royalties on behalf of the rightholders. However, once rightholders have freely chosen to entrust the management of their rights to a collecting society, they must retain the right to control their use and verify that the financial management is transparent and fair.

3.6 The EESC believes that the voluntary standards desired by collecting societies would not be enough to guarantee the open, clear and uniform rules that authors and rightholders want. Soft law measures would contribute in practice to perpetuating the excessive diversity of and role played by territorial rules, which dominate and fragment the European distribution market for online cultural content.

3.7 The EESC believes that a directive is the right choice of instrument since it consolidates the law but allows Member States to adapt its application according to their national circumstances and specificities.

3.8 With regard to collecting societies, the EESC agrees wholeheartedly with the statement that 'collective rights' management in all sectors needs to adapt in terms of the service provided to members and users as regards efficiency, accuracy, transparency and accountability'. These needs fall very naturally within the scope of the Digital Agenda for Europe and the Europe 2020 Strategy 'for smart, sustainable and inclusive growth' as well as the Commission's communications on *A Single Market for Intellectual Property Rights* and on *A coherent framework for building trust in the Digital Single Market for e-commerce and online services*, as well as the follow-up to the *Green Paper on the online distribution of audiovisual works in the European Union*.

<sup>(3)</sup> OJ C 68, 6.3.2012, p. 28 and OJ C 318, 29.10.2011, p. 32.

3.9 'Commission Recommendation 2005/737/EC on the collective cross-border management of copyright and related rights for legitimate online music services invited Member States to promote a regulatory environment suited to the management of copyright and related rights for the provision of legitimate online music services and to improve the governance and transparency standards of collecting societies.'

3.10 But recommendations are not binding; the proposal for a directive fills this gap.

3.11 Furthermore, this proposal 'complements Directive 2006/123/EC of 12 December 2006 on services in the internal market which aims to create a legal framework to ensure the freedom of establishment and the free movement of services between the Member States. Collecting societies are subject to Directive 2006/123/EC as providers of collective management services.' The EESC wonders whether the Services Directive should apply in full, *mutatis mutandis*, to collecting societies. More careful consideration should be given to the particular nature of collecting societies, which are non-profit-making entities.

3.12 Thus, the conception of the draft directive is entirely consistent with current law and the prospects outlined in the programmes for developing the internal market, and it complies with the international agreements to which the Member States are party. The EESC approves the proposed provisions.

3.13 Like the Commission, the EESC, in line with its earlier opinions, prefers a governance and transparency framework which would codify the existing principles and provide a more elaborate framework of rules on governance and transparency, increasing the possibilities for control over collecting societies. Only annual scrutiny of their management by all their members as well as an independent authority or institution will ensure respect for good governance.

3.14 Nevertheless, the EESC questions the technical capability of many collecting societies currently operating in the EU to take on the management of multi-territorial licensing without difficulty.

3.15 Another significant problem is repertoire aggregation. The Commission advocates a 'European passport', which should significantly facilitate aggregation and, as a consequence, the granting of licences. This would make it possible to 'lay down common rules (...) and would create competitive pressure on societies to develop more efficient licensing practices'. The EESC agrees with this approach.

3.16 It also endorses the legal basis of Article 50 TFEU (ex Article 44 TEC) on the freedom of establishment, and Articles

53 (ex Article 47) and 62 (ex Article 55) TFEU, the last of which refers back to Articles 51 to 54 of the TFEU on freedom to provide services.

#### 4. Specific comments

4.1 Copyright and related rights must promote artistic creativity through the fair and proportionate remuneration of holders of these rights and their heirs for a period of 50 to 95 years, depending on the protected rights and the laws of WIPO's Member States. This remuneration should provide them with sufficient material security to enable them to continue their creative work. In practice, very few artists in the music sector, as in others, can make a living from their copyright, mainly due to the functioning of collecting societies, which they describe as opaque, and the fact that production and distribution is controlled by transnational oligopolies.

4.2 In practice, most of the sums owed by licence users are recovered by national or international collecting societies, which redistribute them to their member rightholders:

- either on the basis of distribution criteria which are specific to each collecting society for the collection of lump sum payments for performing rights, one reason why their activities are opaque;
- or on the basis of individual accounts, when the rightholders and licensed works are identified individually (this applies to online distribution, where all the information required is more readily available).

4.3 Nevertheless, the share which actually reaches rightholders in France, for instance, is usually between 9 and 10 % of the music industry's revenues, whether from CD sales or online distribution, even though online distribution costs are far lower than for offline distribution. Production companies, especially the 'major' ones, receive about 50 % of offline revenues, and over 60 % of online revenues; the operating costs charged by collecting societies are often very high, and in order to join them, rightholders often have to give them exclusive rights over their entire works. Furthermore, producers often invoice rightholders for publicity and other costs, further reducing their share.

4.4 The EESC notes that the draft directive answers the need for harmonisation, in accordance with the legal basis chosen, as well as the need for transparency, equity and the monitoring of management, as expressed by rightholders, as well as fair remuneration for the members of collecting societies. Too many members have the impression that they never get anything, whereas a few members get the lion's share <sup>(4)</sup>; nevertheless, the EESC also notes that the unequal contracts imposed

<sup>(4)</sup> [senat.fr/lc/lc30\\_mono.html](http://senat.fr/lc/lc30_mono.html) – comparative study of European collecting societies.

by most music publishers and distributors will continue to apply and to prevent most copyright holders and other right-holders from receiving fair remuneration for their work. The EESC therefore views the draft law as incomplete for the purposes of genuinely promoting culture and literary and artistic works by remunerating authors and creators appropriately.

4.5 Finally, it sets out 'minimum' provisions, which leave Member States significant leeway for transposition, to allow them to respond to the expectations of authors and creators and to promote culture and its dissemination to the best of their ability. As a result, the EESC cannot share the views of certain legislative assemblies that the draft directive does not respect subsidiarity because it is overly prescriptive and detailed. Furthermore, it calls on the Commission to look into ways to ensure that rightholders genuinely profit from the lower costs of online music distribution since the additional revenues are being pocketed by a single market participant, who thus hopes to offset lower revenues from offline distribution. The major players are in effect using unequal contracts and intense lobbying for very repressive legislation against online commerce in an effort to bolster an economy of rarity against the internet, which allows unlimited mass distribution at a very low cost.

4.6 Artists should have better control of the promotion of their online works and the income they generate. They should be able to distribute certain works directly, for free or at a very low cost, in order to promote them. New financing sources for the work of authors are now possible via the internet, such as calls for financing by the listeners of future productions. The directive should therefore provide authors with more control and options.

4.7 The EESC welcomes Article 38, which invites Member States to provide sanctions and measures to ensure compliance with their national implementing provisions for the directive.

4.8 Title II concerns the first dimension of the directive, the organisation and functioning of all types of collecting societies. Chapter 5 of Title II (Articles 17 to 20) deals satisfactorily with transparency and reporting requirements, areas where the EESC places special emphasis.

4.9 Complementary provisions further strengthen transparency obligations. Article 8 deals with supervisory functions, offering members guarantees regarding good management, and the EESC supports the provisions designed to ensure this. Title IV, concerning disputes (Articles 34 to 40), including complaints procedures (Article 37), effectively complements the provisions on the functioning of collecting societies by allowing members to challenge any management of their rights which they deem to be improper.

4.10 With regard to some of the proposed criteria for exempting small collecting societies from multi-territorial licensing, the EESC notes a risk of market concentration which could distort competition to the detriment of smaller operators, for instance those in countries with small populations, or those belonging to certain national minorities, whose contribution to Europe's cultures might call for specific support measures so that they can participate in the European licence market. The EESC believes that, due to these considerations of cultural diversity, in compliance with Article 107 TFEU, small collecting societies in these countries should have access to public support, in order to be able to promote their catalogues directly throughout the EU and grant multi-territorial licences themselves.

4.11 The provisions set out for the purpose of avoiding conflicts of interest and ensuring transparent and efficient management, as well as reporting to the members of collecting societies are appropriate, especially Article 9 on the obligations of the persons who effectively manage the business of the collecting society.

4.12 Title III (Articles 21 to 33) covers European licences for online music. Article 21 (Multi-territorial licensing in the internal market) sets the principle that compliance with the requirements in Title III is to be effectively reviewed by the competent authorities (see Article 39 for their definition).

4.13 Article 22 (Capacity to process multi-territorial licences) concerns the second dimension's central provisions. Collecting societies that grant multi-territorial licences must have the capacity to process electronically, in an efficient and transparent manner, the data needed for the administration of such licences, invoicing users, collecting rights revenue and distributing amounts due to rightholders. The EESC endorses the detailed requirements (paragraph 2) and the fact that they are minimum conditions, but stresses the practical difficulties that will be encountered in evaluating whether or not they have a nullifying effect.

4.14 Requirements for collecting societies are necessary. Article 23 (Transparency of multi-territorial repertoire information) calls for this information to 'include the musical works represented, the rights represented, in whole or in part, and the Member States represented' and Article 24 (Accuracy of multi-territorial repertoire information) requires collecting societies to 'have procedures in place to enable rightholders and other collecting societies to object to the contents of the data referred to in Article 22(2) or to information provided under Article 23'. The EESC believes that the collecting society must accept all forms of legal proof and should then make the necessary corrections with due diligence.

4.15 The need for collecting societies to monitor the use of rights by the service providers to whom they have granted multi-territorial licences forces them to provide an online method for reporting the use of rights that is recognised by voluntary industry standards or practices in force. The EESC agrees that it should be possible to refuse to accept reporting by the user in a proprietary format if the society allows for reporting using a recognised method of electronic data exchange.

4.16 The EESC emphasises that the use of open and free standards, including for online invoicing (Article 25), would be an appropriate and acceptable solution in all circumstances, and that this should be specified here.

4.17 The EESC endorses the requirements set out in Article 25 on accurate and timely invoicing immediately after the use of the multi-territorial licence and the obligation to have procedures in place for service providers to challenge the accuracy of invoices. Accurate and timely payment to right-holders is required (Article 26). The EESC supports the detailed requirements concerning the provision of information to rightholders alongside payment and supporting information for the fees charged.

4.18 The EESC also supports the provisions of Articles 27, 28 and 29 (Obligation to represent another collecting society for multi-territorial licensing) allowing a collecting society which does not grant or offer to grant multi-territorial licences for the online rights in works in its own repertoire to request another collecting society that meets the requirements of this directive to enter into a representation agreement to represent those rights.

4.19 The EESC calls for the wording to be clarified: is there or is there not a requirement to accept the representation in the circumstances foreseen in Article 29(1)?

4.20 The EESC also supports the provisions on multi-territorial licensing set out in Article 30 (Access to multi-territorial licensing), Article 31 (Multi-territorial licensing by subsidiaries of collecting societies), and Article 32 (Licensing terms in online services).

4.21 The EESC endorses the derogation (Article 33) whereby the requirements under Title III do not apply to collecting societies which grant, on the basis of the voluntary aggregation of the required rights, a multi-territorial licence for the online rights required by a broadcaster for its radio or television programmes.

Brussels, 12 December 2012.

*The President*  
*of the European Economic and Social Committee*  
Staffan NILSSON

---